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Tenth Circuit

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Elisabeth A. Shumaker
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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

ERMA ALDABA, as personal representative and next of kin to Johnny Manuel Leija, deceased,

Plaintiff - Appellee,

v.

BRANDON PICKENS; JAMES ATNIP; STEVE BEEBE,

Defendants - Appellants,

and

THE BOARD OF MARSHALL COUNTY COMMISSIONERS; THE CITY OF MADILL,

Defendants.

Nos. 13-7034 & 13-7035

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA
(D.C. No. 6:12-CV-00085-FHS)

Philip W. Anderson of Collins, Zorn & Wagner, P.C., Oklahoma City, Oklahoma and Eric D. Janzen of Steidley & Neal, P.L.L.C., Tulsa, Oklahoma, for Defendants–Appellants.

Jeremy Beaver of Gotcher & Beaver Law Firm, McAlester, Oklahoma, for Plaintiff–Appellee.

Before **BRISCOE**, Chief Judge, **McKAY** and **PHILLIPS,** Circuit Judges.

McKAY, Circuit Judge.

Plaintiff Erma Aldaba brought this 42 U.S.C. § 1983 action on behalf of her deceased son, Johnny Manuel Leija, who died after an altercation with Appellants—Officer Brandon Pickens and Deputies James Atnip and Steve Beebe—in the Oklahoma hospital where he was being treated for pneumonia. Plaintiff brought several claims against various defendants, including Appellants. The district court granted summary judgment in favor of the defendants as to all claims except Plaintiff's claim of excessive force against Appellants. As for this claim, the district court denied Appellants' request for summary judgment on the grounds of qualified immunity, holding there were numerous fact issues regarding the reasonableness of the officers' conduct that prevented summary judgment. Appellants then filed this interlocutory appeal.

I.

When reviewing an interlocutory appeal from the denial of qualified immunity, "we 'take, as given, the facts that the district court assumed when it denied summary judgment.'" *Morris v. Noe*, 672 F.3d 1185, 1189 (10th Cir. 2012) (quoting *Johnson v. Jones*, 515 U.S. 304, 319 (1995)). We accordingly rely on the district court's description of the facts, taken in the light most favorable to Plaintiff, and do not reevaluate the district court's conclusion that the summary judgment record is sufficient to prove these facts. *Id.*

On March 24, 2011, Mr. Leija went to the hospital and was diagnosed with dehydration and severe pneumonia in both lungs. His pneumonia was causing hypoxia—low oxygen levels—which can affect an individual's mental state. When Mr. Leija was admitted to the hospital at 11:00 a.m., he was pleasant, cooperative, and responsive. He was placed on oxygen and given breathing treatments and intravenous antibiotics, and his oxygen saturation level improved. By 6:00 p.m., however, Mr. Leija's behavior had changed. He complained of extreme thirst, and a female nurse found that he had disconnected his oxygen and cut his intravenous tube. The nurse also saw that Mr. Leija was bleeding from his arms and that there was blood on the floor and the toilet. Although the nurse reconnected Mr. Leija's oxygen and IV, he seemed confused and anxious, repeatedly asking for his girlfriend. The nurse reported this to the doctor who had seen Mr. Leija earlier in the day. The doctor prescribed Xanax to control Mr. Leija's anxiety, but when the nurse attempted to give Mr. Leija the medication, he refused to take it and accused the nurse of telling him lies and secrets. Mr. Leija became increasingly uncooperative and aggressive, shouting that the staff was trying to poison him.

The female nurse contacted the doctor again for assistance, and the doctor sent a male nurse to Mr. Leija's room. The male nurse discovered Mr. Leija had again removed his oxygen and IV and was now yelling, "I am Superman. I am God. You are telling me lies and trying to kill me." (Appellant's App. at 80.) The male nurse tried to persuade Mr. Leija to calm down and get back in his bed, but Mr. Leija refused. Mr. Leija's doctor was contacted, and he directed the nurse to give Mr. Leija an injection of Haldol and

Ativan in order to calm him down. However, Mr. Leija refused this medication as well, insisting that only water was pure enough to help him. The male nurse did not believe he and the doctor could restrain Mr. Leija in order to administer the injection. Accordingly, with the doctor's approval, the nurse called law enforcement at 6:36 p.m. "for assistance with a disturbed patient." (*Id.* at 106.) Officer Pickens received the call for assistance while he was eating dinner with Deputies Atnip and Beebe, and the other two officers agreed to go to the hospital with him.

Meanwhile, the doctor arrived at Mr. Leija's room to assist the nurses. He heard Mr. Leija state that the medical staff was trying to poison him, that he was God and Superman, and that only water was pure enough for him. The doctor became increasingly concerned for Mr. Leija's health given the behavioral and personality changes in Mr. Leija from earlier in the day when he was admitted.

Mr. Leija subsequently exited his room in his hospital gown and began walking down the hall. The three police officers arrived at the scene at about this time and observed Mr. Leija standing in the hall, visibly agitated and upset. Medical personnel informed Officer Pickens that Mr. Leija was ill and could die if he left the hospital. Officer Pickens attempted to persuade Mr. Leija to return to his room, but Mr. Leija refused, insisting that the staff was trying to kill him. Officer Pickens assured him that no one was trying to kill him, but Mr. Leija continued down the hallway toward the lobby area. At some point, Mr. Leija stopped, pulled out the IV ports on his arms, and said, "This is my blood," as he clenched and shook his fists. (*Id.* at 290.)

Deputies Atnip and Beebe testified (and the district court apparently assumed) that they repeatedly ordered Mr. Leija to calm down and get down on his knees, but Mr. Leija did not comply, even after they warned him several times they would use a taser. When Mr. Leija failed to comply with their commands, Deputy Beebe fired his taser at Mr. Leija, striking him in the upper torso with one of the two probes. The taser appeared ineffectual, however, and a struggle ensued. Deputy Atnip grabbed Mr. Leija's right forearm while Officer Pickens took his left arm. The officers thrust Mr. Leija face-first against a wall, at which point Deputy Beebe tased him again on the back of the shoulder with a "dry" sting, which causes direct contact with the electrical probes without launching the penetrating barbs. This second taser shot appeared ineffectual as well, but Deputy Atnip pushed his leg into the back of Mr. Leija's knee, causing it to buckle. As the four men fell to the floor, Mr. Leija continued to resist, falling face-down while Deputy Atnip and Officer Pickens struggled with his arms. Deputy Beebe managed to place a handcuff on Mr. Leija's right arm as Officer Pickens kept hold of his left, allowing the male nurse to administer the injection of Haldol and Ativan. At this point, however, Mr. Leija went limp, made a grunting sound, and vomited clear fluid. The officers moved away from Mr. Leija, and medical personnel immediately began CPR. The efforts to revive Mr. Leija failed, however, and he was pronounced dead at 7:29 p.m.

The medical examiner determined Mr. Leija's cause of death to be respiratory insufficiency secondary to pneumonia, with the manner of death being natural. The medical examiner testified the taser shots "certainly could" have increased Mr. Leija's

need for oxygen (*id.* at 332), and he further testified the exertion caused by Mr. Leija's physical struggle with the officers "exacerbated his underlying pneumonia" (*id.* at 333). Mr. Leija's treating physician also testified that placing a man in the prone position with his hands cuffed behind his back could compromise his body's ability to inhale and get oxygen.

The district court held that Mr. Leija was lawfully seized, since probable cause existed for taking him into protective custody based on his mental incompetence and the threat he posed to his own health. The court accordingly granted summary judgment in favor of the law enforcement officers on Plaintiff's unlawful seizure claim. However, the court held that the officers were not entitled to qualified immunity on Plaintiff's excessive force claim. The court held that there were several material disputed facts relating to the objective reasonableness of the force the officers applied to seize Mr. Leija. "Primarily, the record is in dispute as to the *degree* of resistance exhibited by Leija after being confronted by the officers." (*Id.* at 442.) The court noted the hospital surveillance footage of the encounter between Mr. Leija and the officers showed Mr. Leija simply walking away from the officers. The officers contended Mr. Leija began acting more aggressively after he moved out of the frame of the surveillance video. However, "[t]he gap in the video recording results in a failure to have an objective viewing of what transpired after the time Leija walked away from the officers and up until the point where the officers are seen apprehending Leija [after he had already been tased and grabbed by the officers]." (*Id.* at 443.) The court also held that "[t]he testimony of the officers is not

consistent as to the nature of the aggressive behavior of Leija during this critical gap in the video." (*Id.*) The court thus held that there was a material dispute of fact as to the nature and degree of Mr. Leija's resistance to the officers' attempts to seize him. The district court further concluded that the record was in dispute as to the threat Mr. Leija allegedly posed to the officers or the public, since he was an unarmed hospital patient and, while there was an allegation that he was using his blood as a weapon, there was no evidence that any of his blood was spattered on any of the officers. Finally, the court concluded there was a material dispute as to "[t]he officers' knowledge of [Mr. Leija's serious medical] condition—and their efforts to ascertain information about Leija's condition before attempting to use any degree of force on him." (*Id.*) The district court concluded that all of these material disputed facts precluded the issuance of summary judgment in favor of Appellants on Plaintiff's excessive force claim. This interlocutory appeal followed.

II.

We review the district court's denial of summary judgment on qualified immunity grounds de novo, with our review limited to purely legal issues. *Morris*, 672 F.3d at 1189. Based on the facts identified by the district court, we thus consider de novo the purely legal questions of "whether the facts that the district court ruled a reasonable jury could find would suffice to show a legal violation" and "whether that law was clearly established at the time of the alleged violation." *Allstate Sweeping, LLC v. Black*, 706

F.3d 1261, 1267 (10th Cir. 2013).[1]

A. Constitutional Violation

In *Graham v. Connor*, 490 U.S. 386, 395 (1989), the Supreme Court held that "*all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." The Court then held that "[d]etermining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Id.* at 396 (internal quotation marks omitted). This balancing test "requires careful attention to the facts and circumstances of

[1] The dissent concludes that this court may conduct its own factual review of the record in order to identify additional facts that the district court would be likely to find for summary judgment purposes However, appellate review of the evidence in the record should be the exception, not the rule, in qualified immunity cases. *See Johnson*, 515 U.S. at 319. We may need to conduct an evidence-based review of the record when the district court opinion on appeal is so cursory that we cannot determine what facts the court relied on in denying summary judgment. *See Behrens v. Pelletier*, 516 U.S. 299, 312-13 (1996) (concluding that the appellate court would need to conduct a factual review of the record where the district court simply stated that it was denying summary judgment "on the ground that 'material issues of fact remain'" (brackets omitted)). In the case before us, however, the district court's ruling was fully explained. We accordingly will not embark on our own fact-finding expedition into the evidence, particularly not in a manner that would call the district court's own factual determinations into question and resolve factual disputes in favor of the officers, rather than Plaintiff. Following our established practice, we take as given the district court's statement of the facts and its conclusion that the facts are in dispute on several material questions, including the threat Mr. Leija allegedly posed to others in the hospital and the degree and type of resistance he demonstrated in the moments preceding his tasing by the officers.

each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* "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.* "As in other Fourth Amendment contexts, however, the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397.

In determining whether an officer's use of force was excessive, many cases have focused solely on the three factors specifically described in *Graham*. *See, e.g.*, *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1281 (10th Cir. 2007). However, these three factors were not intended to be exclusive, and the circumstances of a particular case may require the consideration of additional factors. This is especially true where a Fourth Amendment excessive-force claim arises out of a protective custody seizure rather than a criminal arrest, since the *Graham* factors are tailored to the criminal context and are unlikely to cover all of the pertinent circumstances in a protective custody case.

For instance, while the three factors listed in *Graham* may be sufficient to evaluate the "governmental interests at stake" in a typical criminal arrest case, *see Graham*, 490 U.S. at 396, an additional governmental interest may be implicated in cases involving protective custody seizures—the governmental interest in preventing a mentally disturbed

individual from harming himself. *See Pino v. Higgs*, 75 F.3d 1461, 1468 (10th Cir. 1996) ("The state has a legitimate interest . . . in protecting a mentally ill person from self-harm.). The need to protect such persons from themselves is thus an additional factor that may weigh into our evaluation of the reasonableness of a particular use of force in such cases. Just as the weight of the second *Graham* factor varies based on the threat the subject poses to police officers and others, the weight of this additional factor will vary based on the severity and immediacy of the threat the individual poses to himself. When an individual poses a more severe and immediate threat to himself, a higher level of force may be reasonable in order to seize him for protective custody purposes.

Two more additional factors may also be pertinent in determining the reasonableness of the force used for a seizure, particularly in the protective custody context. First, as we have previously acknowledged, "a detainee's mental health must be taken into account when considering the officers' use of force[,] and it is therefore part of the factual circumstances the court considers under *Graham*." *Giannetti v. City of Stillwater*, 216 F. App'x 756, 764 (10th Cir. 2007). The Ninth Circuit has explained why an individual's mental or emotional disturbance should be considered in determining the reasonableness of a particular use of force:

> The problems posed by, and thus the tactics to be employed against, an unarmed, emotionally distraught individual who is creating a disturbance or resisting arrest are ordinarily different from those involved in law enforcement efforts to subdue an armed and dangerous criminal who has recently committed a serious offense. In the former instance, increasing the use of force may, in some circumstances at least, exacerbate the situation; in the latter, a heightened use of less-than-lethal force will usually be helpful

> in bringing a dangerous situation to a swift end. In the case of mentally unbalanced persons, the use of officers and others trained in the art of counseling is ordinarily advisable, where feasible, and may provide the best means of ending a crisis. Even when an emotionally disturbed individual is 'acting out' and inviting officers to use deadly force to subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted, not with a person who has committed a serious crime against others, but with a mentally ill individual. . . . [W]here it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in determining, under *Graham*, the reasonableness of the force employed.

Deorle v. Rutherford, 272 F.3d 1272, 1282-83 (9th Cir. 2001) (citations and footnotes omitted). This factor will weigh against the use of force most strongly where the mentally disturbed individual has committed no crime and poses a threat only to himself, since a seizure by force may well undermine the sole governmental interest supporting the seizure in such a case—the interest in protecting the mentally disturbed individual from harming himself. As the Ninth Circuit has noted, when "a mentally disturbed individual not wanted for any crime . . . [i]s being taken into custody to prevent injury to himself[, d]irectly causing him grievous injury does not serve that objective in any respect." *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1059 (9th Cir. 2003).

Second, the reasonableness of a particular use of force depends in part on whether the law enforcement officers knew or should have known that the individual had special characteristics making him more susceptible to harm from this particular use of force. For instance, in *Cruz v. City of Laramie*, 239 F.3d 1183 (10th Cir. 2001), we found the use of hog-tie restraints to be unreasonable when officers know or should be on notice

that the subject has diminished capacity and is accordingly more likely to experience positional asphyxia from the use of such restraints. We explained:

> We do not reach the question whether all hog-tie restraints constitute a constitutional violation per se, but hold that officers may not apply this technique when an individual's diminished capacity is apparent. This diminished capacity might result from severe intoxication, the influence of controlled substances, a discernible mental condition, or any other condition, apparent to the officers at the time, which would make the application of a hog-tie restraint likely to result in any significant risk to the individual's health or well-being. In such situations, an individual's condition mandates the use of less restrictive means for physical restraint.

Id. at 1188. This factor is particularly pertinent when the reason for seizing an individual is to ensure he receives the necessary medical treatments for his compromised physical condition. In such a case, law enforcement officers should be especially sensitive to the likelihood that a particular use of force may do more harm than good. We note in particular that the use of tasers and similar electronic control devices may be counterproductive, at best, to the goal of ensuring that a mentally and medically compromised individual is restored to health. *See Rosa v. Taser Int'l, Inc.*, 684 F.3d 941, 948 n.6 (9th Cir. 2012) (noting that a 2009 notice issued by Taser International warned law enforcement officers using electronic control devices "to pay special attention to 'physiologically or metabolically compromised' suspects, including those with cardiac disease and the effects of drugs," since their bodies are at a greater risk of harm from such devices).

These three additional factors, as well as the three *Graham* factors, are all pertinent to our analysis of the law enforcement officers' seizure of Mr. Leija in this case. We

consider all of these factors in order to "careful[ly] balanc[e] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing government interests at stake" as required by *Graham*, 490 U.S. at 396.

The first additional factor applicable to this case—the severity and immediacy of the threat Mr. Leija posed to himself—weighs in favor of the application of some force, if necessary, in order to protect Mr. Leija from the threat he posed to himself. According to the facts identified by the district court, Officer Pickens was informed that Mr. Leija could die if he left the hospital, and Mr. Leija was clearly delusional and mentally disturbed. Mr. Leija thus posed both an immediate and a severe threat to himself, and the government had an interest in seizing Mr. Leija in order to ensure he received the necessary medications he was refusing as a result of his disturbed mental state.

However, the other additional factors pertinent to this case weigh against the level of force employed here, and particularly against the officers' use of a taser. Mr. Leija was clearly delusional and mentally disturbed, which weighs against the reasonableness of the officers' decision to employ such a severe level of force against him. *See Cavanaugh v. Woods Cross City*, 625 F.3d 661, 664 (10th Cir. 2010) ("Although Tasers may not constitute deadly force, their use unquestionably 'seizes' the victim in an abrupt and violent manner," making the nature and quality of the intrusion on the victim's Fourth Amendment interests "quite severe."). When faced with a mentally ill individual, a reasonable police officer should make a "greater effort to take control of the situation through less intrusive means." *Bryan v. MacPherson*, 630 F.3d 805, 829 (9th Cir. 2010).

> A mentally ill individual is in need of a doctor, not a jail cell . . . . [T]he purpose of detaining a mentally ill individual is not to punish him, but to help him. The government has an important interest in providing assistance to a person in need of psychiatric care; thus, the use of force that may be justified by that interest necessarily differs in both degree and in kind from the use of force that would be justified against a person who has committed a crime or who poses a threat to the community.

Id. (internal quotation marks omitted). The situation the police officers faced in this case called for conflict resolution and de-escalation, not confrontation and tasers.

Mr. Leija's compromised physical condition also weighs against the types of force employed in this case. A use of force that might be reasonable against an apparently healthy individual may be unreasonable when employed against an individual whose diminished capacity should be apparent to a reasonable police officer. *See Cruz*, 239 F.3d at 1188. Here, taking the facts in the light most favorable to Plaintiff, the officers were on notice that Mr. Leija was gravely ill and thus was very likely to have diminished capacity. This factor thus weighs against the reasonableness of the officers' decision to tase and wrestle to the ground a hospital patient whose mental disturbance was the result of his serious and deteriorating medical condition.

Furthermore, the first two *Graham* factors weigh against the use of force in this case. Taking the facts in the light most favorable to Plaintiff, Mr. Leija did not commit any crime, much less a severe crime, and he posed no threat to the police officers or anyone else. Thus, the only governmental interest weighing in favor of the use of force in this case is the interest in protecting Mr. Leija from the threat he posed to himself, as discussed above.

Finally, the third *Graham* factor also weighs against the officers' actions in this case. Under this factor, a higher level of force may be employed when the subject is actively resisting or attempting to evade arrest by flight. In cases where the subject actively resisted a seizure, whether by physically struggling with an officer or by disobeying direct orders, courts have held either that no constitutional violation occurred or that the right not to be tased in these circumstances was not clearly established. *See, e.g.*, *Hinton v. City of Elwood*, 997 F.2d 774, 781 (10th Cir. 1993) (finding no violation where subject refused to talk to police after they asked him to stop, shoved an officer, and was tased during the ensuing struggle); *see also Cockrell v. City of Cincinnati*, 468 F. App'x 491, 495 (6th Cir. 2012) (collecting cases). Conversely, when officers tased a subject who was detained or not exhibiting active resistance, courts have typically allowed an excessive force claim to proceed. *See, e.g.*, *Roosevelt-Hennix v. Prickett*, 717 F.3d 751, 759-60 (10th Cir. 2013) (affirming denial of qualified immunity where detained subject alleged she was tased after telling officers that she was physically incapable of complying with their command to place her feet outside police cruiser and officers made no attempt to help her); *see also Cockrell*, 468 F. App'x at 496 (collecting cases).

Here, Deputies Atnip and Beebe claimed that Mr. Leija refused to comply with their orders to calm down and get on his knees, even after they warned him that he would be tased. Ms. Aldaba disputes that any such orders or warnings were rendered, but we must "take, as given, the facts that the district court assumed when it denied summary judgment," *Morris*, 672 F.3d at 1189 (internal quotation marks omitted). Moreover,

based on all of the facts, we can at least infer that Mr. Leija knew the police were there to coax him back into his room for treatment and that he resisted in this regard. Indeed, the hospital surveillance video shows that just after he exited his room, Mr. Leija waved off Officer Pickens and slowly walked away, signaling that he understood the officers wanted him to return to his room. As the officers contend, these facts indicate some level of resistance. However, viewing the facts in Plaintiff's favor, nothing suggests Mr. Leija's resistance was anything more than passive. *See Bryan*, 630 F.3d at 830 ("Resistance . . . should not be understood as a binary state, with resistance being either completely passive or active. Rather, it runs the gamut from the purely passive protestor who simply refuses to stand, to the individual who is physically assaulting the officer." (internal quotation marks omitted)); *see also Mattos v. Agarano*, 661 F.3d 433, 450 (9th Cir. 2011) (en banc) ("[W]e draw a distinction between a failure to facilitate an arrest and active resistance to arrest."). The analysis thus turns to whether the officers' use of force was commensurate with Mr. Leija's level of resistance.

In that regard, Deputy Beebe made the initial showing of force by tasing Mr. Leija. The surveillance video does not capture the first taser strike, but Deputy Atnip and Officer Pickens can be seen moments later grabbing Mr. Leija's arms and pushing him against a wall. Deputy Beebe then tases Mr. Leija a second time before the officers bring him to the floor and attempt to handcuff him. On appeal, the parties raise several arguments regarding the struggle that followed the initial taser strike. However, we need not address these arguments because we conclude that Plaintiff has sufficiently

demonstrated an excessive force violation based on the officers' initial decision to tase Mr. Leija, which precludes summary judgment in favor of Appellants on Plaintiff's excessive force claim.[2]

Taking the facts in the light most favorable to Plaintiff, Deputy Beebe was not justified in tasing Mr. Leija as an initial use of force given the resistance he was exhibiting up to that point and the fact that the only governmental interest supporting the seizure was the interest in protecting Mr. Leija from the threat he posed to himself. *See Abbott v. Sangamon Cnty.*, 705 F.3d 706, 730 (7th Cir. 2013) (holding that passive non-compliance without active resistance does not justify substantial escalation of force); *cf. Hinton*, 997 F.2d at 781 (finding no violation where officers first grabbed non-compliant subject and then used stun-gun after the subject began actively and openly resisting officers' attempts to handcuff him). Moreover, while Officer Pickens and Deputy Atnip did not themselves tase Mr. Leija, it is clearly established in this circuit that "[a]n officer who fails to intervene to prevent a fellow officer's excessive use of force may be liable under § 1983." *Fogarty v. Gallegos*, 523 F.3d 1147, 1162 (10th Cir. 2008).

[2] The reasonableness of the initial taser strike is pertinent to the reasonableness of the officers' subsequent actions, since the "totality of the circumstances" analysis includes consideration of "whether the officers' own reckless or deliberate conduct during the seizure unreasonably created the need to use such force." *Medina v. Cram*, 252 F.3d 1124, 1132 (10th Cir. 2001) (internal quotation marks and brackets omitted). Because we affirm the district court's denial of summary judgment based on the initial taser strike, we need not resolve the question of whether the officers' subsequent actions would likewise constitute excessive force. The jury can appropriately resolve this and other remaining factual disputes regarding Plaintiff's excessive force claim on remand.

Thus, Officer Pickens and Deputy Atnip may be found liable for their decision not to intervene after it became clear that Deputy Beebe intended to tase Mr. Leija.

Taking the facts in the light most favorable to Plaintiff, a jury could find that Appellants violated Mr. Leija's constitutional rights by employing such a severe level of force against him despite their knowledge of his mental instability, his serious medical condition, and the fact that he had committed no crime and posed a threat only to himself. We accordingly affirm the district court's conclusion that Appellants are not entitled to summary judgment on Plaintiff's excessive force claim.

B. Clearly Established Law

Having held that the alleged facts regarding the initial taser strike would be sufficient to establish an excessive force claim, we must turn to the question of whether the law was clearly established at the time of the alleged violation. *See Allstate Sweeping, LLC v. Black*, 706 F.3d 1261, 1267 (10th Cir. 2013). Under *Graham*, the analysis of an excessive-force claim is necessarily fact-specific, and thus prior cases do not need to involve all of the same factual circumstances or factors in order for an excessive force violation to be clearly established. *See Casey*, 509 F.3d at 1284. Rather, we use a sliding scale in which "[t]he more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation." *Morris*, 672 F.3d at 1196 (internal quotation marks omitted).

In several previous cases, we have examined the reasonableness of taser use in

general without discussing the specific ramifications of law enforcement's use of tasers against the mentally and physically ill. On one end of the spectrum, *Hinton* stands for the uncontroversial proposition that a misdemeanant who ignores an officer's orders to stop, shoves an officer, and then actively and openly resists arrest by, among other things, biting the officer, has no clearly established right not to be tased during the struggle. 997 F.2d at 781. At the other end of the spectrum, *Casey* clearly established that an officer could not tase a non-violent misdemeanant who appeared to pose no threat and who was given no warning or chance to comply with the officer's demands. 509 F.3d at 1281-82. Appellants argue that *Casey* is distinguishable because the officer in that case used a taser without a warning, while here Mr. Leija was warned he would be tased if he did not comply with the officers' demands. However, our decision in *Casey* was based on the conclusion that "it is excessive to use a Taser to control a target without having any reason to believe that a lesser amount of force—or a verbal command—could not exact compliance." *Id.* at 1286. Thus, *Casey* does not stand for the proposition that it is reasonable for an officer to simply give a warning and then use a taser as the initial use of force against a non-violent, non-threatening misdemeanant. Rather, *Casey* establishes that only a lesser level of force may be employed against such an individual unless the individual begins actively resisting or fleeing, as the plaintiff did in *Hinton*. Under *Casey*, a warning is a necessary but not a sufficient part of the reasonableness analysis when a taser is used against a non-violent, non-threatening individual who has not committed a serious crime.

Consistent with our precedents, other courts that have examined the use of tasers against the mentally ill have found it clearly established that officers may not tase non-criminal, non-threatening subjects who primarily exhibit passive resistance. For example, in *Oliver v. Fiorino*, 586 F.3d 898, 901, 906-07 (11th Cir. 2009), the court found that as of 2004, a mentally unstable subject who flagged down an officer to falsely report a shooting had a clearly established right not to be tased where he was suspected of no crime, was largely compliant, and posed no immediate threat of danger to officers beyond one moment of struggle. Likewise in *Asten v. City of Boulder*, 652 F. Supp. 2d 1188, 1203 (D. Colo. 2009), the court concluded that a mentally unstable woman had a clearly established right not to be tased in her own home without warning where she was suspected of no crime, posed no threat to officers or others, only resisted by refusing to allow the officers to enter her home. Finally, in *Borton v. City of Dothan*, 734 F. Supp. 2d 1237, 1249-50 (M.D. Ala. 2010), the court held that officers called to a hospital to assist with a "disturbed patient" who was loud, boisterous, and screaming could not tase the patient without warning while she was restrained to a gurney because she had committed no crime, was no longer a danger or threat, and was outnumbered.

These cases do not exactly mirror the factual circumstances of our case, but "the qualified immunity analysis involves more than 'a scavenger hunt for prior cases with precisely the same facts.'" *Cavanaugh*, 625 F.3d at 666 (quoting *Casey*, 509 F.3d at 1284). Instead, the "more relevant inquiry" for qualified immunity purposes is "whether the law put officials on fair notice that the described conduct was unconstitutional."

Casey, 509 F.3d at 1298. Here, we conclude that *Graham*, *Casey*, *Cruz*, and the other pertinent authorities sufficiently put Appellants on notice that it is not objectively reasonable to employ a taser as the initial use of force against a seriously ill, non-criminal subject who poses a threat only to himself and is showing only passive resistance, regardless of whether they provide a warning first. *Cf. Fogarty*, 523 F.3d at 1162 ("Considering that under [plaintiff's] version of events each of the *Graham* factors lines up in [her] favor, this case is not so close that our precedents would fail to portend the constitutional unreasonableness of defendants' alleged actions.").

We emphasize that significant factual issues remain which must be resolved at trial, including whether Mr. Leija was slinging blood at the officers, whether the officers knew about the extent of Mr. Leija's illness, and whether he exhibited something more than passive resistance in the moments before he was tased.[3] If those facts prove to be

[3] These disputes regarding the reasonableness of the initial taser strike will also be relevant to the analysis of whether the officers' subsequent actions were reasonable. In this analysis, further factual disputes abound as to the severity of force employed by the officers and the degree of resistance displayed by Mr. Leija following the initial taser strike.

We note that a plaintiff may only recover on an excessive force claim if she shows "(1) that the officers used greater force than would have been reasonably necessary to effect a lawful seizure, and (2) some actual injury caused by the unreasonable seizure that is not de minimis, be it physical or emotional." *Cortez v. McCauley*, 478 F.3d 1108, 1129 n. 25 (10th Cir. 2007). Depending on which, if any, of the officers' actions are found to constitute excessive force, the jury may need to resolve factual disputes regarding the cause of Mr. Leija's death and whether he sustained "some actual injury caused by the unreasonable seizure." For instance, at that stage of the inquiry, the jury may need to resolve the factual dispute regarding whether the initial Taser strike actually caused an electrical shock or other injury to Mr. Leija.

different than those we have considered on the summary judgment record, the excessive force analysis may yield a different result. However, based on the facts taken in the light most favorable to Plaintiff, we conclude that Plaintiff can show a violation of clearly established law sufficient to defeat Appellants' request for qualified immunity

III.

We accordingly **AFFIRM** the district court's denial of qualified immunity.

PHILLIPS, Circuit Judge, dissenting:

I would conclude that the three officers did not act with excessive force under the Fourth Amendment. Accordingly, I would also conclude that they violated no clearly established law. I believe they are entitled to summary judgment on their qualified immunity defense.

This case presents a highly unusual encounter between a hospital patient not in his right mind and three law enforcement officers responding to a distress call from his medical providers, who sought help restraining him so they could treat his deteriorating, life-threatening medical condition. Despite the tragic death of Mr. Leija, I believe the officers acted reasonably in confronting a difficult emergency situation.

1. Qualified Immunity: General Policies

"The doctrine of qualified immunity protects government 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.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). It "balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Id.* at 231. The doctrine "'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (quoting *Malley v. Briggs*, 475 U.S. 335, 343, 341 (1986)). This

"accommodation for reasonable error exists because 'officials should not err always on the side of caution' because they fear being sued." *Id.* (quoting *Davis v. Scherer*, 468 U.S. 183, 196 (1984)). Qualified immunity is available "to ensure that fear of liability will not 'unduly inhibit officials in the discharge of their duties.'" *Camreta v. Greene*, 131 S. Ct. 2020, 2030 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 638 (1987)).

The Supreme Court has repeatedly stressed the importance of early review of qualified immunity defenses. "*Harlow* and *Mitchell* make clear that the defense is meant to give government officials a right, not merely to avoid 'standing trial,' but also to avoid the burdens of 'such *pretrial* matters as discovery …, as '[i]nquiries of this kind can be particularly disruptive of effective government.'" *Behrens v. Pelletier*, 516 U.S. 299, 307 (1996) (emphasis in original) (citation omitted). "The privilege is 'an *immunity from suit* rather than a mere defense to liability, and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.'" *Saucier v. Katz*, 533 U.S. 194, 200–01 (2001) (emphasis in original).

2. Qualified Immunity: The Fourth Amendment

"Fourth Amendment reasonableness 'is predominantly an objective inquiry.'" *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074, 2080 (2011) (quoting *City of Indianapolis v. Edmond*, 531 U.S. 32, 47 (2000)). We inquire whether "the circumstances, viewed objectively, justify [the challenged] action." *Id.* (quoting *Scott v. United States*, 436 U.S. 128, 138 (1978)). If the action was justified objectively, it is reasonable whatever the officer's subjective intent. *Id.* (quoting *Whren v. United States*, 517 U.S. 806, 814 (1996)). Qualified immunity shields officers from suits for damages if "a reasonable

officer could have believed [the challenged conduct] to be lawful, in light of clearly established law and the information the arresting officers possessed." *Hunter*, 502 U.S. at 227 (quoting *Anderson*, 483 U.S. at 641). A court "should ask whether the [officers] acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed … years after the fact." *Id.* at 228.

3. Qualified Immunity: Summary Judgment

"Because of the underlying purposes of qualified immunity, we review summary judgment orders deciding qualified immunity questions differently from other summary judgment decisions." *Medina v. Cram*, 252 F.3d 1124, 1128 (10th Cir. 2001). "When a defendant asserts qualified immunity at summary judgment, the burden shifts to the plaintiff to show that: (1) the defendant violated a constitutional right and (2) the constitutional right was clearly established." *Morris v. Noe*, 672 F.3d 1185, 1191 (10th Cir. 2012) (citation omitted). In determining what material facts are genuinely in dispute, the district court construes the evidence in the light most favorable to the nonmovant. *Weigel*, 544 F.3d at 1151.

4. The Material Facts Actually Found by the District Court

The first step in determining the constitutionality of the actions of the three law enforcement officers is to determine the material facts. *Scott v. Harris*, 550 U.S. 372, 378 (2007). After the district court does so, resolving genuine issues of material fact in favor of the nonmovant, the district court then measures those material facts against the substantive claim to see whether they could sustain a jury verdict on the claim. *See id.* at

380. On appeal, we review de novo the district court's legal determination. *Cortez*, 478 F.3d at 1115 (reviewing de novo the district court's denial of qualified immunity).

After reviewing the district court's findings, I disagree with the majority's characterizations that "[Mr. Leija] posed no threat to the police officers or anyone else"; that the "officers tased a subject who was not detained or not exhibiting active resistance"; that, while the district court's facts "indicate some level of resistance" "nothing suggests Mr. Leija's resistance was anything more than passive"; and that during this episode Mr. Leija can be fairly characterized as "a non-violent, non-threatening misdemeanant." Maj. Op. at 14, 15, 16, 19.

Contrary to the majority's characterizations, the facts show that during this episode Mr. Leija (because of his medical condition) was out of control. *See* Maj. Op. at 3–5. As I discuss below, the evidence shows that Mr. Leija was anything but passive, non-violent, and non-threatening. In fact, the doctor and male nurse called law enforcement for help in restraining Mr. Leija after concluding that they could not do it themselves. Appellant's App. vol. II at 434. During this time, Mr. Leija yelled and screamed delusional claims and accusations demonstrating that he was not in his right mind (claiming that he was God and Superman and that the hospital's staff was trying to poison him). *Id.* at 434-35. He had frightened the nurse and doctor with his aggressive behavior, causing the doctor to retreat from Mr. Leija's room after Mr. Leija acted aggressively and began stepping toward him. *Id.* Even early on, before tearing the IV needle from his arm in the hallway, Mr. Leija was bleeding sufficiently to leave blood on the floor, wall, and toilet. *Id.* at 433-34.

Nor did Mr. Leija's behavior become passive after the officers arrived. When the officers first encountered Mr. Leija, he was still yelling about being God and Superman and claiming that the hospital staff was trying to poison him. *Id.* at 435. In its opinion, the majority does not consider the effect this had on the welfare of other patients in the hospital or consider the possibility that someone in Mr. Leija's disturbed state might pose a threat to them. Mr. Leija was visibly agitated and upset. *Id.* Upon Officer Pickens's arriving, the doctor told him that Mr. Leija may die if he left the hospital. *Id.* Seeing that Mr. Leija was trying to leave the hospital, Officer Pickens got in front of him and tried to calm him. *Id.* Ultimately this failed, and Mr. Leija continued down the hallway toward the lobby. *Id.* After Officer Pickens again stopped him and continued trying to calm him, Mr. Leija continued with his aggressive behavior. *Id.* He tore the IV needle from his arm, causing more bleeding, and he then *faced the officers* and clenched and shook his fists. *Id.* After this, Mr. Leija removed the gauze and tape from his arms, causing yet more bleeding, and raised his arms, proclaiming that this was his blood. *Id.*

The district court also found that Deputies Atnip and Beebe then commanded Mr. Leija several times to step back, to calm down, and to get on his knees. Maj. Op. at 4–5; Appellant's App. vol. II at 435. They warned him that otherwise they would taser him.[1] *Id.* at 435-36. When Mr. Leija did not comply, Deputy Beebe fired the taser.[2] *Id.* at 436.

[1] Although the device used was a "Stinger," not a "taser," the two devices are similar and because the witnesses use the verb "taser," I do the same for ease of understanding.

[2] An officer can use a taser in one of two ways. First, the officer can use the taser for a "drive-stun," where the officer presses the taser against a person's body. Second, the

One of the two prongs hit Mr. Leija in the upper body but had no effect (presumably, because the second prong did not strike him). *Id.* Almost immediately, Deputy Atnip then grabbed Mr. Leija's left arm, and Officer Pickens grabbed his right arm. *Id.* Despite turning him to the wall, they still could not get his arms behind his back. Deputy Beebe then tried to "dry" stun Mr. Leija to relax his muscles and help Officer Pickens and Deputy Atnip get his arms behind his body. *Id.* This too had no effect. *Id.* Ultimately, after a struggle, one officer managed to buckle Mr. Leija's knee and all four men went to the floor. *Id.* During this episode, medical personnel were observing and standing by. *Id.* After the officers had Mr. Leija somewhat in control, the male nurse—with syringe in hand—asked them to hold Mr. Leija still so he could inject the medicine. *Id.* Almost immediately after the injection, Mr. Leija vomited and went limp. The officers stepped away, and medical staff tried to revive him. *Id.* That effort failed, and tragically Mr. Leija died. *Id.*

Even based on those limited fact findings—all taken in the Estate's favor as the party opposing summary judgment—I would conclude that the three officers did not use excessive force. To say that Mr. Leija was passive in this encounter is more than the facts can bear. In measuring the reasonableness of the three officers' conduct, the majority ignores the pressing need to restrain Mr. Leija to treat him. The doctor and male nurse obviously wanted to restrain him to the bed to administer medicine and get his oxygen level to a safe level. In addition, the majority ignores the danger to the officers from Mr.

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officer can fire metal darts—prongs—into the body. *McKenney v. Harrison*, 635 F.3d 354, 364 (8th Cir. 2011) (Murphy, J., concurring).

Leija's steady stream of blood. Whether he was flinging it at them or not (and I will assume he did not since the district court specifically addressed that issue and did not find that Mr. Leija did fling his blood), the officers feared with good reason a wrestling match in which Mr. Leija's blood might injure them. As events proved, and as the doctor and male nurse had correctly surmised, Mr. Leija presented a physical challenge, even against superior numbers. The majority fails to consider that a successful tasering could have saved all four men from a dangerous physical tussle and could have led to Mr. Leija getting the medical care he so desperately needed.

In short, I believe the officers acted reasonably for their own safety and Mr. Leija's. They did not simply arrive and taser him without warning or provocation. They tried for several minutes to reason with him and calm him—even as Mr. Leija slowly made his way to the lobby and a possible death if he got outside the hospital. They tasered him when he refused their commands after all else had failed. Their other two alternatives—first using physical force against him or letting him walk out the door—were hardly attractive ones. Indeed, had they opted for either of those two choices and Mr. Leija still died, it is not hard to imagine the officers being sued for *not* using the taser.

I think the reasonableness of their actions is shown by a simple question: What else should the officers have done? At oral argument, the Estate's counsel suggested that one officer could have met with the doctor to learn more about Mr. Leija's condition while the others followed him down the hallway (and presumably out of the hospital and down the street). That itself is unreasonable. The majority criticizes the officers' actions because "[t]he situation the police officers faced in this case called for conflict resolution

and de-escalation, not confrontation and tasers." Maj. Op. at 14. Yet the majority offers nothing concrete for achieving that laudatory goal as the clock ticked on Mr. Leija's life-threatening medical condition. And lost in the majority's criticism is any acknowledgement that the officers *did* try to resolve and de-escalate the conflict.

Does the majority really contend that the three officers—facing this emergency situation in real time—acted incompetently or knowingly violated the law? *See Medina*, 252 F.3d at 1128. Does it contend that the officers should not be credited with a "mistaken judgment" if they really used excessive force? We must remember that "[b]ecause 'police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation,' … the reasonableness of the officer's belief as to the appropriate level of force should be judged from that on-scene perspective." *Saucier*, 533 U.S. at 205 (quoting *Graham v. Conner*, 490 U.S. 386, 397 (1989)). The Supreme Court has "cautioned us against the '20/20 vision of hindsight' in favor of deference to the judgment of reasonable officers on the scene." *Id.* (quoting *Graham*, 490 U.S. at 393, 396).

5. The Material Facts That The District Court Likely Would Find

I agree with the majority that we do not have authority to review the record to challenge or reweigh the fact findings that the district court actually made for summary judgment. *See Johnson v. Jones*, 515 U.S. 304, 313 (1995) (reviewing denial of summary judgment based on qualified immunity, and concluding that a party cannot appeal any part of district court's order based on "evidence sufficiency"—that is, "facts a party may,

or may not, be able to prove at trial"). Thus, I accept that the district court's material fact determinations (for summary judgment purposes) bind us at this stage. Accordingly, as I noted above, I give the Estate full credit on all those facts that the district court found.

But here, the district court failed to find or identify all the facts material to excessive force. It declared that "[t]he present case presents many material disputed facts as to the objective reasonableness of the force by Atnip, Beebe, and Pickens." Appellant's App. vol. II at 442. Clarifying this, the district court said that "[p]rimarily, the record is in dispute as to the degree of resistance exhibited by Leija after being confronted by the officers." *Id.* Along this same line, the district court found that "[t]he testimony of the officers is not consistent as to the nature of the aggressive behavior of Leija during [a] critical gap in the video."[3] *Id.* at 443. Additionally, the district court said that "the record is in dispute as to the degree of threat Leija posed to the officers or the public." *Id.* Here, it noted that no blood had splattered the officers, despite the officers saying that Leija had used his blood as a weapon. *Id.* Finally, the district court found genuine issues of material fact about "[t]he officers' knowledge of [Leija's medical] condition—and their efforts to ascertain information about Leija's condition before attempting to use any degree of force on him…."[4] *Id.*

[3] The word "gap" might suggest that the video was edited in some fashion to remove the images leading up to and including the tasering. In fact, the video is intact, but the camera looked down one hallway and not around a corner where that activity occurred.

[4] In view of these general pronouncements that genuine issues of material fact remain on these areas critical to qualified immunity, I must disagree with the majority that "the district court's ruling was fully explained." Maj. Op. at 8 n.1. In my view, it is insufficient for the district court to set forth facts on summary judgment that themselves

When a district court simply announces that there are "genuine issues of material fact" remaining, but does not identify and resolve them for summary judgment, we must delve into the record to find what material facts the district court likely would have found. *See Behrens*, 516 U.S. at 312-13. This makes sense because otherwise, defendants would have no way to inform the appeals court of the facts supposedly amounting to a violation of clearly established law. *See id. at* 312–13 (tasking the court of appeals with reviewing the record to determine what facts the district court likely assumed when the district court "did not identify the particular charged conduct that it deemed adequately supported" denial of summary judgment, but instead justified denial on the ground that "[m]aterial issues of fact remain"); *Johnson*, 515 U.S. at 319 (recognizing that when district courts fail to state the facts they relied upon to deny summary judgment, "a court of appeals may have to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed"); *see also Leatherwood v. Welker*, 757 F.3d 1115, 1117, 1119 (10th Cir. 2014) (reviewing district court's denial of summary judgment for qualified immunity on grounds that "questions of material fact remain regarding the existence of reasonable suspicion [for the search]," and saying that "[w]hen the district court does not set forth with specificity the facts it relied on, we may look to the record to determine which facts the court likely assumed").

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do not defeat qualified immunity, but then to avoid any review by generally stating afterward that genuine issues of material fact remain on those same matters. Under that standard, the strong policies set forth by the Supreme Court favoring early disposition of qualified immunity defenses lose all force. *Hunter v. Bryant*, 502 U.S. at 227.

Here, the district court merely (and without explanation) found that genuine issues of material fact existed about Leija's degree of resistance. On that same subject, it concluded that the officers' testimony was "inconsistent" but never described in what way. Because of the importance of this latter conclusion, this is a good place to start our not-so-cumbersome review of the slim record for facts the district court would likely find in denying summary judgment.

Deputy Atnip testified that, before Deputy Beebe tasered Mr. Leija, Mr. Leija was shaking his clenched fists and asking Officer Pickens if he wanted to fight. Appellant's App. vol. I at 131-33; vol. II at 395. Deputy Atnip testified that Mr. Leija had his fists up with blood dripping from his hands. *Id.* vol. II at 397. He testified that Mr. Leija got close to Officer Pickens with blood dripping and that he (Deputy Atnip) then commanded Mr. Leija to get to his knees. *Id.* vol. II at 381. Deputy Atnip repeated the commands several times before Deputy Beebe fired the taser. *Id.* Deputy Atnip said that Mr. Leija never stopped being aggressive. *Id*. at 383.

Deputy Beebe also testified that Mr. Leija, with fists raised, asked Officer Pickens if he wanted to fight. *Id.* vol. I at 158. Soon after that, Mr. Leija ripped the IV port from his arm, causing blood to drip, and then raised his fists toward Officer Pickens. *Id.* As Officer Pickens backed up, he and Deputy Atnip then began commanding Mr. Leija to quit swinging his arms and to get on his knees. *Id.* at 159. Deputy Beebe further testified that Mr. Leija continued toward them, and that Deputy Beebe took about three steps back before firing the taser. *Id.* Deputy Beebe retreated because he did not want Mr. Leija's blood on him. *Id.* at 252. He believed that Mr. Leija was using his blood as a weapon. *Id.*

Officer Pickens testified about his efforts to talk to Mr. Leija. In addition to Mr. Leija's statements about the hospital staff trying to kill and poison him, Mr. Leija said he wanted his wife and wanted to leave the hospital. *Id.* at 242.Officer Pickens testified that, upon stopping Mr. Leija a second time in the hallway, Mr. Leija grew even angrier, that he pulled the gauze and needles from his arm, and that he began bleeding everywhere. Appellant's App. vol. II at 285, 288, 290. He testified that he stepped away because he was worried Mr. Leija's blood might get on him and injure him ("I didn't know what he had, if it was something I could get, so I stepped away from him."). *Id*. at 290. He described Mr. Leija's raising his arms over his head, both arms losing a fairly steady stream of blood. *Id.* at 290. He recollected Mr. Leija then saying that this was his blood, which he took to mean that Mr. Leija was going to use his blood as a weapon. *Id.* at 290-91. In addition, in an interrogatory answer, Officer Pickens stated that during this time, Mr. Leija had pounded his clenched fists on his thighs and sprayed blood. *Id.* at 430.

Although the district court did not explain why, it stated that the officers' testimony was inconsistent about the degree of Mr. Lejia's resistance. Officer Pickens certainly never testified that Mr. Leija had *not* challenged him to a fight. Nothing in the record shows anyone asking Officer Pickens about that. In the middle of his testimony about Mr. Leija's bloody arm raising, the Estate's counsel asked, "And you haven't left out anything, as far as any statements that he made or that you made to him? You've told me everything that happened up until the time that he raised his hands above his head and said, this is my blood?" *Id*. at 290-91. Officer Pickens responded, "As far as I know, yes." *Id*. at 291. I would not reward this indirect "tell me everything" question by foreclosing

Officer Pickens from asserting that Mr. Lejia asked him if he wanted to fight. The way to foreclose it is to ask about it directly.

Based on this record I have some difficulty concluding that the district court could likely find that Mr. Leija did not challenge Officer Pickens to fight. The two deputies were emphatic about it. The Estate apparently did not think it wise to ask Officer Pickens about it directly. We have no deposition testimony in the record from any of the other witnesses in the hallway saying that the deputies are wrong. Yet based on the district court's finding of "inconsistent testimony," I assume this is what it meant and accordingly think it would likely find for summary judgment purposes that Mr. Leija did not challenge Officer Pickens to fight.

But based on the undisputed record, I also think that the district court would likely find that Mr. Leija made threatening gestures that would cause the officers to fear for their safety. In addition, I think the district court would likely find that the officers had legitimate health concerns about exposing themselves to Mr. Leija's free-flowing blood. In measuring the degree of risk posed, the district court would likely credit the doctor's testimony about a trail of blood down the hallway. Appellant's App. vol. I at 229.

I believe that the district court would also likely find that the medical staff wanted the officers to subdue Mr. Leija so that they could treat his serious, deteriorating medical condition. The doctor stated that he considered physical force to ensure that Mr. Leija got the needed treatment, and that someone had gone to get soft restraints to immobilize him for medical care once he was subdued. *Id.* at 226. The male nurse testified that he had told the doctor that the two of them could not handle Mr. Leija. *Id.* at 103. After

observing Mr. Leija, the male nurse believed that more than two people were needed to approach Mr. Leija. *Id.* He felt he needed law enforcement for patient safety. *Id.* at 104.

Finally, I believe that the district court would likely find that the officers ordered Mr. Leija to stop and get on his knees, but that he would not comply. In addition to the officers' testimony, the doctor testified that he heard an officer loudly tell Mr. Leija to get to his knees, but that Mr. Leija continued down the hallway toward the officers without breaking stride. *Id.* at 229. The male nurse testified that he heard the officers tell Mr. Leija more than once to get on his knees, but that Mr. Leija did not comply. *Id.* at 108.

While I do not believe these additional findings are necessary to make the officers' response to the emergency situation reasonable, I believe that they make it all the more reasonable. They further support my view that the officers did not use excessive force in violation of the Fourth Amendment.

6. Clearly Established Law

Even if the officers acted with excessive force under the Fourth Amendment, I still believe they would be entitled to summary judgment. They would be entitled to this "unless it is shown that the official violated a statutory or constitutional right that was 'clearly established' at the time of the challenged conduct." *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014) (quoting *Ashcroft*, 131 S. Ct. at 2080). "And a defendant cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood he was violating it." *Id.* at 2023 (quoting *Ashcroft*, at 2083-84). "In other words, 'existing precedent must have placed the statutory or constitutional question'

confronted by the official 'beyond debate.'" *Id.* (citation omitted). "Ordinarily, in 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." *Morris*, 672 F.3d at 1196. But because cases almost never have exactly the same circumstances, we require less that way as the conduct becomes more obviously egregious. *Id.*

In its sole reference to the second prong of qualified immunity—clearly established law—the district court simply noted that "[t]he reasonableness standard is clearly established for the purposes of a section 1983 action … and it requires courts to balance several factors including the severity of the crime, the degree of the threat the subject poses to the safety of the officer and the public, and the subject's cooperation or resistance." Appellant's App. vol. II at 442 (citation omitted). Yet the Supreme Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality . . . since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." *Plumhoff*, 134 S. Ct. at 2023 (quotation marks and citation omitted). "The general proposition, for example, that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established." *Ashcroft*, 131 S. Ct. at 2084.

At oral argument, counsel for the Estate commendably began his argument by acknowledging that he had no cases with similar facts. The majority faces this same problem. Even so, it still apparently concludes that clearly established law advised the

officers "beyond debate" that their actions amounted to excessive force. To get there, the majority relies on our "sliding scale" analysis, in which "[t]he more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation." *Morris*, 672 F.3d at 1189 (quoting *Johnson*, 515 U.S. at 319). In this regard, it notes that "the qualified immunity analysis involves more than a 'scavenger hunt for prior cases with precisely the same facts.'" Maj. Op. at 20; *Cavanaugh v. Woods Cross City*, 625 F.3d 661, 666 (10th Cir. 2010) (quoting *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007)).

As its strongest case from our circuit supporting its notion that the three officers here violated clearly established law, the majority relies upon *Casey v. City of Federal Heights*, 509 F.3d 1278 (10th Cir. 2007). In that case, we reversed the grant of summary judgment based on qualified immunity. *Id*. at 1287. The facts of the case are shocking. Casey challenged a traffic ticket and lost. *Id*. at 1279. After ruling, the judge handed him the case file and told him to take it to the cashier's window to pay the fine. *Id.* His eight-year-old daughter visited the restroom while Casey went to the parking lot to get money to pay the fine. *Id*. A court clerk told him not to take the file outside the building, but Casey responded that he would be right back after getting his money. *Id*. As he returned with the court file and money to pay his fine, Officer Sweet intercepted him and ordered him back to his truck. *Id*. at 1280. Casey replied that he needed to return the file and get his daughter. *Id*.

When Casey moved around him to take the file to the cashier, the officer grabbed Casey's arm and put it in a painful arm-lock. *Id.* As Casey tried to continue to the

courthouse, the officer jumped on his back. Office Lor then arrived and almost immediately tasered Casey. *Id*. With more officers now there, the officers took Casey to the ground and repeatedly banged his face into the concrete. *Id.* While Casey was on the ground, Officer Losli tasered him again with a "dry" stun. *Id.* Officer Lor tried to tase Casey a third time before being told to put her taser away after she hit another officer instead. *Id*.

As a second case, the majority relies on *Cruz v. City of Laramie*, 239 F.3d 1183 (10th Cir. 2001). In this case, police responded to a call that a man was running around naked. *Id*. at 1185. Upon seeing him and his lively behavior (jumping up and down on an exterior landing of an apartment building, yelling, and kicking his legs up and down), police called for an ambulance. *Id*. After trying to calm him and coax him down, the officers finally succeeded and Cruz came down to the ground but tried to walk past them. *Id.* The officers wrestled him to the ground and handcuffed him face down. *Id.* To stop his kicking, the officers wrapped a nylon restraint around his ankles. *Id*. The record had some evidence that the officers had "hog-tied" him, that is, tied his ankles within a foot of his wrists. *Id*. Before the ambulance arrived, Cruz's face blanched, leading the officers to remove the restraint. *Id.* The emergency crew unsuccessfully tried CPR, but Cruz died. *Id*. His autopsy revealed a large amount of cocaine in his system. *Id*.

On appeal, we noted that our circuit had not yet ruled on the validity of hog-tie restraints. *Id*. at 1188. We held that officers "may not apply this technique when an individual's diminished capacity is apparent." *Id*. Although recognizing cases from other jurisdictions, we could not say that "a rule prohibiting such a restraint in this situation

was 'clearly established' at the time of this unfortunate incident." *Id*. at 1189. I simply observe that the cases on hog-ties were more plentiful and on point than the majority's cases offered in support of its decision in this case.

Reviewing the three factors set forth in *Graham*, 490 U.S. at 396, we found it debatable whether Casey's conduct even amounted to a crime. *Casey*, 509 F.3d at 1281. We found that Officer Sweet had no reason to believe that Casey posed a threat to anyone's safety. *Id*. at 1282. And finally, we concluded that when Officer Sweet used physical force on Casey, Casey was "neither 'actively resisting arrest' nor 'attempting to evade arrest by flight.'" *Id*. (quoting *Graham*, 490 U.S. at 396). Although we located no case in which a citizen was peacefully trying to return to a courthouse and then "tackled, Tasered, knocked to the ground by a bevy of police officers, beaten, and Tasered again, all without warning or explanation," we denied Officer Sweet qualified immunity. *Id*. at 1285. We also denied it to Officer Lor after noting that we knew of no circuit court that had "upheld the use of a Taser immediately and without warning against a misdemeanant like Mr. Casey." *Id*. at 1286.

I disagree that the three officers in the present case could read *Casey* and know that it clearly established they could not taser Mr. Leija in the circumstances of this case. I fail to understand how the majority likens the peaceful Mr. Casey to the combative Mr. Leija. Nor do I understand how the two cases compare when Mr. Leija was warned about the taser if he did not comply with the officers' directions, while Mr. Casey was tackled and tasered twice for no apparent reason, except perhaps for overzealous officers who lacked any sense or judgment. In relying upon *Casey*, the majority continues to ignore the

pressing need for the officers to do what the medical staff wanted and needed—control of Mr. Leija so he could be treated rather than allowed to drift outside untreated, where the doctor said he would probably die. In short, I think, if anything, *Casey* helps the officers here because they had a need to use the taser and warned Mr. Leija before using it.

In addition, the majority relies on a string of cases from outside our circuit involving "the use of tasers against the mentally ill [that] have found it clearly established that officers may not tase non-criminal, non-threatening subjects who primarily exhibit passive resistance." Maj. Op. at 20. Again, describing Mr. Leija in those terms disregards the facts. On inspection, none of these cases resemble Mr. Leija's case and provide no basis for a conclusion that the three officers here should have known that their actions violated clearly established law. None of the cited cases involves the same medical emergency here or a corresponding need for force to subdue a combative person endangering his own life because his medical condition had deprived him of his ability to continue to undergo necessary treatment. As such, the cases offer no help.

The majority understates it when it says that "[t]hese cases do not exactly mirror the factual circumstances of our case." Maj. Op. at 21. *See Oliver v. Fiorino*, 586 F.3d 898, 901-02 (11th Cir. 2009) (affirming denial of summary judgment for qualified immunity in case where man appearing mentally unstable but not accused or suspected of a crime was tasered 8 to 12 times for five seconds each while he was lying on hot pavement immobilized and clenched up, allegedly resulting in his death); *Borton v. City of Dothan*, 734 F. Supp. 2d 1237, 1242-44 (M.D. Ala. 2010) (denying summary judgment on qualified immunity grounds for a mentally ill woman who while strapped to a gurney but

struggling and screaming was tasered three times, first on her right leg, then on her left leg as she screamed, "I give up," and finally on her face, knocking her unconscious); *Asten v. City of Boulder*, 652 F. Supp. 2d 1188, 1194 (D. Colo. 2009) (after a mentally ill woman denied police entry into her home, an officer cut the screen on her door and used it to fire his taser into her stomach, never warning her or telling her of their intent to take her into custody).

I disagree that any of the majority's cases would put the three officers on notice that their actions would amount to excessive force. The majority fails to acknowledge the urgency of Mr. Lieja's medical condition and the danger he posed to the officers and others. The majority's broad rule against the use of tasers compels officers desiring not to be sued to resort first to physical force in restraining individuals needing to be restrained for their own protection. In my mind, it disregards the risks to law enforcement from violent physical encounters and will "unduly inhibit [officers] in the discharge of their duties." *Camreta*, 131 S. Ct. at 2030.

For these reasons, I respectfully dissent.

Eisenhour v. Weber County

United States Court of Appeals for the Tenth Circuit

March 12, 2014, Filed

12-4190

Reporter
744 F.3d 1220; 2014 U.S. App. LEXIS 4913; 121 Fair Empl. Prac. Cas. (BNA) 1746; 2014 WL 958468

Subsequent History: Judgment entered by *Eisenhour v. Weber County, 2014 U.S. App. LEXIS 4843 (10th Cir. Utah, Mar. 12, 2014)*
Motion denied by *Eisenhour v. Weber County, 2015 U.S. Dist. LEXIS 35229 (D. Utah, Mar. 20, 2015)*

Prior History: [**1] Appeal from the United States District Court for the District of Utah. (D.C. No. 1:10-CV-00022-DB).
Eisenhour v. Weber County, 2012 U.S. Dist. LEXIS 146687 (D. Utah, Oct. 10, 2012)
Eisenhour v. Weber County, 739 F.3d 496, 2013 U.S. App. LEXIS 25856 (10th Cir. Utah, 2013)

LexisNexis® Headnotes

Legal Ethics > Judicial Conduct

HN1 *Utah Code Ann. § 78A-11-112* provides that the transmission, production, or disclosure of any complaints, papers, or testimony in the course of proceedings before the Judicial Conduct Commission may not be introduced in any civil action. *Utah Code Ann. § 78A-11-112(1)*.

Legal Ethics > Judicial Conduct

HN2 Under a plain reading of *Utah Code Ann. § 78A-11-112(1)*, testimony taken during the course of proceedings before the Judicial Conduct Commission cannot be introduced in a civil action. The statute elsewhere authorizes disclosure under limited circumstances.

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

HN3 The appellate court reviews the district court's grant of summary judgment de novo, employing the same legal standard applicable in the district court.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

HN4 Summary judgment is appropriate only if the evidence reflects the absence of a genuine issue of material fact.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

HN5 In determining whether summary judgment is appropriate, the reviewing court must view the evidence in the light most favorable to the party opposing summary judgment.

Labor & Employment Law > ... > Civil Actions > Exhaustion of Remedies > General Overview

HN6 Federal courts lack jurisdiction over Title VII of the Civil Rights Act of 1964 claims that were not previously covered in a claim presented to the EEOC.

Labor & Employment Law > ... > Civil Actions > Exhaustion of Remedies > General Overview

HN7 Under the new test for exhaustion, each act of retaliation must be separately exhausted, even when acts that post-date the EEOC complaint reasonably relate to others presented to the EEOC.

Labor & Employment Law > ... > Civil Actions > Exhaustion of Remedies > Filing of Charges

HN8 Federal courts lack jurisdiction over incidents occurring after the filing of an EEOC claim unless the plaintiff files a new EEOC claim or otherwise amends her original EEOC claim to add the new incidents. *29 C.F.R. § 1601.12(b)*.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Public Employees

HN9 When faced with a *First Amendment* claim by a public employee, the district court must balance the *First Amendment* interests of that employee, speaking as a concerned citizen, with the government's interests in promoting the efficiency of the public services it performs through its employees. To conduct this balancing, the district court asks: (1) whether the speech was made pursuant to an employee's official duties; (2) whether the speech was on a matter of public concern; (3) whether the government's interests, as employer, in promoting the efficiency of the public service are sufficient to outweigh the plaintiff's free speech interests; (4) whether the protected speech was a motivating factor in the adverse employment action; and (5) whether the defendant would have reached the same employment decision in the absence of the protected conduct. While the first three inquiries involve matters of law, the last two are questions of fact.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Public Employees

HN10 In deciding whether the communication is constitutionally protected, the United States Court of Appeals for the Tenth Circuit asks whether it relates to a matter of public concern (which is protected) or a matter of purely personal interest (which is not protected). The Tenth Circuit must consider the speaker's motivation: Was the speech calculated to redress personal grievances or did it have some broader public purpose?

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Public Employees

HN11 Speech involves a public concern when the speaker intends to bring to light actual or potential wrongdoing or breach of public trust by a public official or to disclose any evidence of corruption, impropriety, or other malfeasance within a governmental entity. When courts evaluate whether speech concerns the public, they do so by the content, form, and context of a given statement, as revealed by the whole record.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Public Employees

HN12 A mixed motive is not fatal to a public employee's *First Amendment* claim.

Labor & Employment Law > ... > Whistleblower Protection Act > Scope & Definitions > General Overview

HN13 Utah's Whistleblower Act prohibits government employers from retaliating against employees who report employer misconduct. *Utah Code Ann. § 67-21-3(1)(a)*.

Labor & Employment Law > Wrongful Termination > Whistleblower Protection Act > General Overview

HN14 Under Utah's Whistleblower Act, an employee must sue within 180 days of the alleged violation. *Utah Code Ann. § 67-21-3(1)(a)*.

Labor & Employment Law > Wrongful Termination > Whistleblower Protection Act > General Overview

HN15 The Utah Court of Appeals holds that the 180-day period set forth in *Utah Code Ann. § 67-21-3(1)(a)* required the filing of an action in a court rather than the filing of a notice in an administrative agency.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Relation Back

HN16 Under *Fed. R. Civ. P. 15(c)*, amendments to pleadings relate back to the original filing when the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out, or attempted to be set out, in the original pleading. *Fed. R. Civ. P. 15(c)(1)(B)*.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN17 For purposes of the *Fourteenth Amendment's Due Process Clause*, property interests must derive from some independent source, such as state law, contract, or other understandings that give rise to a claim of entitlement. When a plaintiff claims a property interest in her job, the United States Court of Appeals for the Tenth Circuit asks whether she had a legitimate expectation of continued employment, as defined by some independent source such as a contract for a fixed term or state law.

Labor & Employment Law > Employment Relationships > At Will Employment > General Overview

HN18 The presumption under Utah law is that employment with the county is at-will.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Labor & Employment Law > Employment Relationships > At Will Employment > General Overview

HN19 At-will employees lack a property interest in continued employment.

Labor & Employment Law > Employment Relationships > General Overview

HN20 A reduction-in-force occurs when a department discontinues the use of an identifiable position. A reduction-in-force does not occur when an entire department is eliminated.

Governments > State & Territorial Governments > Employees & Officials

Pensions & Benefits Law > Governmental Employees > State Pensions

HN21 Under Utah law, a public employee qualifies to buy early retirement after accumulating 25 years of service. *Utah Code Ann. § 49-12-701(1)(a)*.

Civil Rights Law > ... > Immunity From Liability > Local Officials > Customs & Policies

HN22 A municipality can be liable under *42 U.S.C.S. § 1983* for the acts of a municipal official only when the official possesses final policymaking authority to establish municipal policy with respect to the acts in question.

Civil Rights Law > ... > Immunity From Liability > Local Officials > Customs & Policies

HN23 In determining whether a municipal official had final policymaking authority, the United States Court of Appeals for the Tenth Circuit considers two factors: (1) whether his discretionary decisions were constrained by general policies enacted by others, and (2) whether those decisions were reviewable by others.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

HN24 To overcome a defense of qualified immunity, a plaintiff must show that: (1) the defendant's conduct violated the law, and (2) the law was clearly established when the violation occurred. If the plaintiff makes this showing, the burden shifts to the defendant to establish that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law.

Constitutional Law > Equal Protection > Gender & Sex

HN25 The United States Court of Appeals for the Tenth Circuit recognizes that sexual harassment could constitute an equal-protection violation.

Constitutional Law > Equal Protection > Gender & Sex

HN26 The United States Court of Appeals for the Tenth Circuit's cases do not suggest that a plaintiff's failure to report harassment precludes liability for an equal-protection violation.

Constitutional Law > Equal Protection > Gender & Sex

HN27 In cases involving an equal-protection violation based on sexual harassment, the United States Court of Appeals for the Tenth Circuit has not required the plaintiff to show she was treated differently from a similarly situated individual. It is enough that the plaintiff presents sufficient evidence that the defendant discriminated against her because of her sex, thereby depriving her of the right to equal protection of the laws.

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Linette B. Hutton of Winder & Counsel, PC, Salt Lake City, Utah, for Defendant-Appellee Craig D. Storey.

Judges: Before GORSUCH, BALDOCK, and BACHARACH, Circuit Judges.

Opinion by: BACHARACH

Opinion

[*1223] **BACHARACH**, Circuit Judge.

Marcia Eisenhour sued Weber County, three of its county commissioners, and a state judge. According to Ms. Eisenhour, the judge (Craig Storey) sexually harassed her and the County retaliated against her for reporting the harassment. She claimed violations of Utah's Whistleblower Act, the *First Amendment*, the *Fourteenth Amendment's* Due Process and *Equal Protection Clauses*, and Title VII. The district court granted summary judgment to the defendants on all claims.

Ms. Eisenhour challenges this ruling and the district court's exclusion of her **[*1224]** testimony on disciplinary proceedings involving the judge. We affirm: (1) the **[**2]** exclusion of Ms. Eisenhour's testimony during the disciplinary proceedings involving Judge Storey, and (2) the award of summary judgment on the claims against the County for violation of the *Fourteenth Amendment's Equal Protection* and *Due Process Clauses*, liability under Title VII, and violation of the Whistleblower Act relating to the refusal to rehire her. But, we conclude that genuine issues of material fact existed on: (1) the claims against the County under the Whistleblower Act and the *First Amendment* based on closing of the Justice Court, (2) the *First Amendment* claim against the County Commissioners, and (3) the claim against Judge Storey based on the *Fourteenth Amendment's Equal Protection Clause*. Accordingly, on these claims, we reverse the award of summary judgment.

I. Ms. Eisenhour's Evidence

The facts, presented in the light most favorable to Ms. Eisenhour as the party opposing summary judgment, are as follows:

A. Ms. Eisenhour's Evidence of Sexual Harassment

Ms. Eisenhour worked for Weber County for 24 years, serving as the Court Administrator for the

Weber County Justice Court under the direct supervision of Judge Storey. According to Ms. Eisenhour, she was subjected to [**3] offensive touching and unreasonable questions about her activities away from work.

Judge Storey began acting inappropriately toward Ms. Eisenhour in early 2008. He became ″touchy″ and would often stand so close to her that his groin rubbed against her. In addition to the touching, Judge Storey once called Ms. Eisenhour into his office and told her that he had a dream about her in which she was naked. Ms. Eisenhour also found a poem by Judge Storey, which revealed his romantic feelings for her.

According to Ms. Eisenhour, she was also subjected to unreasonable demands about her activities. Before 2008, she was allowed to work flexible hours and to miss work without obtaining prior approval. In 2008, however, Judge Storey told Ms. Eisenhour that her frequent absences and unpredictable work patterns had become a problem and that, in the future, she could not miss work without his approval. To obtain approval, she would need to tell him where she was going, what she was doing, and whom she would be with. Perceiving the new policy as ″possessive″ and an attempt to control her, Ms. Eisenhour went to the County Attorney's Office and complained of sexual harassment by Judge Storey. Ms. Eisenhour [**4] was immediately placed on paid administrative leave pending an investigation.

B. Evidence of an Investigation into Ms. Eisenhour's Allegations

The County launched an investigation into Ms. Eisenhour's allegations. Ms. Eisenhour told investigators about the poem, Judge Storey's dream about her, the inappropriate touching, and the new restrictions on missing work. The investigators also interviewed witnesses, including Judge Storey. But, Ms. Eisenhour testified that the investigators had never asked Judge Storey whether the allegations were true. Instead, she stated that the investigation focused on her work ethic and the quality of her work. Ms. Eisenhour eventually returned to work. When she did, she became part of the Clerk/Auditor's Department and was no longer supervised by Judge Storey. To minimize contact between Judge Storey and Ms. Eisenhour, the County moved Judge Storey's office to a different floor and designated a deputy [*1225] court clerk as a liaison between Judge Storey and Ms. Eisenhour.

The County ultimately decided not to discipline Judge Storey and referred Ms. Eisenhour's complaints to Utah's Judicial Conduct Commission. The Commission investigated the incident, found no misconduct [**5] on Judge Storey's part, and dismissed the allegations. Ms. Eisenhour reacted by going to the press. Two newspapers printed articles about the allegations, stating that no action was being taken against Judge Storey.

C. Evidence Involving the County's Decision to Close the Justice Court

Between August and December 2009, the County Commissioners decided to close the Justice Court, which meant the loss of Ms. Eisenhour's job. The County maintains that the Commissioners made the decision because of increasing revenue losses rather than Ms. Eisenhour's allegations or her decision to go to the media. After the court closed, Ms. Eisenhour applied to the County for three vacant positions. Unsuccessful, Ms. Eisenhour lost not only her job but also the potential for retirement benefits. Because Judge Storey had more years of service, however, he was able to retire with benefits.

II. Ms. Eisenhour's Claims and the District Court's Ruling on Summary Judgment

On March 13, 2009, Ms. Eisenhour filed claims with Utah's Antidiscrimination and Labor Division and the Equal Employment Opportunity

Commission, alleging sexual harassment and retaliation. Still dissatisfied, she sued Judge Storey, Weber County, [**6] and the County Commissioners, invoking Title VII, *42 U.S.C. § 1983*, and the Utah Whistleblower Act.[1]

The district court granted summary judgment to the defendants on all claims. The court reasoned that Judge Storey had qualified immunity and did not act with the intent to violate Ms. Eisenhour's equal-protection rights. On the claims against the County, the district court held that it lacked jurisdiction over the Title VII claim, that the equal-protection claim failed because Judge Storey was not an official policymaker, that the *First Amendment* claim failed because Ms. Eisenhour had not engaged in protected speech, and that her due-process claim failed because she had not established a property interest in her employment.

III. Exclusion of Ms. Eisenhour's Deposition Testimony

In deciding whether to grant summary judgment, the district court declined to consider Ms. Eisenhour's deposition testimony taken during the Judicial Conduct Commission's investigation. The parties agree that the issue is governed by *Utah Code Ann. § 78A-11-112*.[2] Appellant's [**7] App. vol. 1, at 318, 321-22, 366-69, 373-75. ***HN1*** This statute provides in pertinent part that [*1226] "[t]he transmission, production, or disclosure of any complaints, papers, or testimony in the course of proceedings before the commission . . . may not be introduced in any civil action." *Utah Code Ann. § 78A-11-112(1)*. Ms. Eisenhour disagrees with the ruling, but we conclude that the court did not err.

Our review is de novo. *Cent. Kan. Credit Union v. Mut. Guar. Corp., 102 F.3d 1097, 1104 (10th Cir. 1996)*. ***HN2*** Under a plain reading of *section 78A-11-112(1)*, testimony taken during the course of proceedings before the [**8] Judicial Conduct Commission cannot be introduced in a civil action. The statute elsewhere authorizes disclosure under limited circumstances, but the issue here is whether the deposition transcript can be introduced, not whether it can be disclosed. *See Utah Code Ann. § 78A-11-112(3)*. Thus, the district court had an obligation to exclude the testimony taken during the Judicial Conduct Commission's investigation.

IV. Summary Judgment

Because Ms. Eisenhour's deposition testimony was properly excluded, we do not consider it in our review of the summary-judgment ruling. In this review, we agree with the district court that the statute of limitations barred Ms. Eisenhour's Whistleblower Act claim based on the County's refusal to rehire her, that the Title VII claim was unexhausted, that Ms. Eisenhour lacked a property interest for her due-process claim, and that the County did not incur liability for an equal-protection violation because Judge Storey was not a "policymaker" regarding the alleged acts. But we also conclude that the district court erred in granting summary judgment: (1) to Judge Storey on the *§ 1983* claim for an equal-protection violation, (2) to the County and County Commissioners [**9] on the *§ 1983* claim for violation of the *First Amendment*, and (3) to the County on the Whistleblower Act claim based on closing of the Justice Court. In our view, the evidence created a genuine issue of material fact on these claims.

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[1] Ms. Eisenhour also sued Judge Storey for intentional infliction of emotional distress, but she does not address that cause of action in this appeal.

[2] Because the parties agree that the issue is governed by the Utah statute, we need not independently determine whether admissibility of Ms. Eisenhour's testimony was governed by federal law or state law. We note, however, that federal law would also render the testimony confidential if the investigation had involved a federal judge rather than a state judge. 28 U.S.C. § 360(a) (2006); *see also* 10th Cir. Rules for Judicial-Conduct & Judicial-Disability Proceedings, ***Rule 23(a)-(b)***, ***(d)*** (restricting disclosure of judicial-conduct investigations involving federal judges in the Tenth Circuit).

A. Standard of Review

HN3 ″We review the district court's grant of summary judgment de novo, employing the same legal standard applicable in the district court.″ *Thomson v. Salt Lake Cnty., 584 F.3d 1304, 1311 (10th Cir. 2009)*. ***HN4*** Summary judgment is appropriate only if the evidence reflects the absence of a genuine issue of material fact. *Id*. ***HN5*** In making this assessment, we must view the evidence in the light most favorable to Ms. Eisenhour, the party opposing summary judgment. *Noland v. McAdoo, 39 F.3d 269, 271 (10th Cir. 1994)*.

B. Title VII Claim

Ms. Eisenhour asserts a claim under Title VII for retaliation. The district court held that it lacked jurisdiction over the claim because Ms. Eisenhour failed to exhaust administrative remedies. We agree.

HN6 Federal courts lack jurisdiction over Title VII claims that were not previously covered in a claim presented to the Equal Employment Opportunity Commission. *Shikles v. Sprint/United Mgmt. Co., 426 F.3d 1304, 1317 (10th Cir. 2005)*. **[**10]** Ms. Eisenhour filed an EEOC claim for sexual harassment, but this claim did not refer to any of the retaliatory acts underlying the eventual cause of action under Title VII.

Ms. Eisenhour argues that she had no obligation to file a new EEOC claim because the new incidents were ″reasonably related″ to the claim she had made. Although this argument might once have been viable, it is no longer. In 2003, we addressed a similar argument in *Martinez* **[*1227]** *v. Potter, 347 F.3d 1208, 1210 (10th Cir. 2003)*. There the plaintiff asserted a claim with the EEOC in July 1999 for retaliatory conduct that had occurred in May 1999. In the eventual court action, however, the plaintiff alleged retaliation for conduct taking place after the EEOC complaint. The issue in *Martinez* was whether the plaintiff failed to exhaust claims that post-dated the submission to the EEOC. The federal district court applied the old test in our circuit: whether the suit involved claims reasonably related to the allegations in the EEOC complaint. We held, however, that this test had been effectively overruled by the Supreme Court. *Martinez, 347 F.3d at 1210* (citing *Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 122, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002)*). **[**11]** ***HN7*** Under the new test, each act of retaliation must be separately exhausted, even when acts that post-date the EEOC complaint reasonably relate to others presented to the EEOC. *Id. at 1210-11*.

The Plaintiff relies on two of our decisions issued prior to 2003: *Simms v. Oklahoma ex rel. Department of Mental Health, 165 F.3d 1321, 1326 (10th Cir. 1999)*, and *Seymore v. Shawver & Sons, Inc., 111 F.3d 794, 799 (10th Cir. 1997)*. These decisions did suggest that exhaustion was unnecessary for claims related to those presented in an earlier EEOC complaint. *Simms, 165 F.3d at 1326*; *Seymore, 111 F.3d at 799*. But this view was unambiguously rejected in 2003 when we decided *Martinez v. Potter, 347 F.3d 1208, 1210-11 (10th Cir. 2003)*. *See, e.g., Annett v. Univ. of Kan., 371 F.3d 1233, 1238 (10th Cir. 2004)* (noting that *Seymore* has been effectively abrogated in our circuit).

Under the new rule, ***HN8*** federal courts lack jurisdiction over incidents occurring after the filing of an EEOC claim unless the plaintiff files a new EEOC claim or otherwise amends her original EEOC claim to add the new incidents. *See 29 C.F.R. § 1601.12(b)*. Because Ms. Eisenhour did not file a new EEOC claim or amend her submission to **[**12]** add the new incidents, the Title VII claim was unexhausted. As a result, we affirm the award of summary judgment to the County on the Title VII retaliation claim.

C. *First Amendment* Claim

Ms. Eisenhour invokes the *First Amendment*, claiming that the County retaliated against her by

closing the Justice Court when she spoke to the media about the Judicial Conduct Commission's investigation of Judge Storey. The County urged summary judgment on grounds that: (1) the communications to the media did not involve protected speech, and (2) it closed the Justice Court because of budgetary considerations rather than a retaliatory motive. We conclude that triable issues of fact existed and that the district court erred in granting summary judgment to the County.

HN9 When we are faced with a *First Amendment* claim by a public employee, the district court must balance the *First Amendment* interests of that employee, speaking as a concerned citizen, with the government's interests in ″promoting the efficiency of the public services it performs through its employees.″ *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968)*. To conduct this balancing, the district court asks:

> (1) whether **[**13]** the speech was made pursuant to an employee's official duties; (2) whether the speech was on a matter of public concern; (3) whether the government's interests, as employer, in promoting the efficiency of the public service are sufficient to outweigh the plaintiff's free speech interests; (4) whether the protected speech was a **[*1228]** motivating factor in the adverse employment action; and (5) whether the defendant would have reached the same employment decision in the absence of the protected conduct.

Dixon v. Kirkpatrick, 553 F.3d 1294, 1301-02 (10th Cir. 2009). While the first three inquiries involve matters of law, the last two are questions of fact. *Id. at 1302*.

In its motion for summary judgment and its appellate brief, the County addressed only the second and fourth factors. Viewing the evidence in the light most favorable to Ms. Eisenhour, we hold that her comments to the media involved protected speech and that she presented sufficient evidence for a reasonable fact-finder to infer that her comments were a motivating factor in the County's decision to close the Court.

The threshold question is whether Ms. Eisenhour's communications to the media were protected under the *First Amendment*. **[**14]** *See Wren v. Spurlock, 798 F.2d 1313, 1317 (10th Cir. 1986)*. ***HN10*** In deciding whether the communication is constitutionally protected, we ask whether it relates to a matter of public concern (which is protected) or a matter of purely personal interest (which is not protected). *Wulf v. City of Wichita, 883 F.2d 842, 856-57 (10th Cir. 1989)*. We must consider the speaker's motivation: Was the speech calculated to redress personal grievances or did it have some broader public purpose? *Starrett v. Wadley, 876 F.2d 808, 816 (10th Cir. 1989)*.

HN11 Speech involves a public concern when the speaker intends to ″'bring to light actual or potential wrongdoing or breach of public trust'″ by a public official or to ″disclose[] any evidence of corruption, impropriety, or other malfeasance″ within a governmental entity. *Conaway v. Smith, 853 F.2d 789, 796 (10th Cir. 1988)* (quoting *Connick v. Myers, 461 U.S. 138, 148, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983)*). When we evaluate whether speech concerns the public, we do so ″by the content, form, and context of a given statement, as revealed by the whole record.″ *Connick v. Myers, 461 U.S. 138, 147-48, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983)*.

It is true, as the County argues, that Ms. Eisenhour cannot turn an ″everyday employment dispute[]″ **[**15]** into a constitutional violation. *Borough of Duryea, Pa. v. Guarnieri, U.S. , 131 S. Ct. 2488, 2501, 180 L. Ed. 2d 408 (2011)*. But when Ms. Eisenhour spoke to the media, the subject-matter involved not only her employment dispute, but also her complaints about the work of the Judicial Conduct Committee. For example, the *Salt Lake Tribune* article included an allegation

that the Utah Judicial Conduct Commission had failed to properly perform its duty by refusing to hear from eight witnesses during a closed-door hearing on the alleged harassment. Appellant's App. vol. 2, at 874. And this commission was the investigative body entrusted by the public to uphold judicial integrity, which involves a public interest. *See* Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 839, 98 S. Ct. 1535, 56 L. Ed. 2d 1 (1978) (stating in another *First Amendment* context that "[t]he operations of the courts and the judicial conduct of judges are matters of utmost public concern"); Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 889, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009) (stating that public confidence in elected judges is "a vital state interest").

As the County argues, one can reasonably infer that Ms. Eisenhour's motivation was personal, as well as public, for the article referred [**16] to her allegations against Judge Storey as well as the Commission's failure to hear from the eight witnesses. But ***HN12*** a mixed motive is not fatal to her [*1229] claim. *See* Deutsch v. Jordan, 618 F.3d 1093, 1100 (10th Cir. 2010) ("But the speaker's having a highly personal motive for a disclosure does not necessarily mean that the speech is not a matter of public concern."); Wulf v. City of Wichita, 883 F.2d 842, 860 n.26 (10th Cir. 1989) (noting that while speech was "linked to some degree to [the plaintiff's] personal dispute with [the defendant] on and to his dissatisfaction with his transfer to [another] [d]epartment, which he viewed as retaliatory, [the speech also] contain[ed] allegations of public concern").

The existence of an interest that is public, as well as private, is also borne out by the forum and timing of Ms. Eisenhour's speech. She chose to speak with the media, through a public forum, only *after* the Commission had allegedly failed to carry out its investigatory obligation. *See* Considine v. Bd. of Cnty. Comm'rs of Cnty. of Adams, Colo., 910 F.2d 695, 700 (10th Cir. 1990) (holding that statements were protected under the *First Amendment* in part because they had been made to the [**17] media, which suggested an intent to disclose wrongdoing by government officials); *see also* Markos v. City of Atlanta, 364 F.3d 567, 571 (5th Cir. 2004) (noting that the form of the plaintiff's speech was "quintessentially public as his comments appeared in the form of an article in the local newspaper").

The County relies heavily on Workman v. Jordan, 32 F.3d 475 (10th Cir. 1994), and David v. City & Cnty. of Denver, 101 F.3d 1344 (10th Cir. 1996). Acknowledging that our facts differ from those in *Workman* and *David*, the County cites these cases to "show that the Tenth Circuit has held that sexual harassment complaints address personal matters, not matters of public concern." Br. Weber County Appellees at 28. For the sake of argument, we can assume that sexual harassment does not involve a matter of public concern. Here, though, Ms. Eisenhour's statements to the media addressed not only sexual harassment, but also the failure of a governmental entity to properly carry out its public responsibilities. No such allegation existed in *Workman* or *David*.

Unlike the plaintiffs in Workman and David, Ms. Eisenhour presented evidence not only of sexual harassment, but also of a lapse by a public [**18] body charged with overseeing the judiciary. Viewing this evidence in the light most favorable to Ms. Eisenhour, we conclude that her statements to the media involved a matter of public concern, as well as private concern. *See* Pucci v. Nineteenth Dist. Court, 628 F.3d 752 (6th Cir. 2010).[3]

[3] The issue in *Pucci* was similar. There, a deputy court administrator complained about one of the judges and was terminated. She sued the judge, claiming that he retaliated against her for exercising her ***First Amendment*** rights. *See* Pucci, 628 F.3d at 758-59. The judge argued that he was entitled to summary judgment because the deputy court administrator's complaint involved an internal complaint and did not constitute protected speech. *See* id. at 768. The Sixth Circuit Court of Appeals rejected the judge's argument, stating that "the

Having held that the speech involves a public concern, we must address the County's argument that its closing of the Justice Court was not retaliatory. [**19] We reject this argument, concluding that the summary-judgment evidence would allow a reasonable fact-finder to conclude that the County terminated Ms. Eisenhour because of her comments to the media. This evidence includes: (1) the timing of the County's announcement that it would close the [*1230] Justice Court, and (2) the court's profitability.

First, a reasonable fact-finder could conclude that the County decided to close the Justice Court soon after newspapers had published Ms. Eisenhour's allegations. The *Salt Lake Tribune* article, the first to be released, was published August 4, 2009. Appellant's App. vol. 2, at 873-74. Only one week later, County officials began discussing the possibility of closing the Court. Appellant's App. vol. 3, at 992-94 (e-mails between the County Attorney and County Commissioners, discussing the possibility of closing the Justice Court). And, according to County officials, they ultimately decided to close the Court by December 2009. *Id*. at 974 (deposition of Jan Zogmaister), 1020 (deposition of Ken Bischoff); *id*. vol. 2, at 882-83 (deposition of Alan McEwan).

Second, the evidence creates a genuine issue of fact about the legitimacy of the County's explanation [**20] for closing the Justice Court. The County states that it was not financially feasible to continue operating the Court. But Ms. Eisenhour presents evidence that when the County decided to close the Justice Court, it was still generating a net profit. *Id*. vol. 3, at 982-88 (Weber County budget summaries of revenues and expenditures for 2007 to 2009). And the County's budget projections for 2009 showed that the Justice Court again expected to generate a net profit. *Id*. Indeed, the Defendants concede that the court earned $127,000 in net income in 2009. Br. Weber County Appellees at 7.

From the evidence, the fact-finder could reasonably connect: (1) the County's decision to close the Court, with (2) Ms. Eisenhour's remarks to the media.

Because the speech involves a matter of public concern and the fact-finder could reasonably infer a retaliatory motive, the district court erred by granting summary judgment to the County on the *First Amendment* claim.

D. Qualified Immunity for the County Commissioners

On the *First Amendment* claim for retaliation, Ms. Eisenhour has also sued three county commissioners in their personal capacities. This claim is based on the Commissioners' decision to close the [**21] Justice Court. Their motivation, according to Ms. Eisenhour, was to retaliate for her comments to the media.

Like the County, the Commissioners argued in the district court and in our court that Ms. Eisenhour's speech was not protected under the *First Amendment* and that the County closed the courthouse because of budgetary considerations rather than a retaliatory motive. Appellant's App. vol. 1, at 176-78; Br. Weber County Appellees at 30-33.[4]

As discussed above, these arguments involve factual issues turning on the resolution of conflicting evidence, thereby preventing summary judgment for the County. Because the Commissioners' argument for summary judgment was virtually identical to the County's, we conclude that the same issues of fact prevent summary judgment for the three county commissioners. Accordingly, we hold that the

nature of [the deputy court administrator's] complaints implicate[d] the propriety and legality of public, in-court judicial conduct, and render[ed] her speech of sufficient public gravity to warrant ***First Amendment*** protection." *Id*.

[4] The district court did not rule on the issue of qualified immunity. *See* Appellant's App. vol. 1, at 385-86.

Commissioners were not entitled to summary judgment based on qualified immunity.

E. Whistleblower Act Claim

Ms. Eisenhour alleges that the County violated ***HN13*** Utah's Whistleblower Act, which [*1231] prohibits government employers from retaliating against employees who [**22] report employer misconduct. Utah Code Ann. § 67-21-3(1)(a). According to Ms. Eisenhour, the County violated the state law by closing the Justice Court and refusing to hire her. The County argues that Ms. Eisenhour waited too long to assert the claim and lacks evidence of retaliation. We agree with the County on the claim involving a refusal to rehire her. But we disagree with the County on the claim involving closing of the Court.

Timeliness

HN14 Under the Whistleblower Act, an employee must sue within 180 days of the alleged violation. Utah Code Ann. § 67-21-3(1)(a). Ms. Eisenhour maintains that her claim was timely, arguing that: (1) the County failed to rehire her as an "Election Specialist" within the 180-day period, (2) she began the action on October 19, 2010, by notifying the County through the administrative process, and (3) her claim relates back to her original complaint.

First, Ms. Eisenhour argues that one of the retaliatory acts (the failure to hire her as an "Election Specialist") took place within the 180-day period. But she did not adequately present this argument to the district court. In her response to the summary-judgment motion, she simply included a short footnote: "Even [**23] if this were not true [discussing relation-back of the first amended complaint], it is important that Ms. Eisenhour alleges that the County improperly failed to consider her vacancies that occurred after July 15, 2010. *See, e.g.*, Additional Material Facts 45-51; Exhibits Q-S." R. vol. 1, at 219 n.4. Because the Plaintiff did not adequately present this argument to the district court, it cannot be used to disturb the district court's ruling. *See* Allison v. Bank One-Denver, 289 F.3d 1223, 1244 (10th Cir. 2002).

Ms. Eisenhour's second argument is invalid because it confuses her administrative notice with the filing of a civil action. The two are distinct, as the Utah Court of Appeals explained in Thorpe v. Wash. City, 2010 UT App 297, 243 P.3d 500 (Utah Ct. App. 2010). There, the plaintiff argued that his filing of a notice of an administrative claim qualified as the "bring[ing] [of] a civil action" under the Whistleblower Act; thus, he contended that the civil action began when he filed an administrative notice. Alternatively, he argued that he had tolled the statutory deadline by filing the notice. ***HN15*** The Utah Court of Appeals rejected both arguments, holding that the 180-day period required the filing [**24] of an action in a court rather than the filing of a notice in an administrative agency. Thorpe, 243 P.3d at 504-06.

Like the plaintiff in *Thorpe*, Ms. Eisenhour waited more than 180 days from the alleged violation to assert a Whistleblower Act claim. Thus, under *Thorpe*, Ms. Eisenhour waited too long to assert a court claim under the Whistleblower Act even though she had submitted an administrative claim within 180 days.

Finally, Ms. Eisenhour argues that the Whistleblower Act claim related back to the original complaint, which was filed within the 180-day period. Though Ms. Eisenhour waited too long to assert a Whistleblower Act claim in federal court, she did sue on other legal theories within the 180-day period. And even though the initial complaint did not include a claim under the Whistleblower Act, she later amended the complaint to invoke the statute. This claim would be timely if it related back to the claims in the original complaint. For the closing of the court, the claim did relate back; for the refusal to rehire her, the claim did not relate back.

HN16 [*1232] Under Rule 15(c) of the Federal

Rules of Civil Procedure, amendments to pleadings relate back to the original filing when "the amendment [**25] asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." *Fed. R. Civ. P. 15(c)(1)(B)*.

In the original complaint, Ms. Eisenhour alleged retaliation through multiple acts, including the County's decision to close the Justice Court. The subsequent Whistleblower Act claim is based in part on the same factual allegation from the original complaint. Thus, a genuine issue of material fact exists on timeliness of the Whistleblower Act claim arising out of the court closing.

The refusal to rehire, however, did not arise out of the events in the original complaint because the vacancies did not open up until after Ms. Eisenhour had sued. As Ms. Eisenhour points out, she was not terminated until April 1, 2010, six weeks after she filed her original complaint. Thus, the eventual claims for the refusal to rehire could not have related back to the original complaint. Those aspects of the Whistleblower Act claim were not filed within the 180-day window; thus, they are time-barred.

Evidence of Retaliation

The County again denies a retaliatory motive for its decision to close the Justice Court, relying on budgetary [**26] considerations. As discussed above, however, the budgetary explanation creates a genuine issue of material fact. Thus, the County was not entitled to summary judgment on the Whistleblower Act claim stemming from the closing of the Justice Court.

F. Due Process Claim

Ms. Eisenhour argues that the County deprived her of a property interest in her job without due process of law. The district court held that Ms. Eisenhour had failed to establish a protected property interest. We agree.

HN17 For purposes of the *Fourteenth Amendment's Due Process Clause*, property interests must derive from some independent source, such as state law, contract, or other understandings that give rise to a claim of entitlement. *Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972)*. When a plaintiff claims a property interest in her job, we ask whether she had "a legitimate expectation of continued employment," as defined by some independent source such as a contract for a fixed term or state law. *Hennigh v. City of Shawnee, 155 F.3d 1249, 1253 (10th Cir. 1998)*.

According to Ms. Eisenhour, she had a property interest in continued employment with the County. But she does not identify a source for this interest. [**27] Thus, she cannot rebut ***HN18*** the presumption under Utah law that her employment with the County was at-will. *See Fox v. MCI Commc'ns Corp., 931 P.2d 857, 859 (Utah 1997)*. And ***HN19*** "[a]t-will employees lack a property interest in continued employment." *Darr v. Town of Telluride, 495 F.3d 1243, 1252 (10th Cir. 2007)*.

Ms. Eisenhour also contends that she had a property interest involving: (1) preferential consideration for future vacancies, and (2) early vesting for retirement benefits. This contention is not supportable even when the evidence is viewed favorably to Ms. Eisenhour.

She argues that the governing policies entitled her to a new job with the County. For this argument, she points to a provision in the Weber County Personnel Policies and Procedures Manual: "Tenured employees who are separated in [*1233] reductions-in-force shall be placed on the reappointment register and may be reappointed without examination to any vacancies for which they are qualified." Appellant's App. vol. 2, at 623. But Ms. Eisenhour had no right to appear on the reappointment register, for the County did not

implement a reduction-in-force.

HN20 A reduction-in-force occurs when ″[a] department discontinues the use of [an] identifiable [**28] position.″ *Id.* at 611. A reduction-in-force does not occur when, as here, an entire department is eliminated. *See id.* Therefore, Ms. Eisenhour did not have a property interest in preferential consideration for future vacancies.

She also lacked an entitlement to vest early for retirement benefits. ***HN21*** Under Utah law, a public employee qualifies to buy early retirement after accumulating 25 years of service. *Utah Code Ann. § 49-12-701(1)(a)*. When the Justice Court closed, Ms. Eisenhour had three more months before she could obtain the required 25 years. Therefore, Ms. Eisenhour lacked a property interest in the opportunity for early retirement.

G. Equal-Protection Claim Against the County

Ms. Eisenhour asserts that the County violated her right to equal protection, and the district court granted summary judgment to the County on the ground that Judge Storey was not an official policymaker. We agree with the district court's decision.

HN22 ″[A] municipality can be liable under *Section 1983* for the acts of a municipal official only when the official possesses 'final policymaking authority' to establish municipal policy with respect to the acts in question.″ *Starrett v. Wadley, 876 F.2d 808, 814 (10th Cir. 1989)* [**29] (quoting *Pembaur v. City of Cincinnati, 475 U.S. 469, 483, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986)*). We apply this test to the two types of alleged acts: (1) Judge Storey's inappropriate touching, and (2) his establishment of a rule that Ms. Eisenhour had to obtain prior approval before missing work. Accordingly, we must decide whether Judge Storey had final policymaking authority for these acts.

HN23 In determining whether Judge Storey had final policymaking authority, we consider two factors: (1) ″whether his 'discretionary decisions [were] constrained by general policies enacted by others,'″ and (2) ″whether those 'decisions [were] reviewable by others.'″ *Milligan-Hitt v. Bd. of Trs. of Sheridan Cnty. Sch. Dist. No. 2, 523 F.3d 1219, 1228 (10th Cir. 2008)* (quoting *Dill v. City of Edmond, 155 F.3d 1193, 1211 (10th Cir. 1998)*). These factors involve questions of law. *Id. at 1224*.

Judge Storey lacked policymaking authority to touch Ms. Eisenhour inappropriately under the County's sexual harassment policy. That policy unambiguously prohibited inappropriate touching. Appellant's App. vol. 1, at 164. Thus, Judge Storey's decision to touch Ms. Eisenhour was ″constrained by [a policy] enacted by others.″ *See Milligan-Hitt, 523 F.3d at 1228*. [**30] Under that policy, Judge Storey's conduct was subject to review—and was in fact reviewed—by both the County and the Judicial Conduct Commission.

Ms. Eisenhour argues that the County implicitly gave Judge Storey the authority to touch her inappropriately by failing to ask Judge Storey whether he had done so. This argument confuses what the County did before and after the alleged touching. Even if the County failed to properly respond after-the-fact, this failure would not suggest that the County had authorized Judge Storey to grope Ms. Eisenhour before-the-fact.

[*1234] Although Judge Storey arguably had policymaking authority with regard to scheduling of his staff, Ms. Eisenhour fails to explain how Judge Storey's work-leave policy amounted to sexual harassment or otherwise violated her equal-protection rights. On its face, Judge Storey's policy would not have constituted a denial of equal protection.

To [**31] Ms. Eisenhour, Judge Storey implemented the policy as a way to hound her. But the policy itself did not constitute sexual harassment. As a result, the County cannot incur liability based on the judge's adoption of a policy

requiring Ms. Eisenhour to account for her time when she was missing work.

Judge Storey lacked policymaking authority to inappropriately touch Ms. Eisenhour, and his monitoring of her whereabouts (when missing work) did not violate the *Equal Protection Clause*. As a result, the County was entitled to summary judgment on the equal-protection claim.

H. Equal-Protection Claim Against Judge Storey

Ms. Eisenhour also asserts an equal-protection claim against Judge Storey. The district court concluded that Judge Storey is entitled to qualified immunity and that he did not act with the required intent. Judge Storey defends these conclusions, adding that Ms. Eisenhour did not show she had been treated differently from a similarly situated individual. We reverse the district court's grant of summary judgment to Judge Storey, concluding that he is not entitled to qualified immunity, that there is a fact-issue about whether Judge Storey inappropriately touched Ms. Eisenhour, and [**32] that Ms. Eisenhour had no requirement to show she was treated differently from a similarly situated individual. ***HN24*** To overcome a defense of qualified immunity, a plaintiff must show that: (1) the defendant's conduct violated the law, and (2) the law was clearly established when the violation occurred. *Albright v. Rodriguez, 51 F.3d 1531, 1534-35 (10th Cir. 1995)*. If Ms. Eisenhour makes this showing, the burden shifts to Judge Storey to establish that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. *Id. at 1535*. We hold that Ms. Eisenhour made the threshold showing and that issues of fact precluded summary judgment.

In *Starrett v. Wadley, 876 F.2d 808 (10th Cir. 1989)*, ***HN25*** we recognized that sexual harassment could constitute an equal-protection violation. The facts in *Starrett* resemble those in Ms. Eisenhour's sworn account. The *Starrett* plaintiff claimed that her supervisor had made sexual advances, asking to meet at secluded locations after hours, pinching her buttocks, placing his arm on her leg, and making obscene gestures. *Id. at 814-15*. We held that under those facts, a reasonable jury could conclude that the supervisor's conduct discriminated [**33] against the plaintiff because of her sex, thereby depriving her of equal protection. *Id. at 815*.

Starrett governs because Ms. Eisenhour presents evidence that would also allow a reasonable jury to infer that she had been discriminated against because of her sex. She states under oath that Judge Storey wrote an inappropriate poem about her, told her that he had a dream about her in which she was naked, and rubbed his groin against her. Under *Starrett*, this evidence would allow a reasonable jury to conclude that Judge Storey violated her right to equal protection.

And if Judge Storey committed an equal-protection violation, it would have been "clearly established" by our decision in *Starrett*. *See Lankford v. City of Hobart,* [*1235] 27 F.3d 477, 480 (10th Cir. 1994) (stating that "with this court's opinion in *Starrett v. Wadley* . . . it became clearly established that sexual harassment can constitute a violation of equal protection and give rise to an action under *42 U.S.C. § 1983*").

Thus, Ms. Eisenhour has made her two-part showing, and the burden shifts to Judge Storey to establish that there is no genuine issue of material fact. Judge Storey cannot meet this burden.

The district court reached [**34] a contrary conclusion based on inapplicable Supreme Court decisions and inappropriate reliance on the County's evidence that Ms. Eisenhour had not complained about Judge Storey.

In reaching its decision, the district court relied on two Supreme Court cases: *City of Canton v. Harris, 489 U.S. 378, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989)*, and *Daniels v. Williams, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986)*. The

district court's reliance on these cases is misplaced. *City of Canton* is off-point; it identifies the mental state necessary to hold a government employer liable based on a failure to train theory. *489 U.S. at 388*. *Daniels* explains that *§ 1983* liability requires a deliberate act. *474 U.S. at 331*. But the district court fails to explain why the acts Ms. Eisenhour testified about — discussing a dream in which she was naked and standing so closely to her that his groin rubbed against her—cannot be characterized as deliberate.

The district court also noted evidence that Ms. Eisenhour had not complained about Judge Storey's behavior. But this evidence would not have precluded liability and was disputed by Ms. Eisenhour. ***HN26*** Our cases do not suggest that a plaintiff's failure to report harassment precludes liability for an equal-protection violation. **[**35]** *See Lankford v. City of Hobart, 27 F.3d 477, 480-81 (10th Cir. 1994)*; *Starrett v. Wadley, 876 F.2d 808, 814-15 (10th Cir. 1989)*. In any event, Ms. Eisenhour presented evidence that she had complained about Judge Storey's behavior when she reported his sexual harassment to the County Attorney in July 2008.

Finally, Judge Storey contends that Ms. Eisenhour's claim fails because she did not show that she had been treated differently from a similarly situated individual. We reject this argument. ***HN27*** In cases involving an equal-protection violation based on sexual harassment, we have not required the plaintiff to show she was treated differently from a similarly situated individual. *See Lankford, 27 F.3d at 480-81*; *Noland v. McAdoo, 39 F.3d 269, 272-73 (10th Cir. 1994)*; *Woodward, 977 F.2d at 1400-01*; *Starrett, 876 F.2d at 814-15*. It is enough that the plaintiff presents sufficient evidence that the defendant discriminated against her because of her sex, thereby depriving her of the right to equal protection of the laws. *See Starrett, 876 F.2d at 814-15*.

V. Conclusion

For the reasons stated above, we affirm the award of summary judgment on Ms. Eisenhour's claims against the County under the: (1) **[**36]** Whistleblower Act for a refusal to rehire her, (2) Title VII, and (3) *§ 1983* based on a deprivation of due process and denial of equal protection. We also hold that the district court properly excluded Ms. Eisenhour's testimony taken during the judicial-misconduct investigation. But we agree with Ms. Eisenhour that genuine issues of fact precluded summary judgment on: (1) her *§ 1983* claim against the County and the County Commissioners based on the *First Amendment*, **[*1236]** (2) the Whistleblower Act claim against the County based on the court closing, and (3) the *§ 1983* claim against Judge Storey based on the *Fourteenth Amendment's Equal Protection Clause*. Accordingly, we remand to the district court with instructions to vacate the award of summary judgment on these claims.

Walton v. Gomez (In re Estate of Booker)

United States Court of Appeals for the Tenth Circuit

March 11, 2014, Filed

No. 12-1496

Reporter
745 F.3d 405; 2014 U.S. App. LEXIS 4493; 2014 WL 929157

ESTATE OF MARVIN L. BOOKER; ROXEY A. WALTON, as Personal Representative, Plaintiffs - Appellees, v. FAUN GOMEZ, individually and in her official capacity; JAMES GRIMES, individually and in his official capacity; KYLE SHARP, individually and in his official capacity; KENNETH ROBINETTE, individually and in his official capacity; CARRIE RODRIGUEZ, individually and in her official capacity, Defendants - Appellants, and CITY AND COUNTY OF DENVER; DENVER HEALTH AND HOSPITAL AUTHORITY, d/b/a Denver Health Medical Center; GAIL GEORGE, R.N., individually and in her official capacity; SUSAN CRYER, R.N., individually and in her official capacity, Defendants.

Prior History: [**1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO. (D.C. No. 1:11-CV-00645-RBJ-KMT).
Estate of Booker v. City & County of Denver, 2012 U.S. Dist. LEXIS 127401 (D. Colo., Sept. 6, 2012)

LexisNexis® Headnotes

Civil Procedure > Appeals > Summary Judgment Review > Appealability

Civil Procedure > Appeals > Appellate Jurisdiction > Collateral Order Doctrine

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

HN1 The appellate court has jurisdiction under *28 U.S.C.S. § 1291* to review all final decisions of the district courts of the United States. *28 U.S.C.S. § 1291*. Ordinarily, orders denying summary judgment are not appealable final orders for purposes of *§ 1291*. The denial of qualified immunity to a public official, however, is immediately appealable under the collateral order doctrine to the extent it involves abstract issues of law. The appellate court has interlocutory jurisdiction over denials of qualified immunity at the summary judgment stage to the extent they turn on an issue of law.

Civil Procedure > Appeals > Summary Judgment Review > Appealability

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

HN2 In the context of interlocutory jurisdiction over denials of qualified immunity at the summary judgment stage, under the appellate court's limited jurisdiction, the appellate court may review: (1) whether the facts that the district court ruled a reasonable jury could find would suffice to show a legal violation, or (2) whether that law was clearly established at the time of the alleged violation. Under the Supreme Court's direction, however, the appellate court has no interlocutory jurisdiction to review whether or not the pretrial record sets forth a ″genuine″ issue of fact for trial.

Thus, if a district court concludes that a reasonable jury could find certain specified facts in favor of the plaintiff, the Supreme Court has indicated the appellate court usually must take them as true—and does so even if the appellate court's own de novo review of the record might suggest otherwise as a matter of law.

Civil Procedure > Appeals > Summary Judgment Review > General Overview

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

HN3 A key exception to Johnson's jurisdictional rule arises if a district court fails to specify which factual disputes precluded a grant of summary judgment for qualified immunity. When faced with this circumstance, the appellate court is unable to separate an appealed order's reviewable determination (that a given set of facts violates clearly established law) from its unreviewable determination (that an issue of fact is ″genuine″). Accordingly, before the appellate court can review abstract legal questions, the appellate court may have to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed.

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

HN4 Where a district court denied summary judgment on claims because they turned on issues of fact, and it did not explicitly identify which material facts were in dispute, an appellate court must comb the record to determine what facts the district court, in the light most favorable to the plaintiffs, likely assumed.

Civil Procedure > Appeals > Summary Judgment Review > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

HN5 The appellate court takes this opportunity to urge district courts to heed Johnson's admonition to state the facts the court is assuming for purposes of resolving a summary-judgment based request for qualified immunity. Such a consistent course of action preserves the district court's institutional advantage, at this interlocutory stage, in determining the existence, or nonexistence, of a triable issue of fact.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN6 In the context of video evidence, where a district court failed to identify the particular charged conduct that it deemed adequately supported by the record, an appellate court must look behind the order denying summary judgment and review the entire record, including video evidence submitted by the defendants in support of their motion for summary judgment.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

HN7 The court is mindful of another exception to Johnson's jurisdictional rule—when the record ″blatantly contradicts″ the plaintiff's version of events. But where the district court failed to identify the specific factual disputes that precluded summary judgment and the appellate court must therefore review the entire record to determine which facts the district court ″likely assumed,″ there is no need to resort to the blatantly-contradicted-by-the-record exception to the jurisdictional rule set out in Johnson.

Civil Rights Law > Protection of Rights > Section 1983 Actions > Scope

HN8 *42 U.S.C.S. § 1983* allows an injured person to seek damages against an individual who has violated his or her federal rights while acting under color of state law.

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

Evidence > Burdens of Proof > Allocation

HN9 Individual defendants named in a *42 U.S.C.S. § 1983* action may raise a defense of qualified immunity, which shields public officials from damages actions unless their conduct was unreasonable in light of clearly established law. Generally, when a defendant asserts qualified immunity, the plaintiff carries a two-part burden to show: (1) that the defendant's actions violated a federal constitutional or statutory right, and, if so, (2) that the right was clearly established at the time of the defendant's unlawful conduct.

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

HN10 To determine whether the right was clearly established, a court asks whether the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right. Ordinarily, in 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. The plaintiff is not required to show, however, that the very act in question previously was held unlawful to establish an absence of qualified immunity.

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

HN11 An appellate court reviews de novo a district court's denial of a summary judgment motion asserting qualified immunity.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

HN12 A district court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(a)*. In applying this standard, the court construes the evidence in the light most favorable to the nonmoving party.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

HN13 When the defendant has moved for summary judgment based on qualified immunity, a court still views the facts in the light most favorable to the non-moving party and resolves all factual disputes and reasonable inferences in its favor. Unlike most affirmative defenses, however, the plaintiff would bear the ultimate burden of persuasion at trial to overcome qualified immunity by showing a violation of clearly established federal law.

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

HN14 At summary judgment, a court must grant qualified immunity unless the plaintiff can show (1) a reasonable jury could find facts supporting a violation of a constitutional right, which (2) was clearly established at the time of the defendant's conduct. The Supreme Court has asked whether a violation could be made out on a favorable view of the parties' submissions. The Supreme Court has held that qualified immunity is proper when

the record plainly demonstrates no constitutional right has been violated, or that the allegations do not offend clearly established law.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

HN15 Regarding the test for qualified immunity, a court may, at its discretion, consider the two parts of this test in the sequence the court deems best in light of the circumstances in the particular case at hand. If a plaintiff successfully carries his two-part burden, the defendant bears the burden, as an ordinary movant for summary judgment, of showing no material issues of fact remain that would defeat the claim of qualified immunity.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

HN16 Testimony that would be inadmissible at trial cannot be used to defeat a motion for summary judgment because a third party's description of a witness' supposed testimony is not suitable grist for the summary judgment mill.

Civil Procedure > Appeals > Appellate Jurisdiction > General Overview

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

HN17 That plaintiffs' claims against defendants in their official capacities remain pending below does not prevent an appellate court from reviewing the defendants' qualified immunity defense to the claims against them in their individual capacities.

Civil Procedure > Appeals > Summary Judgment Review > Appealability

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

HN18 With jurisdictional limits in mind—an appellate court may consider only abstract issues of law, not factual disputes—the appellate court reviews the district court's denial of a summary judgment motion asserting qualified immunity de novo. Where defendants have asserted qualified immunity, it is the plaintiffs' burden to show with respect to each claim that (1) a reasonable jury could find facts supporting a violation of a constitutional right that (2) was clearly established at the time of the defendants' conduct.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Constitutional Law > Substantive Due Process > Scope

HN19 Excessive force claims can be maintained under the *Fourth*, *Fifth*, *Eighth*, or *Fourteenth Amendment* and each carries with it a very different legal test. For instance, although an excessive force claim brought under the *Fourth Amendment* depends on the objective reasonableness of the defendants' actions, the same claim brought under the *Fourteenth Amendment* turns on additional factors, including the motives of the state actor. Thus, a district court evaluating an excessive force claim must first isolate the precise constitutional violation with which the defendant is charged because the choice of amendment matters.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Constitutional Law > Substantive Due Process > Scope

HN20 Determining which amendment applies to an allegation of excessive force requires consideration of where the plaintiff finds himself in the criminal justice system. Any force used leading up to and including an arrest may be actionable under the *Fourth Amendment's* prohibition against unreasonable seizures. By contrast, claims of excessive force involving convicted prisoners arise under the *Eighth Amendment*. And when neither the *Fourth* nor *Eighth Amendment* applies—when the plaintiff finds himself in the criminal justice system somewhere between the two stools of an initial seizure and post-conviction punishment—a court turns to the *Due Process Clauses of the Fifth* or *Fourteenth Amendment* and their protection against arbitrary governmental action by federal or state authorities.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

Constitutional Law > Substantive Due Process > Scope

HN21 It is well-established that the *Fourteenth Amendment* governs any claim of excessive force brought by a ″pretrial detainee″—one who has had a judicial determination of probable cause as a prerequisite to the extended restraint of his liberty following arrest. For similar reasons, the court has also concluded that the *Fourteenth Amendment* standard controls excessive force claims brought by federal immigration detainees.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Constitutional Law > Substantive Due Process > Scope

HN22 The *Fourth Amendment*, not the *Fourteenth Amendment*, governs excessive force claims arising from treatment of an arrestee detained without a warrant and prior to any probable cause hearing.

Civil Procedure > Judgments > Entry of Judgments > General Overview

HN23 Whatever the particular result in any given case, the use of alternative dispositions generally benefits everyone.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Constitutional Law > Substantive Due Process > Scope

HN24 The *Fourth Amendment*, by its plain terms, prohibits only ″unreasonable seizures.″ *U.S. Const. amend. IV*. It says nothing about the treatment owed to a detainee after he or she has been lawfully seized pursuant to probable cause. Although the court has recognized that a ″continuing seizure″ may extend beyond arrest up until a probable cause determination, the Supreme Court has observed that the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment. The Due Process Clause protects a detainee from certain conditions and restrictions of pretrial detainment.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

Constitutional Law > Substantive Due Process > Scope

HN25 The *Fourteenth Amendment* standard governs excessive force claims arising from post-arrest and pre-conviction treatment if the arrestee has been taken into custody pursuant to a warrant supported by probable cause.

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

HN26 Although the court frequently conducts separate qualified immunity analyses for different defendants, the court has not always done so at the summary judgment stage of excessive force cases. Where appropriate, the court has aggregated officer conduct.

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

HN27 At times, the court has analyzed officer action individually, but the court has still denied qualified immunity when an officer failed to prevent others from using excessive force even though the officer himself did not engage in excessive force.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

HN28 A police officer may be responsible for another officer's use of excessive force if the officer actively participated in the use of excessive force. In an excessive force suit under *42 U.S.C.S. § 1983* the ″axiomatic″ principle that where several independent actors concurrently or consecutively produce a single, indivisible injury, each actor will be held jointly and severally liable for the entire injury, has been applied.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

HN29 A law enforcement official who fails to intervene to prevent another law enforcement official's use of excessive force may be liable under *42 U.S.C.S. § 1983*.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

HN30 It is not necessary that a police officer actually participate in the use of excessive force in order to be held liable under *42 U.S.C.S. § 1983*. Rather, an officer who is present at the scene and who fails to take reasonable steps to protect the victim of another officer's use of excessive force, can be held liable for his nonfeasance.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

HN31 In the excessive force context, the same responsibility must exist as to nonsupervisory officers who are present at the scene of such summary punishment, for to hold otherwise would be to insulate nonsupervisory officers from liability for reasonably foreseeable consequences of the neglect of their duty to enforce the laws and preserve the peace.

Civil Rights Law > ... > Scope > Law Enforcement Officials > General Overview

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Constitutional Law > Substantive Due Process > Scope

HN32 When a plaintiff finds himself in the criminal justice system somewhere between an initial seizure and post-conviction punishment a court turns to the *Due Process Clauses of the Fifth* or *Fourteenth Amendment* and their protection against arbitrary governmental action by federal or state authorities.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

Constitutional Law > Substantive Due Process > Scope

HN33 An excessive force claim under the *Fourteenth Amendment* targets arbitrary governmental action, taken without due process. Force inspired by malice or by unwise, excessive zeal amounting to an abuse of official power that shocks the conscience may be redressed under the *Fourteenth Amendment*.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

Constitutional Law > Substantive Due Process > Scope

HN34 To determine whether a use of force is excessive under the *Fourteenth Amendment* a court considers three factors: (1) the relationship between the amount of force used and the need presented; (2) the extent of the injury inflicted; and (3) the motives of the state actor. How much one due process ″factor″ may ″balance″ against another is the subject of little discussion in the court's case law. The court has, however, described the standard as a ″high threshold.″

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

Constitutional Law > Substantive Due Process > Scope

HN35 A court looks to three factors in evaluating an excessive force claim under the *Fourteenth Amendment*: (1) the relationship between the amount of force used and the need presented; (2) the extent of the injury inflicted; and (3) the motives of the state actor.

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

Constitutional Law > Substantive Due Process > Scope

HN36 It has been clearly established that putting substantial or significant pressure on a suspect's back while that suspect is in a face-down prone position after being subdued and/or incapacitated constitutes excessive force.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Constitutional Law > Substantive Due Process > Scope

HN37 Although the two standards are different, a finding of ″excessive force″ under the *Fourth Amendment* is highly relevant to the relationship between the amount of force used and the need presented in the first part of an excessive force inquiry under the *Fourteenth Amendment*. Evaluating reasonableness of seizure under the *Fourth Amendment* requires ″careful attention″ to facts such as 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.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

HN38 Under prevailing Tenth Circuit authority, it is excessive to use a taser to control a target without having any reason to believe that a lesser amount of force—or a verbal command—could not exact compliance.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

Constitutional Law > Substantive Due Process > Scope

HN39 Use of a taser is unconstitutional where a jury could conclude that the victim did not pose an immediate threat to the officer or others and where the victim was not actively resisting. The use of tasers in at least some circumstances—such as in a good faith effort to stop a detainee who is attempting to inflict harm on others—can comport with due process.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

HN40 In the excessive force context, the reasonableness of an officer's actions must be assessed in light of the officer's training.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

HN41 Regarding a carotid restraint, courts from various jurisdictions have held the use of such force on a non-resisting subject to be excessive.

Civil Procedure > Parties > Pro Se Litigants > General Overview

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

Governments > Courts > Judicial Precedent

HN42 Although unpublished, Griffith's reasoning is persuasive for chokehold cases in which individuals were handcuffed and/or not resisting. *10th Cir. R. 32.1*. Unpublished opinions are not precedential, but may be cited for their persuasive value. *10th Cir. R. 32.1*.

Civil Procedure > Appeals > Standards of Review > General Overview

Evidence > ... > Expert Witnesses > Credibility of Witnesses > General Overview

HN43 Regarding experts, an appellate court may not weigh their credibility on appeal.

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

Constitutional Law > Substantive Due Process > Scope

HN44 The court has described the subjective intent standard for an excessive force due process violation as force inspired by unwise, excessive zeal amounting to an abuse of official power that shocks the conscience, or by malice rather than mere carelessness. Similarly, the court has described the due process standard as requiring that the force be inspired by malice or by excessive zeal that shocks the conscience. The court has granted qualified immunity in the absence of any evidence meeting this standard.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

Constitutional Law > Substantive Due Process > Scope

HN45 The court has not found any case in the Tenth Circuit that disposed of a due process excessive force claim solely on the ″motive″ factor when disproportionate force and serious injury were present. Indeed, the court has said that how much one due process ″factor″ may ″balance″ against another is the subject of little discussion in the court's case law and that this court usually has examined an officer's motive in combination with the other factors.

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

HN46 Ordinarily, in 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. In the *Fourth Amendment* context, because excessive force jurisprudence requires an all-things-considered inquiry with careful attention to the facts and circumstances of each particular case, there will almost never be a previously published opinion involving exactly the same circumstances. The court cannot find qualified immunity whenever the court finds a new fact pattern. The court has therefore adopted a sliding

scale to determine when law is clearly established in which the more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Constitutional Law > Substantive Due Process > Scope

HN47 *Fourth Amendment* case law addressing whether force is ″reasonable″ is relevant to the first due process excessive force factor: the relationship between the amount of force used and the need presented. Cases finding force to be unreasonable necessarily imply that the use of force was disproportionate to the need presented. Indeed, the Graham *Fourth Amendment* excessive force factors are consistent with the disproportionate force analysis under the *Fourteenth Amendment*: (1) the severity of the offense, (2) whether the subject posed an immediate threat to the safety of officers or others, and (3) whether the subject resists officers.

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Constitutional Law > Substantive Due Process > Scope

HN48 There undoubtedly is a clearly established legal norm precluding the use of violent physical force against a criminal suspect or detainee who already has been subdued and does not present a danger to himself or others.

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

HN49 Assuming, for instance, that various courts have agreed that certain conduct is a constitutional violation under facts not distinguishable in a fair way from the facts presented in the case at hand, the officer would not be entitled to qualified immunity based simply on the argument that courts had not agreed on one verbal formulation of the controlling standard. For a right to be clearly established, it is not necessary that courts have agreed upon the precise formulation of the standard.

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

Constitutional Law > Substantive Due Process > Scope

HN50 In the excessive force context, the ″legal norms″ underlying the three-factor due process analysis—proportionality, injury, and motive—have been clearly established.

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

HN51 In the qualified immunity context, a single unpublished opinion provides little support for the notion that the law is clearly established on a given point, but the appellate court has never held that a district court must ignore unpublished opinions in deciding whether the law is clearly established.

Civil Rights Law > Protection of Rights > Prisoner Rights > Medical Treatment

Civil Rights Law > ... > Scope > Law Enforcement Officials > Custody

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Constitutional Law > Substantive Due Process > Scope

HN52 Deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and

wanton infliction of pain proscribed by the *Eighth Amendment*. Prison doctors and prison guards may thus be liable under *42 U.S.C.S. § 1983* for indifference manifested in their response to the prisoner's needs or by intentionally denying or delaying access to medical care or intentionally interfering with treatment once prescribed. The court has applied the Estelle rule to treatment of pretrial detainees, holding that pretrial detainees are entitled to the degree of protection against denial of medical attention which applies to convicted inmates. It is therefore proper to apply a due process standard which protects pretrial detainees against deliberate indifference to their serious medical needs.

Civil Rights Law > Protection of Rights > Prisoner Rights > Medical Treatment

Civil Rights Law > ... > Scope > Law Enforcement Officials > Custody

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Constitutional Law > Substantive Due Process > Scope

HN53 To state a denial of medical care claim, a plaintiff must satisfy both an objective and a subjective component. First, the detainee must produce objective evidence that the deprivation at issue was in fact sufficiently serious. A medical need is sufficiently serious if it is one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention.

Civil Rights Law > Protection of Rights > Prisoner Rights > Medical Treatment

Civil Rights Law > ... > Scope > Law Enforcement Officials > Custody

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Constitutional Law > Substantive Due Process > Scope

HN54 Because pretrial detainees are in any event entitled to the degree of protection against denial of medical attention which applies to convicted inmates, the court relies on *Eighth Amendment* cases in the court's discussion of the legal standard for a failure to provide medical care claim. Although pretrial detainees are protected under the Due Process Clause rather than the *Eighth Amendment*, the court applies an analysis identical to that applied in *Eighth Amendment* cases brought pursuant to *42 U.S.C.S. § 1983*.

Civil Rights Law > Protection of Rights > Prisoner Rights > Medical Treatment

Civil Rights Law > ... > Scope > Law Enforcement Officials > Custody

Constitutional Law > Substantive Due Process > Scope

HN55 Under the subjective component, the detainee must establish deliberate indifference to his serious medical needs by presenting evidence of the prison official's culpable state of mind. He must show that the prison official acted or failed to act despite his knowledge of a substantial risk of serious harm.

Civil Rights Law > Protection of Rights > Prisoner Rights > Medical Treatment

Civil Rights Law > ... > Scope > Law Enforcement Officials > Custody

Constitutional Law > Substantive Due Process > Scope

HN56 The Supreme Court has cautioned that an inadvertent failure to provide adequate medical care does not rise to a constitutional violation. But whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in usual ways, including inference from circumstantial evidence. Although not dispositive, an official's training may undermine his or her claim that he or she was unaware of such a risk. While published requirements for health care do not create constitutional rights, such protocols certainly provide circumstantial evidence that a prison

health care gatekeeper knew of a substantial risk of serious harm. In any event, the factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.

Civil Rights Law > Protection of Rights > Prisoner Rights > Medical Treatment

Civil Rights Law > ... > Scope > Law Enforcement Officials > Custody

Constitutional Law > Substantive Due Process > Scope

HN57 Where defendants' delay in seeking medical care contributed to a detainee's death, this is without doubt, sufficiently serious to meet the objective component necessary to implicate the *Fourteenth Amendment*.

Civil Rights Law > Protection of Rights > Prisoner Rights > Medical Treatment

Civil Rights Law > ... > Scope > Law Enforcement Officials > Custody

Constitutional Law > Substantive Due Process > Scope

HN58 In the context of a detainee's deliberate indifference claim, the question is: were the symptoms displayed by the detainee such that the defendants knew the risk to the detainee and chose (recklessly) to disregard it.

Civil Rights Law > ... > Scope > Law Enforcement Officials > General Overview

Constitutional Law > Substantive Due Process > Scope

HN59 The reasonableness of an officer's actions must be assessed in light of the officer's training.

Civil Rights Law > Protection of Rights > Prisoner Rights > Medical Treatment

Civil Rights Law > ... > Scope > Law Enforcement Officials > Custody

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

HN60 While the failure to provide CPR to a prisoner in need does not create an automatic basis for liability in all circumstances, a trier of fact could conclude that, looking at the full context of the situation, officers trained to administer CPR who nonetheless did not do so despite an obvious need demonstrated the deliberate indifference required for an *Eighth Amendment* claim. An officer trained in CPR, who fails to perform it on a prisoner manifestly in need of such assistance, is liable under *42 U.S.C.S. § 1983* for deliberate indifference.

Civil Rights Law > Protection of Rights > Prisoner Rights > Medical Treatment

Civil Rights Law > ... > Scope > Law Enforcement Officials > Custody

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

HN61 In the context of a detainee's deliberate indifference claim, an official would not escape liability if the evidence showed that he merely refused to verify underlying facts that he strongly suspected to be true, or declined to confirm inferences of risk that he strongly suspected to exist.

Civil Rights Law > Protection of Rights > Prisoner Rights > Medical Treatment

Civil Rights Law > ... > Scope > Law Enforcement Officials > Custody

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Constitutional Law > Substantive Due Process > Scope

HN62 In the context of a detainee's deliberate indifference claim, even a brief delay may be unconstitutional. A delay in care for known unconsciousness brought on by asphyxiation is especially time-sensitive and must ordinarily be measured not in hours, but in a few minutes. A brief delay in care is particularly problematic when the defendants were responsible for placing

the detainee in his vulnerable state and engaged in activity that could produce foreseeable, rapid, and deadly consequences.

Civil Rights Law > Protection of Rights > Prisoner Rights > Medical Treatment

Civil Rights Law > ... > Scope > Law Enforcement Officials > Custody

Constitutional Law > Substantive Due Process > Scope

HN63 Because deliberate indifference is assessed at the time of the alleged omission, the defendants' eventual provision of medical care does not insulate them from liability. Even where medical care is ultimately provided, a prison official may nonetheless act with deliberate indifference by delaying the treatment of serious medical needs.

Civil Rights Law > Protection of Rights > Prisoner Rights > Medical Treatment

Civil Rights Law > ... > Scope > Law Enforcement Officials > Custody

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Constitutional Law > Substantive Due Process > Scope

HN64 There is little doubt that deliberate indifference to an inmate's serious medical need violates a clearly established constitutional right. This principle also clearly applies to pretrial detainees through the *Due Process Clause of the Fourteenth Amendment*. The right to custodial medical care is clearly established. Garcia "clearly established" that pretrial detainees receive the same protection under the *Fourteenth Amendment* as convicted inmates under the *Eighth Amendment*.

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

HN65 The law can be clearly established even when the very action in question has not previously been held unlawful. As long as the unlawfulness of the defendants' actions was "apparent" in light of pre-existing law, then qualified immunity is inappropriate.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Rights Law > ... > Scope > Law Enforcement Officials > Custody

Constitutional Law > Substantive Due Process > Scope

HN66 Where disputed material facts implicate both of the two questions of whether a serious medical need existed and whether an officer was deliberately indifferent to it, a court may not grant summary judgment.

Civil Rights Law > ... > Section 1983 Actions > Elements > Causal Relationship

HN67 A *42 U.S.C.S. § 1983* defendant sued in an individual capacity may be subject to personal liability and/or supervisory liability. *Section 1983*, however, does not authorize liability under a theory of respondeat superior. Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct. The plaintiff therefore must show an "affirmative link" between the supervisor and the constitutional violation. This requires more than a supervisor's mere knowledge of his subordinate's conduct. Rather, a plaintiff must satisfy three elements to establish a successful *§ 1983* claim against a defendant based on his or her supervisory responsibilities: (1) personal involvement; (2) causation; and (3) state of mind.

Civil Rights Law > ... > Section 1983 Actions > Elements > General Overview

HN68 In the *42 U.S.C.S. § 1983* context, Iqbal articulated a stricter liability standard for personal involvement. Even if "direct participation" is not "necessary" to satisfy this element, surely it is sufficient.

Civil Rights Law > ... > Section 1983 Actions > Elements > Causal Relationship

HN69 In the *42 U.S.C.S. § 1983* context, the second element requires the plaintiff to show that the defendant's alleged action(s) caused the constitutional violation by setting 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.

Civil Rights Law > ... > Section 1983 Actions > Elements > General Overview

HN70 In the *42 U.S.C.S. § 1983* context, the third element requires the plaintiff to show that the defendant took the alleged actions with the requisite state of mind, which can be no less than the mens rea required of the subordinates to commit the underlying constitutional violation.

Civil Rights Law > ... > Section 1983 Actions > Elements > General Overview

Civil Rights Law > ... > Scope > Law Enforcement Officials > Custody

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

HN71 In the context of excessive force and failure to provide medical care claims under *42 U.S.C.S. § 1983*, to establish supervisory liability, the plaintiffs must show the defendant's (1) personal involvement, (2) causation, and (3) the requisite state of mind with respect to either the excessive force or failure to provide medical care claims.

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

Civil Rights Law > Protection of Rights > Section 1983 Actions > Scope

HN72 Under the holding in Iqbal that a supervisory official may be held liable under *42 U.S.C.S. § 1983* only for his or her unconstitutional conduct, there is no longer any need to contemplate whether qualified immunity as applied to supervisory officials requires special or separate consideration.

Governments > Courts > Court Records

HN73 Judicial records are presumptively open to the public. Courts have long recognized a common-law right of access to judicial records. A party seeking to restrict access must therefore show some significant interest that outweighs the presumption. This ″burden of justifying that secrecy″ remains on the party opposed to access even after a court has previously determined that sealing is appropriate.

Civil Procedure > Appeals > Record on Appeal

Governments > Courts > Court Records

HN74 An appellate court, of course, is not bound by a district court's decision to seal certain documents below, and retains its own authority to decide whether the parties may file documents under seal in the appellate court.

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Judges: Before KELLY, LUCERO, and MATHESON, Circuit Judges.

Opinion by: MATHESON

Opinion

[*409] **MATHESON**, Circuit Judge.

Denver police arrested Marvin Booker on a warrant for failure to appear at a hearing regarding

a drug charge. During booking, Mr. Booker died while in custody after officers restrained him in response to his alleged insubordination. Several officers pinned Mr. Booker face-down to the ground, one placed him in a chokehold, and another tased him. After the officers sought medical help for Mr. Booker, he could not be revived.

Mr. Booker's estate sued Deputies Faun Gomez, James Grimes, Kyle Sharp, Kenneth Robinette, and Sergeant Carrie Rodriguez (collectively "Defendants") under *42 U.S.C. § 1983*, alleging they used excessive force against Mr. Booker and failed to provide him with immediate medical care, which resulted in Mr. [**2] Booker's untimely death. The Defendants moved for summary judgment on qualified immunity grounds. The district court denied their motion because disputed facts precluded summary judgment. The Defendants now appeal.

Exercising jurisdiction under *28 U.S.C. § 1291*, we affirm.

I. LEGAL BACKGROUND

We begin by defining the scope of our jurisdiction over the Defendants' interlocutory appeal of the district court's denial of qualified immunity. We then summarize the legal framework for evaluating the Defendants' assertion of qualified immunity at the summary judgment stage.

A. *Jurisdiction*

HN1 This court has jurisdiction under *§ 1291* to review "all final decisions of the district courts of the United States." *28 U.S.C. § 1291*. Ordinarily, "[o]rders denying summary judgment are . . . not appealable final orders for purposes of *28 U.S.C. § 1291*." *Roosevelt-Hennix v. Prickett, 717 F.3d 751, 753 (10th Cir. 2013)*. "The denial of qualified immunity to a public official, however, is immediately appealable under the collateral order doctrine to the extent it involves abstract issues of law." *Fancher v. Barrientos, 723 F.3d 1191, 1198 (10th Cir. 2013)*; *see also Fogarty v. Gallegos, 523 F.3d 1147, 1153 (10th Cir. 2008)* [**3] (we have interlocutory jurisdiction "over denials of qualified immunity at the summary judgment stage to the extent they 'turn[] on an issue of law.'" (quoting *Mitchell v. Forsyth, 472 U.S. 511, 530, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985)*)).

HN2 Under this limited jurisdiction, we may review: "'(1) whether the facts that the district court ruled a reasonable jury could find would suffice to show a legal violation, or (2) whether that law was clearly established at the time of the alleged violation.'" *Roosevelt-Hennix, 717 F.3d at 753* (quoting *Allstate Sweeping, LLC v. Black, 706 F.3d 1261, 1267 (10th Cir. 2013)*). Under the Supreme Court's direction in *Johnson v. Jones, 515 U.S. 304, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995)*, however, this court has no interlocutory jurisdiction to review "whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Id. at 320* (quotations omitted). Thus, "if a district court concludes that a reasonable jury could find certain specified facts in [*410] favor of the plaintiff, the Supreme Court has indicated we usually must take them as true—and do so even if our own *de novo* review of the record might suggest otherwise as a matter of law." *Roosevelt-Hennix, 717 F.3d at 753* (quoting *Lewis v. Tripp, 604 F.3d 1221, 1225 (10th Cir. 2010)*).

HN3 A [**4] key exception to *Johnson*'s jurisdictional rule arises if a district court fails to specify which factual disputes precluded a grant of summary judgment for qualified immunity. When faced with this circumstance, we are unable "to separate an appealed order's reviewable determination (that a given set of facts violates clearly established law) from its unreviewable determination (that an issue of fact is 'genuine')." *Id.* (quoting *Johnson, 515 U.S. at 319*). Accordingly, before we can review abstract legal questions, we "may have to undertake a cumbersome review of the record to determine what facts the district court, in the light most

favorable to the nonmoving party, likely assumed." *Johnson, 515 U.S. at 319*; *see also Roosevelt-Hennix, 717 F.3d at 754, 756 n.8*.

This is one such "cumbersome review" case. ***HN4*** Although the district court denied summary judgment on four claims because they "turn[ed] on issues of fact," it did not explicitly identify which material facts were in dispute. *See* Appx. at 1064. We must therefore comb "the record to determine what facts the district court, in the light most favorable to [the Plaintiffs], likely assumed." *Roosevelt-Hennix, 717 F.3d at 754*. Making our [**5] review less cumbersome is the district court's observation that the "Plaintiffs' Statement of Disputed Facts" (ECF No. 133) outlined the primary factual disputes that formed, at least in part, the basis of its decision. *See* Appx. at 1064 (observing that the "fact disputes" are "set forth in some summary at CM-ECF docket no. 133, but they're everywhere in this case"). That document lays out Plaintiffs' alleged fact disputes, and we therefore assume the district court agreed they were material and disputed.[1]

Also helpful are the various video clips of the encounter. ***HN6*** Because the district court failed to "identify the particular charged conduct that it deemed adequately supported by the record," we must "look behind the order [**6] denying summary judgment and review the *entire* record," including the video evidence submitted by the Defendants in support of their motion for summary judgment. *Roosevelt-Hennix, 717 F.3d at 756 n.8* (quotations omitted) (emphasis added).[2]

[*411] B. *Section 1983* and Qualified Immunity

HN8 Title "*42 U.S.C. § 1983* allows an injured person to seek damages against [**7] an individual who has violated his or her federal rights while acting under color of state law." *Cillo v. City of Greenwood Village, 739 F.3d 451, 459 (10th Cir. 2013)*. ***HN9*** "Individual defendants named in a *§ 1983* action may raise a defense of qualified immunity," *id.*, which "shields public officials . . . from damages actions unless their conduct was unreasonable in light of clearly established law," *Gann v. Cline, 519 F.3d 1090, 1092 (10th Cir. 2008)* (quotations omitted). Generally, "when a defendant asserts qualified immunity, the plaintiff carries a two-part burden to show: (1) that the defendant's actions violated a federal constitutional or statutory right, and, if so, (2) that the right was clearly established at the time of the defendant's unlawful conduct." *Cillo, 739 F.3d at 460*; *see also Pearson v. Callahan, 555 U.S. 223, 232, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009)*.

HN10 To determine whether the right was clearly established, we ask whether "the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2083, 179 L. Ed. 2d 1149 (2011)* (quotations omitted). "Ordinarily, in order for the law to be clearly established, [**8] 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." *Fogarty v. Gallegos, 523 F.3d 1147, 1161 (10th Cir. 2008)* (quotations

[1] ***HN5*** "[W]e take this opportunity to urge district courts to heed *Johnson*'s admonition to state the facts the court is assuming for purposes of resolving a summary-judgment based request for qualified immunity. Such a consistent course of action preserves the district court's institutional advantage, at this interlocutory stage, in determining the existence, or nonexistence, of a triable issue of fact." *Roosevelt-Hennix*, 717 F.3d at 759 (citations and quotations omitted).

[2] ***HN7*** We are mindful of another exception to *Johnson*'s jurisdictional rule—when the record "blatantly contradict[s]" the plaintiff's version of events. *See Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007) (reversing denial of qualified immunity based on disputed facts where video evidence of car chase blatantly contradicted plaintiff's account of events). But because the district court failed to identify the specific factual disputes that precluded summary judgment and we must therefore review the entire record to determine which facts the district court "likely assumed," *Roosevelt-Hennix*, 717 F.3d at 754, there is "no need . . . to resort to the blatantly-contradicted-by-the-record exception to the jurisdictional rule set out in *Johnson*," *id.* at 756 n.8. We therefore consider the video evidence along with any other evidence before the district court.

omitted). ″The plaintiff is not required to show, however, that the very act in question previously was held unlawful . . . to establish an absence of qualified immunity.″ *Weigel v. Broad, 544 F.3d 1143, 1153 (10th Cir. 2008)* (quotations omitted).

C. ***Summary Judgment Standard***

Basic principles guide our review of the denial of summary judgment in this factually contentious case. ***HN11*** ″We review *de novo* the district court's denial of a summary judgment motion asserting qualified immunity.″ *McBeth v. Himes, 598 F.3d 708, 715 (10th Cir. 2010)* (quoting *Bowling v. Rector, 584 F.3d 956, 963 (10th Cir. 2009)*). ***HN12*** A district ″court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law.″ *Fed. R. Civ. P. 56(a)*. ″In applying this standard, we construe the evidence in the light most favorable to [the Plaintiffs] as the nonmoving party.″ **[**9]** *McBeth, 598 F.3d at 715*.

HN13 When the defendant has moved for summary judgment based on qualified immunity, we still view the facts in the light most favorable to the non-moving party and resolve all factual disputes and reasonable inferences in its favor. *See id*. Unlike most affirmative defenses, however, the plaintiff would bear the ultimate burden of persuasion at trial to overcome qualified immunity by showing a violation of clearly established federal law. Thus, ***HN14*** at summary judgment, we must grant qualified immunity unless the plaintiff can show (1) a reasonable jury could find facts supporting a violation of a constitutional right, which (2) was clearly established at the time of the defendant's conduct. *See Saucier v. Katz, 533 U.S. 194, 201-02, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001)* (asking whether ″a violation could be made out on a favorable view of the parties' submissions″), *overruled in part on other grounds by Pearson v. Callahan, 555 U.S. 223, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009)*; *see also Riggins v. Goodman, 572 F.3d 1101, 1107* **[*412]** (10th Cir. 2009) (″[T]he Supreme Court has held that qualified immunity is proper when the record plainly demonstrates no constitutional right has been violated, or that the allegations do not offend clearly established **[**10]** law.″).

HN15 ″We may, at our discretion, consider the two parts of this test in the sequence we deem best 'in light of the circumstances in the particular case at hand.'″ *Bowling, 584 F.3d at 964* (quoting *Pearson, 555 U.S. at 223*). If a ″plaintiff successfully carries his two-part burden,″ the ″defendant bears the burden, as an ordinary movant for summary judgment, of showing no material issues of fact remain that would defeat the claim of qualified immunity.″ *Mick v. Brewer, 76 F.3d 1127, 1134 (10th Cir. 1996)*; *see also Pueblo Neighborhood Health Cntrs., Inc. v. Losavio, 847 F.2d 642, 646 (10th Cir. 1988)* (same).

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual Background*

We recite the facts the district court ″likely assumed″ in the light most favorable to the Plaintiffs, drawing all reasonable inferences in their favor. The following is based on the parties' statements of undisputed facts, the video evidence, and the Plaintiffs' Statement of Disputed Facts (ECF No. 133), which the district court relied upon in denying summary judgment.

1. Initial encounter with Mr. Booker

On the evening of July 8, 2010, Mr. Booker was arrested on a warrant for failure to appear at a court hearing related to **[**11]** a drug charge. Police transported him to the Downtown Detention Center (″DDC″) to be booked. The DDC has an intake area called a ″cooperative seating area″ where arrestees wait to complete the booking process. According to the Defendants, uncooperative arrestees are moved into nearby intake/isolation cells until they calm down.

Around 3:30 a.m. on July 9, Deputy Faun Gomez called for Mr. Booker to approach the booking desk. Mr. Booker did so. Mr. Booker's precise behavior at this point is disputed,[3] but Deputy Gomez determined that Mr. Booker should be moved from the cooperative seating area to cell I-8, an intake/isolation cell. Deputy Gomez approached cell I-8 and ordered Mr. Booker to enter it. He walked toward her, but then turned away and walked toward a short set of stairs that returned to the cooperative seating area.[4]

Deputy Gomez approached from behind Mr. Booker to stop him from returning to the cooperative seating area. She reached toward his upper left arm, but he pulled away from her grasp. When she tried again to grab Mr. Booker's arm, he swung his left arm up and away from her. He then turned toward Deputy Gomez and swung his left elbow, nearly striking her head.[5]

[*413] 2. **Restraining Mr. Booker**

Deputies James Grimes, Kenneth Robinette, Kyle Sharp, and Sergeant [**13] Carrie Rodriguez witnessed Mr. Booker swing his elbow at Officer Gomez. According to their affidavits, they viewed Mr. Booker's action as aggressive. They each hurried to help Deputy Gomez, who was trying to restrain Mr. Booker. Within a few seconds, they took Mr. Booker to the ground, where he lay in the ″prone″ position on his stomach.

Deputy Grimes put Mr. Booker in a ″carotid restraint.″ Appx. at 293, 443-44. According to the Denver Sheriff Department's training materials, ″[t]his technique compresses the carotid arteries and the supply of oxygenated blood to the brain is diminished while concurrently sealing the jugular vein which returns the deoxygenated blood.″ Appx. at 802.[6] The hold is capable of rendering a person unconscious within ″10-20 seconds.″ *Id*. at 803; *see* Aplt. Br. at 9 (Defendants acknowledging ″[a]n effective carotid restraint typically results in the subject going unconscious within five to twenty seconds″). The Sheriff's training materials warn that ″[b]rain damage or death could occur if the technique is applied for more than one minute,″ and ″[t]herefore the application of the technique should not be applied for more than one minute.″ Appx. at 809 (emphasis [**14] in original).

Meanwhile, Deputies Robinette and Gomez tried to handcuff Mr. Booker's hands behind his back. Deputy Robinette applied a ″gooseneck hold,″ a pain compliance technique, by bringing Mr. Booker's right hand behind him. Leaning over Mr. Booker, Deputy Robinette swept Mr. Booker's right wrist behind his back for handcuffing. Eventually, Deputies Gomez and Robinette

[3] It is disputed whether Mr. Booker yelled profanities at Deputy Gomez, whether he became uncooperative, and whether he disobeyed her orders to sit down. Because the Plaintiffs contest this fact and the video recording lacks audio, *see* Appx. at 361, we must resolve the dispute in their favor.

[4] According to the Defendants, at this time Mr. Booker yelled more profanities [**12] and refused to obey Deputy Gomez's order to enter the cell. The Plaintiffs dispute this, contending Mr. Booker was merely returning to get his shoes before entering cell I-8. Because the Plaintiffs' statement of disputed material facts asserts ″there was nothing unusual about Mr. Booker's behavior,″ Aplt. Appx. at 966, and the video does not suggest otherwise, we must resolve this disputed fact in their favor.

[5] Plaintiffs do not dispute that Mr. Booker swung his elbow toward Deputy Gomez. Nor could they, as the video recording would contradict such an assertion. *See* Appx. at 361 (″2nd angle video″), at 3:35:09-3:35:13. They only respond that his reaction was a natural response and that Deputy Gomez started the altercation by grabbing at him.

[6] The Supreme Court has described the carotid restraint as a ″neck restraint″ or ″chokehold″ in which ″an officer positioned behind a subject places one arm around the subject's neck and holds the wrist of that arm with his other hand. The officer, by using his lower forearm and bicep muscle, applies pressure concentrating on the carotid arteries located on the sides of the subject's neck.″ *City of Los Angeles v. Lyons*, 461 U.S. 95, 98 n.1, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983). This is distinct from the more dangerous ″bar arm hold,″ which ″applies pressure at the front of the subject's neck, . . . reduces the flow of oxygen to the lungs, and may render the subject unconscious.″ *Id*.

secured Mr. Booker's left wrist for handcuffing. After Mr. Booker was handcuffed, Deputy Robinette put his knee on Mr. Booker's back, applying 50 to 75 percent of his [**15] total body weight of approximately 190 pounds.[7] *See* Appx. at 376-77, 448; *see also* Aplt. Br. at 4.

Deputy Sharp used Orcutt Police Nunchakus ("OPN") on Mr. Booker.[8] The OPN is a pain compliance device used to apply pressure on a subject. After Mr. Booker was taken to the ground, Deputy Sharp secured the OPN to his left ankle and applied pressure. After Mr. Booker was handcuffed, Deputy Sharp removed the OPN. Deputy Sharp asserts Mr. Booker [*414] then kicked his feet in his direction, but the Plaintiffs deny this allegation. Deputy Sharp reapplied the OPN to Mr. Booker's left ankle and told other deputies Mr. Booker had tried to kick him.

When [**16] Mr. Booker was handcuffed and other deputies had control of his limbs, Deputy Grimes requested that a taser be used on Mr. Booker.[9] Sergeant Rodriguez, the on-duty supervisor, was handed a taser and applied the taser in "drive stun mode"[10] to Mr. Booker's leg for eight seconds.[11] *See* Appx. at 296, 449. The standard cycle is five seconds. Aplee. Br. at 4; Appx. at 449.

After Sergeant Rodriguez used the taser on Mr. Booker, Deputy Grimes ended his carotid hold and Deputy Sharp removed the OPN from Mr. Booker's ankle. Two minutes and 55 seconds expired between the time Deputy Gomez tried to grab Mr. Booker's arm and when Deputy Grimes released the carotid hold.[12] *See* Appx. at 361 ("2nd angle video"), 3:35:07-3:38:02.

3. **Mr. Booker's Resistance**

The district court did not explicitly state whether there was a genuine issue of material fact as to the level of Mr. Booker's resistance during the use of force. In their [**18] affidavits, the officers asserted Mr. Booker resisted efforts to restrain him during virtually the entire use of force. Only after the taser's use, they claim, did Mr. Booker stop resisting.[13] In light of these submissions, the Defendants urge us to rely on the "undisputed

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[7] Because we view the evidence in the light most favorable to Plaintiffs, we adopt the 75 percent figure. And because Deputy Robinette was about 190 pounds, he placed roughly 142.5 pounds on Mr. Booker's back—more than Mr. Booker's entire weight of 135 pounds. *Compare* Appx. at 376-77, 620 *with id*. at 450.

[8] A "nunchaku" is a "martial arts weapon [comprising] two pieces of wood or steel connected by a cord or chain and which can be held in the hands. It had its origin as a farm implement in Okinawa." *United States v. George*, 778 F.2d 556, 558 n.1 (10th Cir. 1985).

[9] A taser delivers electricity into a person's body, causing severe pain. *Cavanaugh v. Woods Cross City*, 625 F.3d 661, 665 (10th Cir. 2010).

[10] A taser has two functions, "dart mode" and "drive stun mode." *See Mattos v. Agarano*, 661 F.3d 433, 443 (9th Cir. 2011) (en banc). In dart mode, a taser shoots probes into a subject and overrides the central nervous system. *Id*. In drive stun mode, "the operator removes the dart cartridge and pushes two electrode contacts located on the front of the taser directly against the victim. In this mode, the taser delivers an electric shock to the victim, but it does not cause an override of the victim's central nervous system . . . ." *Id*. Drive stun mode is used as "a pain compliance tool with limited threat reduction." *Abbott v. Sangamon Cnty., Ill.*, 705 F.3d 706, 726 (7th Cir. 2013) (quotations [**17] omitted); *see also Roosevelt-Hennix v. Prickett*, 717 F.3d 751, 757 n.9 (10th Cir. 2013).

[11] Although the taser functioned for only eight seconds, the video evidence shows Sergeant Rodriguez holding it on Mr. Booker for more than 25 seconds. *See* Appx. at 361 ("2nd angle video"), at 3:37:25-3:37:54.

[12] It is disputed whether Deputy Grimes released the carotid hold intermittently. Plaintiffs' medical expert opined that the level of injury to Mr. Booker suggested Deputy Grimes did not release the hold intermittently. *See* Appx. at 445-46, 1000. Because the video does not clearly controvert this disputed fact, we must resolve it in the Plaintiffs' favor.

[13] The Plaintiffs dispute this fact. They deny that Mr. Booker—who was 56 years old, five foot five inches tall, and 135 pounds—resisted and struggled with the deputies. Plaintiffs allege that, rather than resisting the deputies, Mr. Booker was struggling to breathe while the deputies choked and placed pressure on his back. They also note that Deputy Grimes testified in his deposition that

testimony of the deputies . . . to augment that which cannot be seen on video." Aplt. Br. at 29. This we cannot do.

Because our record review indicates the primary factual dispute in the district court was Mr. Booker's resistance, we must resolve this dispute in the Plaintiffs' favor on interlocutory review. Our analysis therefore accepts Mr. Booker did not [**19] resist during the vast majority of the encounter. The Defendants argue the video [*415] evidence belies this conclusion, but they are mistaken.[14] In fact, the video, which shows Mr. Booker motionless on the floor while the deputies subdue him, contradicts the Defendants' assertion that Mr. Booker consistently resisted them.

4. **Medical attention**[15]

After restraining Mr. Booker, four deputies lifted him by his limbs and carried him to cell I-8. Mr. Booker's condition at this time is disputed. The officers did not check Mr. Booker's vitals or attempt to determine whether he needed immediate medical attention. They placed him face down on the cell floor. The deputies removed Mr. Booker's handcuffs from behind his back and left him alone in the cell. Approximately a minute and a half passed between the time the deputies [**21] placed Mr. Booker in the cell and then left the cell. *See* Appx. at 361 ("I-8 video"), at 3:39:39-3:41:08.

After leaving the cell, Sergeant Rodriguez secured the taser in its designated storage location and then went to the nurses' office to request that Mr. Booker be evaluated. The parties dispute whether Sergeant Rodriguez conveyed that Mr. Booker's condition was an emergency or merely that he was "acting like he's unresponsive." Appx. at 453, 761, 971.

In the meantime, Deputy Sharp returned to the cell about 21 seconds after the other deputies left. *See* Appx. at 361 ("I-8 video"), at 3:41:08-3:41:29. He yelled to Deputy Grimes that Mr. Booker did not appear to be breathing and needed medical attention. Deputy Grimes looked through the cell window and confirmed this observation. Deputy Grimes yelled for others to "step it up." Appx. at 454. Deputy Sharp went to the nurses' station and told a nurse to hurry.

One minute and 31 seconds passed between the time Deputy Sharp returned to cell I-8 and when a nurse arrived at the cell. When the nurse arrived, approximately 4 minutes and 48 seconds had passed since the use of force incident ended.[16] *See* Appx. at 361 ("I-8 video"), at 3:38:02-3:43:00. [**22] [*416] Attempts to resuscitate Mr. Booker were unsuccessful. He was transported to a nearby

Mr. Booker was fully restrained—deputies controlled all his limbs and his hands were cuffed behind his back—when the taser was used. [Appx. at 450, ¶ 40; Dkt. 110-2 at 196-197]

[14] Plaintiffs also provided a report, completed by the Department, that contains statements of inmates who said Mr. Booker was not struggling much, that he called for help, and that he was struggling to breathe. Defendants argue the inmates' statements are inadmissible double hearsay because they are "statements paraphrased by an officer from the Denver Police Department who wrote down what he was purportedly told by inmates." Aplt. Reply Br. at 3; *see also* Adams v. Am. Guarantee and Liab. Ins. Co., 233 F.3d 1242, 1246 (10th Cir. 2000) (***HN16*** "[T]estimony that would be inadmissible at trial cannot be used to defeat a motion for summary judgment because 'a third party's description of a witness' supposed testimony is not suitable grist for the summary judgment mill." (quotations omitted)).

Because the video evidence and the deputies' testimony create a genuine issue of material [**20] fact regarding Mr. Booker's resistance, we need not resolve the admissibility of the inmates' statements.

[15] The district court did not explicitly identify disputed "issues of fact," Appx. at 1064, regarding the officers' efforts to provide Mr. Booker with medical care after the struggle. We therefore must "undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to [the Plaintiffs], likely assumed." Roosevelt-Hennix, 717 F.3d at 754 (quoting Jones, 515 U.S. at 319). In making this inquiry, we primarily consider the Plaintiffs' Statement of Disputed Facts (ECF No. 133), the video evidence, and the parties' other summary judgment submissions.

[16] Plaintiffs dispute this time estimate, arguing that the video of the use of force does not clearly show when it ended. But Plaintiffs have not provided any competing time estimate. In the absence of such an estimate, we are left to determine, based on the summary

hospital, where he was pronounced dead.

The medical examiner opined in the autopsy report that the cause of Mr. Booker's death was "cardiorespiratory arrest during physical restraint." Appx. at 736. The report states,

> The restraints consisted of weight applied to the decedent's body while held prone on the floor, application of a carotid "sleeper" hold . . . , application of a Taser to a lower extremity in the "stun drive" mode for 8 seconds, restriction of arm movement by cuffing his hands behind his back, and restriction of leg movement by use of an "OPN" (nunchuk).

Id. Mr. Booker's death was listed as a homicide. Plaintiffs' experts opined that Mr. Booker died [**23] of asphyxia caused by the deputies' efforts to restrain him. *See* Appx. at 724-25, 825.

B. ***Procedural Background***

1. **Complaint and summary judgment**

Mr. Booker's estate filed a civil rights action in Denver County District Court. The Defendants removed the suit to federal court. Plaintiffs' amended complaint named as defendants the four deputies—Gomez, Grimes, Sharp, and Robinette—and Sergeant Rodriguez, both individually and in their official capacities.[17] It also named the City and County of Denver, the Denver Health and Hospital Authority, as well as nurses Gail George and Susan Cryer.[18]

Plaintiffs alleged 10 causes of action. Relevant here are their claims under *42 U.S.C. § 1983*[19] against all the officers for: (1) excessive force in [**24] violation of the *Fourth Amendment*, (2) deprivation of life without due process in violation of the *Fourteenth Amendment*, and (3) failure to provide medical care. Plaintiffs asserted a fourth claim against Sergeant Rodriguez for (4) failure to train or supervise, resulting in a violation of Mr. Booker's constitutional rights.[20]

In July 2012, the Defendants [**25] moved for summary judgment asserting qualified immunity. In support, they submitted video footage of the use of force. The Defendants argued that Plaintiffs' excessive force claim must be reviewed exclusively under the *Fourteenth Amendment*, not the [*417] *Fourth Amendment*, because Mr. Booker was a pretrial detainee. Defendants analyzed the excessive force claim by reviewing the actions of each deputy individually, not their actions as a whole. Defendants also asserted they were entitled to qualified immunity on the medical care claim and that Sergeant Rodriguez was entitled to qualified immunity on Plaintiffs' claim for supervisory liability.

In response, Plaintiffs contended the Defendants violated Mr. Booker's clearly established right

judgment submissions and the district court's oral order, what set of facts the district court "likely assumed." *Roosevelt-Hennix*, 717 F.3d at 754 (quoting *Jones*, 515 U.S. at 319).

[17] Deputy Robinette's name was inadvertently omitted from the caption, but this error was remedied.

[18] Because only the officers are parties to the instant appeal, we do not discuss in further detail Mr. Booker's claims against the City of Denver, Denver Health and Hospital Authority, or the nurse defendants. A related appeal, No. 12-1386, involved the medical defendants. The Plaintiffs filed a stipulated motion to dismiss that appeal, which this court granted.

[19] Plaintiffs also brought conspiracy claims under 42 U.S.C. §§ 1985 and 1986, as well as state law claims. The district court dismissed these claims, and the Plaintiffs have not cross-appealed. We therefore do not consider them here.

[20] Plaintiffs brought all of these claims against the Defendants in both their official and individual capacities. Because the Defendants only appeal the district court's denial of qualified immunity on the claims brought against them in their individual capacity, our discussion is limited to those claims. ***HN17*** That the Plaintiffs' claims against the Defendants in their "official capacit[ies] remain[] pending below does not prevent us from reviewing [the Defendants'] qualified immunity defense to the claim[s] against [them] in [their] individual capacit[ies]." *Brown v. Montoya*, 662 F.3d 1152, 1161 n.6 (10th Cir. 2011).

against excessive force under the *Fourteenth Amendment*. They did not dispute Defendants' argument against analyzing the excessive force claim under the *Fourth Amendment*. In response to Defendants' focus on the acts of each deputy, Plaintiffs argued that each deputy had a clearly established duty to intervene to stop the excessive force of others, regardless of whether an individual's conduct was excessive. Plaintiffs also argued the deputies violated Mr. Booker's [**26] clearly established right to medical care through their deliberate indifference to his severe condition. Finally, Plaintiffs asserted factual disputes precluded summary judgment on the supervisory liability claim against Sergeant Rodriguez.

2. **District court's order**

On December 5, 2012, the district court heard argument on Defendants' summary judgment motion. Plaintiffs' counsel argued that "the excessive force claim ought to be analyzed under the *Fourteenth Amendment*, not the *Fourth Amendment*, because Mr. Booker was a pretrial detainee." Appx. at 1031. Plaintiffs' counsel also stated the excessive force claim was "viable under the *Fourth* or *Fourteenth Amendment*," but he did not want to "tak[e] time in this hearing [on that issue] because [he did not] think the viability of the claim[] sinks or swims at the summary judgment [stage] on that distinction." *Id*. Defendants' counsel contended the proper analysis was under the *Fourteenth Amendment*.

Ruling from the bench, the district court denied Defendants' summary judgment motion with respect to the excessive force, medical care, and supervisory liability claims.[21] *See* Appx. at 1060 ("The motion is denied with respect to claims one, two, three, [**27] four."). As to excessive force, the district court thought the proper analysis was under the *Fourth Amendment*, not the *Fourteenth Amendment*, although it saw this question of the applicable amendment as a "gray area." *Id*. at 1061. Nevertheless, the district court concluded the Plaintiffs had shown the Defendants violated Mr. Booker's rights under either amendment. *See id*. at 1063 ("I think the first requirement to defeat qualified immunity clearly exists in one of the two constitutional pegs.").

As to whether the constitutional violation was clearly established, the district court observed the following:

> Given the version of the facts that the plaintiff alleges—and they more than just allege it, there is video, which is subject to interpretation, there is apparently testimony from inmates who observed these proceedings, this incident and so forth—if what happened is what the plaintiff claims, then any reasonable officer in Denver or anywhere else would know that that was excessive force. It's just not even a close call.

Id. at 1063-64. The court continued: "The entire excessive force part of this case is *just* [**28] *riddled with fact disputes*. They're set forth in some summary at CM-ECF docket no. 133, but they're just everywhere [*418] in this case. . . . [E]very [claim] turns on issues of fact; and for that reason, this is not, in my view, even a close call." *Id*. at 1064 (emphasis added).[22]

The district court did not specifically discuss the medical care or supervisory liability claims at the

[21] There is no written summary judgment order, only the transcript of the hearing.

[22] ECF No. 133 is the "Plaintiffs' Supplemental Response to Law Enforcement Defendants' Combined Motion for Summary Judgment." *See* Appx. at 966. After Defendants filed a 54-page summary judgment memorandum and Plaintiffs responded with a 100-page memorandum with 475 pages of exhibits, the district court criticized the parties' motion practice as having "run amuck [sic]." Appx. at 956. It ordered Plaintiffs to submit a supplement to their response memorandum "that specifically identifies what genuine issues of material fact exist and what evidence shows that these issues are disputed." *Id*. at 956-57. ECF No. 133 is that supplemental response.

hearing, but it denied summary judgment on those claims because each turned on "issues of fact." *Id.* at 1064. The Defendants appealed.

III. DISCUSSION

We discern five issues from [**29] the Defendants' appeal: (A) whether the district court erred by considering Plaintiffs' excessive force claim under both the Fourth and the *Fourteenth Amendment* standards; (B) whether the district court erred in failing to conduct an individualized analysis of each Defendant's actions; (C) whether the district court erred in denying qualified immunity on Plaintiffs' excessive force claim; (D) whether the district court erred in denying qualified immunity on Plaintiffs' claim for failure to provide medical care; and (E) whether the district court erred in failing to grant qualified immunity to Sergeant Rodriguez on the Plaintiffs' supervisory liability claim.

HN18 With jurisdictional limits in mind—we may consider only abstract issues of law, not factual disputes—"we review the district court's denial of a summary judgment motion asserting qualified immunity de novo." *Fancher v. Barrientos, 723 F.3d 1191, 1194 (10th Cir. 2013)*. Because Defendants have asserted qualified immunity, it is the Plaintiffs' burden to show with respect to each claim that (1) a reasonable jury could find facts supporting a violation of a constitutional right that (2) was clearly established at the time of the Defendants' [**30] conduct. *See Martinez v. Beggs, 563 F.3d 1082, 1088 (10th Cir. 2009)*; *see also Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2080, 179 L. Ed. 2d 1149 (2011)*; *Saucier v. Katz, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001)*, *overruled in part on other grounds by Pearson v. Callahan, 555 U.S. 223, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009)*.

A. *The District Court Did Not Err by Addressing Both the Fourth and Fourteenth Amendment* Standards.

Defendants contend the district court erred by analyzing Mr. Booker's claims under a *Fourth Amendment* excessive force standard. They argue that because Mr. Booker was arrested pursuant to a warrant supported by probable cause—as opposed to a person seized without a warrant and prior to a probable cause determination—a *Fourteenth Amendment* analysis applies. They read the district court's decision to address only the *Fourth Amendment*. Although we agree the *Fourteenth Amendment* governs the Plaintiffs' excessive force claim, we disagree with the Defendants' characterization of the district court's ruling.

1. Legal Standard

HN19 "Excessive force claims can be maintained under the *Fourth*, *Fifth*, *Eighth*, or *Fourteenth Amendment* . . . and each carries with it a very different [*419] legal test." *Porro v. Barnes, 624 F.3d 1322, 1325 (10th Cir. 2010)*. For instance, [**31] although an excessive force claim brought under the *Fourth Amendment* depends on the objective reasonableness of the defendants' actions, the same claim brought under the *Fourteenth Amendment* turns on additional factors, including "the motives of the state actor." *See id. at 1325-26*. Thus, a district court evaluating an excessive force claim must first "isolate the precise constitutional violation with which [the defendant] is charged" because "[t]he choice of amendment matters." *Id. at 1325* (citing *Baker v. McCollan, 443 U.S. 137, 140, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979)*); *see also Graham v. Connor, 490 U.S. 386, 393-95, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)*.

HN20 Determining which amendment applies to an allegation of excessive force requires consideration of "where the [plaintiff] finds himself in the criminal justice system." *Porro, 624 F.3d at 1325*. Any force used "leading up to and including an arrest" may be actionable under the *Fourth Amendment's* prohibition against unreasonable seizures. *Id. at 1325-26*. By contrast,

claims of excessive force involving convicted prisoners arise under the *Eighth Amendment*. *Id.* ″And when neither the *Fourth* nor *Eighth Amendment* applies—when the plaintiff finds himself in the criminal justice system somewhere between [**32] the two stools of an initial seizure and post-conviction punishment—we turn to the *due process clauses of the Fifth* or *Fourteenth Amendment* and their protection against arbitrary governmental action by federal or state authorities.″ *Id. at 1326* (citing *Cnty. of Sacramento v. Lewis, 523 U.S. 833, 843, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998)*).

HN21 It is therefore well-established that the *Fourteenth Amendment* governs any claim of excessive force brought by a ″pretrial detainee″—one who has had a ″judicial determination of probable cause as a prerequisite to [the] extended restraint of [his] liberty following arrest.″ *Bell v. Wolfish, 441 U.S. 520, 536, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979)* (quoting *Gerstein v. Pugh, 420 U.S. 103, 114, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975)*); *see also Graham, 490 U.S. at 395 n.10*. For similar reasons, we have also concluded that the *Fourteenth Amendment* standard ″controls excessive force claims brought by federal immigration detainees.″ *Porro, 624 F.3d at 1326*.

On the other hand, we have held that ***HN22*** the *Fourth Amendment*, not the Fourteenth, governs excessive force claims arising from ″treatment of [an] arrestee detained *without a warrant*″ and ″*prior to* any probable cause hearing.″ *Austin v. Hamilton, 945 F.2d 1155, 1160 (10th Cir. 1991)* (emphasis added), *abrogated* [**33] *on other grounds by Johnson v. Jones, 515 U.S. 304, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995)*.

2. **Analysis**

a. *The district court correctly concluded that summary judgment was inappropriate under either standard.*

We conclude the district court did not err in considering Plaintiffs' excessive force claim under both the *Fourth* and *Fourteenth Amendments*. Rather, the district court did what many courts do: it analyzed the case under more than one legal rule and made alternative rulings, holding that Defendants were not entitled to qualified immunity on Plaintiffs' excessive force claim under *either* the *Fourth* or *Fourteenth Amendment*. *See Murrell v. Shalala, 43 F.3d 1388, 1389 (10th Cir. 1994)* (***HN23*** ″Whatever the particular result in any given case, the use of alternative dispositions generally benefits everyone.″). At the hearing, the district court expressly [*420] observed ″[i]f [the Plaintiffs] could prove what they've said happened, [the Defendants are] going to get clobbered under *any excessive force standard*, right? If they could prove these facts, as they allege them, [the Defendants are] dead in the water, *whether it's the Fourteenth or the Fourth*.″ Appx. at 1039 (emphasis added).

In *Culver v. Town of Torrington, Wyo., 930 F.2d 1456 (10th Cir. 1991)*, [**34] we addressed a similar issue where ″[t]he trial court did not state which [excessive force] standard it was applying″ in the context of ″a post-arrest pre-trial detention setting.″ *Id. at 1457, 1460*. We reasoned that we did not have to ″determine whether to apply the *Fourteenth* or *Fourth Amendment* standard since there [was] no practical difference in the application of the two standards in [that] case.″ *Id.* We agreed with the trial court that the appellant's excessive force claim failed under either standard. *Id. at 1461*. *Culver* supports the district court's approach in this case. *See also Austin, 945 F.2d at 1158* (″[W]e hold that *under either a fourth amendment* or substantive due process standard, a reasonable officer could not have believed the manner of plaintiffs' arrest and detention in this case to be constitutionally permissible, in light of the clearly established law and the information defendants possessed at the time.″ (quotations and citations omitted)); *Martin v. Bd. of Cnty. Comm'rs, 909 F.2d 402, 407 n.5 (10th Cir. 1990)*

(same).

We disagree with the Defendants that the district court's approach requires reversal.

b. *The Fourteenth Amendment* standard governs Plaintiffs' [**35] *excessive force claim*.

We nonetheless agree with the Defendants—and the Plaintiffs concede[23]—that the *Fourteenth Amendment* is the applicable amendment for the excessive force claim in this case. ***HN24*** The *Fourth Amendment*, by its plain terms, prohibits only "unreasonable seizures." *U.S. Const. amend. IV*. It says nothing about the treatment owed to a detainee *after* he or she has been lawfully seized pursuant to probable cause. Although we have recognized that a "continuing seizure" may extend beyond arrest up until a probable cause determination, *see Austin, 945 F.2d at 1160*, the Supreme Court has observed that the "*Due Process Clause* protects a pretrial detainee from the use of excessive force that amounts to punishment." *Graham, 490 U.S. at 395 n.10*; *see also Bell v. Wolfish, 441 U.S. 520, 533, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979)* ("We do not doubt that the *Due Process Clause* protects a detainee from certain conditions and restrictions of pretrial detainment.").

In this case, unlike the plaintiff in *Austin*—where the excessive force occurred before a probable cause determination and thus constituted a continuing seizure under the *Fourth Amendment*, *see 945 F.2d at 1160*—Mr. Booker was arrested pursuant to a warrant based on probable cause for failing to appear at a court proceeding in conjunction with drug charges. Although there was no probable cause determination on the drug charges, there was a probable cause determination [*421] for Mr. Booker's failure to appear. In this important respect, our holding in *Austin* does not control this case. After the officers arrested Mr. Booker and brought him into the "cooperative seating area" for booking, he was a "pretrial detainee." Like the immigration detainee in *Porro* whose excessive force claim arose under the *Fourteenth Amendment* because he did not "dispute that he had been lawfully seized and detained," *624 F.3d at 1326*, [**37] Mr. Booker's claim is governed by the *Fourteenth Amendment's Due Process Clause*.

Accordingly, we hold ***HN25*** the *Fourteenth Amendment* standard governs excessive force claims arising from post-arrest and pre-conviction treatment if the arrestee has been taken into custody pursuant to a warrant supported by probable cause.

B. *Individualized Analysis of the Officers' Use of Force*

Defendants argue the district court should have assessed their actions individually, rather than "judging the conduct of all the deputies as a whole . . . ." Aplt. Br. at 24. We disagree and conclude that individualized analysis was not necessary at the summary judgment stage in this case.

1. Legal Standard

HN26 Although we frequently conduct separate qualified immunity analyses for different defendants, we have not always done so at the summary judgment stage of excessive force cases. Where appropriate, we have aggregated officer conduct. *See, e.g., Lundstrom v. Romero, 616 F.3d 1108, 1126-27 (10th Cir. 2010)*; *Fisher v. City of Las Cruces, 584 F.3d 888, 895-902 (10th Cir. 2009)*; *York v. City of Las Cruces, 523 F.3d 1205, 1210-11 (10th Cir. 2008)*. In *Weigel v. Broad, 544 F.3d 1143 (10th Cir. 2008)*, for instance, two

[23] In their amended complaint, the Plaintiffs characterized the excessive force claim as arising under the ***Fourth Amendment***. In their response to the Defendants' motion for summary judgment, however, the Plaintiffs did not mention the ***Fourth Amendment*** and explicitly [**36] argued the excessive force claim under the ***Fourteenth Amendment***. At the summary judgment hearing, Plaintiffs' counsel asserted "the excessive force claim ought to be analyzed under the ***Fourteenth Amendment***, not the ***Fourth Amendment***, because Mr. Booker was a pretrial detainee." Appx. at 1031.

officers [**38] handcuffed an arrestee and bound his legs. For three minutes, one of the officers applied pressure to the man's upper torso as the man lay on his stomach, while the other officer went to warm his hands in the police cruiser. The man died of asphyxiation, and his estate sued both officers under § 1983. Even though only one officer placed pressure on the victim's back, we did not perform separate analyses for the two officers and denied qualified immunity for both of them. *See* id. at 1155.

HN27 At other times, we have analyzed officer action individually, but we have still denied qualified immunity when an officer failed to prevent others from using excessive force even though the officer himself did not engage in excessive force. *See, e.g.,* Walker v. City of Orem, 451 F.3d 1139, 1159 (10th Cir. 2006) ("We will consider the officers' conduct separately for purposes of this de novo [qualified immunity] inquiry."); *Currier v. Doran*, 242 F.3d 905, 919-25 (10th Cir. 2001) (same in the context of social workers sued under § 1983). For example, in Casey v. City of Federal Heights, 509 F.3d 1278, 1280-81 (10th Cir. 2007), two officers used force on a plaintiff who removed a file from a courthouse, [**39] which was a misdemeanor. One officer tackled the plaintiff, and the other used a taser on him. *See id.* As part of our qualified immunity analysis, we "discuss[ed] the liability of [the officers] individually." Id. at 1281. We determined that each officer violated the plaintiff's clearly established constitutional rights, and that the officer who tackled the plaintiff could be held liable under § 1983 for doing "nothing to prevent [the second officer] from Tasering him and other officers from beating him." Id. at 1283.

2. **Analysis**

We conclude the district court's failure to conduct an individualized analysis is not reversible error because the facts [*422] show that: (1) all Defendants actively and jointly participated in the use of force, and (2) even if a single deputy's participation did not constitute excessive force, that deputy could be liable under a failure-to-intervene theory.

a. *Active participation*

First, all Defendants actively participated in a coordinated use of force on Mr. Booker: Deputy Grimes applied the carotid hold; Deputy Gomez helped handcuff Mr. Booker; Deputy Robinette handcuffed him and applied pressure to his back; Deputy Sharp applied the OPN; and Sergeant Rodriguez [**40] used the taser. If excessive force occurred,[24] all deputies contributed to it. *See* Bletz v. Gribble, 641 F.3d 743, 754 (6th Cir. 2011) (***HN28*** "[A] police officer may be responsible for another officer's use of excessive force if the officer . . . actively participated in the use of excessive force." (quotations omitted)); *see also* Watts v. Laurent, 774 F.2d 168, 179 (7th Cir. 1985) (applying in excessive force suit under § 1983 the "axiomatic" principle "that where several independent actors concurrently or consecutively produce a single, indivisible injury, each actor will be held jointly and severally liable for the entire injury"). Because the Defendants here engaged in a group effort, a reasonable jury could find them liable for any underlying finding of excessive force.

b. *Failure to intervene*

Second, even if a single deputy's use of force was not excessive, ***HN29*** "a law enforcement official who fails to intervene to prevent another law enforcement official's use of excessive force may be liable under § 1983." Mick v. Brewer, 76 F.3d 1127, 1136 (10th Cir. 1996). [**41] Thus, even if one of the defendant deputies did not use excessive force, a reasonable jury could nonetheless find on

[24] We address below the Defendants' contention that they are entitled to qualified immunity as a matter of law on Plaintiffs' excessive force claims.

this record that he or she violated Mr. Booker's clearly established rights by not taking steps to prevent other deputies' excessive force. *See Mascorro v. Billings, 656 F.3d 1198, 1204 n.5 (10th Cir. 2011)* (***HN30*** ″It is not necessary that a police officer actually participate in the use of excessive force in order to be held liable under *section 1983*. Rather, an officer who is present at the scene and who fails to take reasonable steps to protect the victim of another officer's use of excessive force, can be held liable for his nonfeasance.″).[25] In *Fogarty v. Gallegos, 523 F.3d 1147 (10th Cir. 2008)*, we affirmed the district court's denial of qualified immunity on a failure to intervene claim because the defendant was present during the allegedly unconstitutional arrest, which lasted ″between three and five minutes.″ *Id. at 1164*. Here, Plaintiffs alleged and the video confirmed that all of the Defendants were present and observed the entire use of force over a two-to-three minute period. **[*423]** Because ″Plaintiffs presented evidence suggesting that [the Defendants] could have prevented **[**42]** or stopped″ the assault on Mr. Booker, *Lusby v. T.G. & Y. Stores, Inc., 749 F.2d 1423, 1433 (10th Cir. 1994)*, *vacated on other grounds sub nom. City of Lawton, Okla. v. Lusby*, 474 U.S. 805, 106 S. Ct. 40, 88 L. Ed. 2d 33 (1985), a reasonable jury could find any given defendant here liable for failing to intervene. *See Mick, 76 F.3d at 1137* (reasoning a ″sworn affidavit by an eyewitness to the effect that [the defendant] watched the [excessive force] incident and did nothing to prevent it″ precluded summary judgment for defendant based on qualified immunity for failure to intervene claim).

* * *

Under either theory, if Mr. Booker was the victim of excessive force—which we address in greater detail below—a reasonable jury could find each deputy subject to *§ 1983* liability for violating his clearly established rights. Accordingly, we hold that the district court did not err by failing to engage in an individualized inquiry at the summary judgment stage.

C. *Qualified Immunity on Plaintiffs' Fourteenth Amendment* Excessive Force Claim

Defendants argue they are entitled to qualified immunity on the Plaintiffs' excessive force claim. We disagree, largely because we may not resolve critical factual disputes—such as whether Mr. Booker resisted during the entire encounter—in the Defendants' favor.

1. Legal Standard

As noted above, ***HN32*** ″when the plaintiff finds himself in the criminal justice system somewhere between . . . an initial seizure and post-conviction punishment **[**44]** . . . we turn to the *due process clauses of the Fifth* or *Fourteenth Amendment* and their protection against arbitrary governmental action by federal or state authorities.″ *Porro, 624 F.3d at 1326*. ***HN33*** An excessive force claim under the *Fourteenth Amendment* targets ″arbitrary governmental action, taken without due process . . . .″ *Id.* We have said that ″[f]orce inspired by malice or by unwise, excessive zeal amounting to an abuse of official power that shocks the conscience may be redressed under the *Fourteenth Amendment*.″ *Roska ex rel. Roska v. Peterson, 328 F.3d 1230, 1243 (10th Cir. 2003)* (quotations omitted). ***HN34*** To determine whether a use of

[25] Other circuits have reached similar conclusions, including junior officer liability. *See, e.g., Putman v. Gerloff*, 639 F.2d 415, 423 (8th Cir. 1981) (″We conclude although Crowe was a subordinate the evidence is sufficient to hold him jointly liable for failing to intervene if a fellow officer, albeit his superior, was using excessive force and otherwise was unlawfully punishing the prisoner.″); *Byrd v. Brishke*, 466 F.2d 6, 11 (7th Cir. 1972) (***HN31*** ″[T]he same responsibility must exist as to nonsupervisory officers who are present at the scene of such summary punishment, for to hold otherwise would be to insulate nonsupervisory officers **[**43]** from liability for reasonably foreseeable consequences of the neglect of their duty to enforce the laws and preserve the peace.″); *see also Wilson v. Town of Mendon*, 294 F.3d 1, 6 (1st Cir. 2002) (same); *Smith v. Mensinger*, 293 F.3d 641, 650 (3d Cir. 2002) (same); *Anderson v. Branen*, 17 F.3d 552, 557 (2d Cir. 1994) (same).

force is excessive under the *Fourteenth Amendment* we consider three factors: ″(1) the relationship between the amount of force used and the need presented; (2) the extent of the injury inflicted; and (3) the motives of the state actor.″ *Id.*

″How much one due process 'factor' may 'balance' against another is the subject of little discussion in our case law.″ *Porro, 624 F.3d at 1327 n.1*. We have, however, described the standard as a ″high threshold.″ *Bella v. Chamberlain, 24 F.3d 1251, 1257 (10th Cir. 1994)*.

2. **Qualified Immunity**

The Defendants are entitled [**45] to qualified immunity unless the Plaintiffs can show (a) a reasonable jury could find unconstitutional the deputies' use of force—a carotid restraint, pressure on Mr. Booker's back, and application of a taser—once Mr. Booker was fully restrained; and (b) this use of force violated clearly established law. *See Martinez v. Beggs, 563 F.3d 1082, 1088 (10th Cir. 2009)*; *see also Pearson v. Callahan, 555 U.S. 223, 232, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009)*. For the following reasons, we conclude the Plaintiffs have met both of these burdens and affirm the district court's denial of qualified immunity on Plaintiffs' excessive force claim.

[*424] a. *Qualified immunity—constitutional violation*

As noted above, ***HN35*** we look to three factors in evaluating an excessive force claim under the *Fourteenth Amendment*: ″(1) the relationship between the amount of force used and the need presented; (2) the extent of the injury inflicted; and (3) the motives of the state actor.″ *Porro, 624 F.3d at 1326* (quoting *Roska, 328 F.3d at 1243*). We address them in turn.

i. Relationship between the force used and the need presented

The evidence, when viewed in the light most favorable to the Plaintiffs, shows the deputies used various types of force—including substantial [**46] pressure on his back, a taser, and a carotid neckhold—on Mr. Booker while he was not resisting. Because Mr. Booker was handcuffed and on his stomach, we conclude the force was not proportional to the need presented.

1) Pressure on back

In *Weigel*, we agreed with other circuits that ***HN36*** it was ″clearly established that putting substantial or significant pressure on a suspect's back while that suspect is in a face-down prone position after being subdued and/or incapacitated constitutes excessive force.″ *544 F.3d at 1155* (quoting *Champion v. Outlook Nashville, Inc., 380 F.3d 893, 903 (6th Cir. 2004)*); *see also Drummond ex rel. Drummond v. City of Anaheim, 343 F.3d 1052, 1061-62 (9th Cir. 2004)*; *Gutierrez v. City of San Antonio, 139 F.3d 441, 449-51 (5th Cir. 1998)*.[26] Here, Deputy Robinette placed an estimated 142.5 pounds—more than Mr. Booker's

[26] We recognize that much of the case law we rely upon in this subsection deals with excessive force claims under [**47] the Fourth, not the ***Fourteenth, Amendment***. ***HN37*** Although the two standards are different, a finding of ″excessive force″ under the ***Fourth Amendment*** is highly relevant to the ″relationship between the amount of force used and the need presented″ in the first part of an excessive force inquiry under the ***Fourteenth Amendment***. *See Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989) (evaluating reasonableness of seizure under the ***Fourth Amendment*** requires ″careful attention″ to facts such as ″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″). For instance, in *Clark v. Edmunds*, 513 F.3d 1219 (10th Cir. 2008), we cited a ***Fourth Amendment*** excessive force case to support our conclusion that an officer's actions were warranted under the ***Due Process Clause***. *Id.* at 1223 (citing *Thompson v. City of Lawrence, Kan.*, 58 F.3d 1511, 1517 (10th Cir. 1995)); *see also Porro*, 624 F.3d at 1329 (citing ***Fourth Amendment*** excessive force case with approval in resolving excessive force claim involving use of a taser under the ***Fourteenth Amendment***).

overall weight—on Mr. Booker's back while he was handcuffed on his stomach. Because of Mr. Booker's prone, restrained, position, the placement of weight exceeding Mr. Booker's total body weight could be construed as substantial or significant.

2) Taser

HN38 Under prevailing [**48] Tenth Circuit authority, "it is excessive to use a Taser to control a target without having any reason to believe that a lesser amount of force—or a verbal command—could not exact compliance." *Casey, 509 F.3d at 1286*. This principle applies here. Sergeant Rodriguez used the taser on Mr. Booker for three seconds longer than recommended when he was already handcuffed on the ground and subdued by multiple deputies. A reasonable jury could conclude that a lesser degree of force would have exacted compliance and that this use of force was disproportionate to the need. *See Cavanaugh v. Woods Cross City, 625 F.3d 661, 665 (10th Cir. 2010)* (***HN39*** use of taser unconstitutional [*425] where jury could "conclude that [the victim] did not pose an immediate threat" to officer or others and where victim was not actively resisting); *Porro, 624 F.3d at 1329* ("The use of tasers in at least some circumstances—such as in a *good faith effort to stop a detainee who is attempting to inflict harm on others*—can comport with due process." (emphasis added)); *Cortez v. McCauley, 478 F.3d 1108, 1128 (10th Cir. 2007)* (finding excessive force where plaintiff did not "actively resist[ ] seizure" and "cooperated fully").

3) Carotid [**49] restraint/chokehold

Deputy Grimes used the carotid restraint for approximately two and a half minutes even though he was trained to use it for only one minute. *See Weigel, 544 F.3d at 1155* (***HN40*** "[T]he reasonableness of an officer's actions must be assessed in light of the officer's training."); Appx. at 809 (Denver Sheriff's training materials recommending against "application of the technique" for "more than one minute" because "[b]rain damage or death could occur if the technique is applied for more than one minute" (emphasis in original)). Further, Deputy Grimes continued to use the restraint while Mr. Booker was handcuffed in a prone, face-down position on the ground. ***HN41*** Courts from various jurisdictions have held the use of such force on a non-resisting subject to be excessive. *See United States v. Livoti, 196 F.3d 322, 327 (2d Cir. 1999)* (upholding excessive force verdict where officer put victim in choke hold for one minute to render victim unconscious, and where department prohibited such holds); *Valencia v. Wiggins, 981 F.2d 1440, 1447 (5th Cir. 1993)* (upholding district court's determination that the defendants' use of a "choke hold and other force . . . to subdue a non-resisting [**50] [detainee] and render him temporarily unconscious" constituted excessive force under the *Due Process Clause*); *Papp v. Snyder, 81 F. Supp. 2d 852, 857 (N.D. Ohio 2000)* (denying qualified immunity where jury could conclude that officer used a choke hold and carotid hold when the victim was restrained by others and handcuffed); *McQurter v. City of Atlanta, Ga., 572 F. Supp. 1401, 1414 (N.D. Ga. 1983)* (use of chokehold was "excessive and malicious" when used after victim was "manacled" and "effectively restrained"), *abrogated on other grounds by Budinich v. Bectson Dickinson & Co., 486 U.S. 196, 108 S. Ct. 1717, 100 L. Ed. 2d 178 (1988)*.[27]

[27] In *Gouskos v. Griffith*, 122 F. App'x 965 (10th Cir. 2005) (unpublished), we reversed a grant of qualified immunity where the plaintiff submitted evidence that an officer put "him in a chokehold and chok[ed] him almost to unconsciousness when he was already on the ground, he was exclaiming that he was not resisting, and three other officers were sitting on him, holding his legs, and handcuffing him . . . ." *Id.* at 976. ***HN42*** Although unpublished, *Griffith's* reasoning is persuasive for chokehold cases in which individuals were handcuffed and/or not resisting. *See* ***10th Cir. R. 32.1*** ("Unpublished [**51] opinions are not precedential, but may be cited for their persuasive value."); *see also* ***Fed. R. App. P. 32.1***.

Given the length of time Deputy Grimes used the carotid restraint,[28] his training to the contrary, the factual dispute over whether he released the hold intermittently, and that Mr. Booker was otherwise restrained for a significant period when the hold was used, a reasonable jury could conclude Deputy Grimes' use of the hold was disproportionate to the need for force.

ii. The extent of the injury inflicted

This factor weighs considerably in Plaintiffs' favor. The autopsy report concluded [*426] that Mr. Booker died of cardiorespiratory arrest as a result of restraint. *See* Appx. at 736. The report describes the carotid hold, the pressure on Mr. Booker's back, and the taser as contributing to Mr. Booker's death. *See id*. Plaintiffs' experts also opine that he died of asphyxia caused by the deputies' restraints, *see* Appx. at 725, 825, and ***HN43*** we may not weigh their credibility on appeal. *See* Krechman v. Cnty. of Riverside, 723 F.3d 1104, 1110 (9th Cir. 2013) [**52] (reversing grant of qualified immunity because district court improperly weighed expert testimony in determining "that Defendants' conduct was not a substantial factor in [the victim's] death").

A reasonable jury could conclude this evidence of Mr. Booker's cause of death supports the Plaintiffs' claim of excessive force. *See* Martin v. Bd. of Cnty. Comm'rs, 909 F.2d 402, 407 (10th Cir. 1990) (upholding excessive force claim where police officers' unreasonable conduct in transporting woman from hospital to prison aggravated an existing fracture in her neck).

iii. The motives of the state actor

Defendants argue the Plaintiffs failed to demonstrate their requisite subjective intent to harm Mr. Booker. We disagree.

In Hannula v. City of Lakewood, 907 F.2d 129, 132 (10th Cir. 1990), *abrogated in part by* Graham, 490 U.S. at 394-95, ***HN44*** we described the subjective intent standard for an excessive force due process violation as "[f]orce inspired by unwise, excessive zeal amounting to an abuse of official power that shocks the conscience, or by malice rather than mere carelessness." *Id*. (quotations omitted); *see also* Porro, 624 F.3d at 1326 (same). Similarly, in *Cortez*, we described the due process [**53] standard as "requir[ing] that the force be inspired by malice or by excessive zeal that shocks the conscience." 478 F.3d at 1129 n.24.

We have granted qualified immunity in the absence of any evidence meeting this standard. In *Hannula*, for example, we held that a § 1983 plaintiff failed to show the defendant violated clearly established law in part because the evidence—that the arresting "officer appeared angry"—did "not establish" malice in the absence of any additional proof. 907 F.2d at 132. In Roska v. Peterson, 328 F.3d 1230 (10th Cir. 2003), we affirmed dismissal of an excessive force claim under the Fourteenth Amendment in part because "nothing in the record indicate[d] that the defendants were motivated by malice or other improper motive." Id. at 1243. Finally, in Bella v. Chamberlain, 24 F.3d 1251, 1258 (10th Cir. 1994), we faulted a plaintiff for "mak[ing] no allegations of improper motives or malice," nor could we infer any from the facts.

But in these cases, reasons other than motive foreclosed plaintiffs' excessive force claims, such as evidence of proportional force or de minimis physical injury. *See* Cortez, 478 F.3d at 1129 (de minimis injury); Roska, 328 F.3d at 1233 [**54] ("no serious physical injury was inflicted"); Bella, 24 F.3d at 1258-59 (force not disproportionate to need); Hannula, 907 F.2d at 132 (no proof of substantial force and injury was minimal). Defendants have not cited, and ***HN45*** we have not found, any case in this circuit that disposed of a due process excessive force claim

[28] As previously discussed, *see supra* note 12, the Defendants assert Deputy Grimes released the hold intermittently, but we lack jurisdiction to resolve this disputed fact in their favor.

solely on the ″motive″ factor when disproportionate force and serious injury were present. Indeed, in *Porro*, we said that ″[h]ow much one due process 'factor' may 'balance' against another is the subject of little discussion in our case law″ and that this court usually has ″examined an officer's motive in combination with the [other] factors.″ *624 F.3d at 1327 n.1*.

[*427] Moreover, based on several facts in the record that we must view in the light most favorable to the Plaintiffs, a reasonable jury could find excessive zeal behind the use of force on Mr. Booker. First, the carotid restraint was used for approximately two and a half minutes. Defendants acknowledge that ″deputies are instructed about the risk associated with a continuous one minute application of the hold.″ Aplt. Br. at 35; *see also* Appx. at 809 (″[b]rain damage or death″ (emphasis in original)). Deputy Grimes' **[**55]** actions conflicted with Denver Sheriff Department policy and training. In addition, he continued the hold after Mr. Booker was handcuffed, suggesting that the carotid restraint was no longer necessary to maintain and restore discipline.

Second, not only was the taser used while Mr. Booker was handcuffed and otherwise restrained by deputies, it was used for eight seconds. Sergeant Rodriguez admitted in her deposition that she was trained to use a standard taser ″cycle″ of up to five seconds. A jury could conclude that a 60 percent upward departure from a normal cycle on a handcuffed man demonstrates excessive zeal. Further, although the taser only functioned for eight seconds, the video shows Sergeant Rodriguez holding it on Mr. Booker for upward of 25 seconds. *See* Appx. at 361 (″2nd angle video″), at 3:37:25-3:37:54.

In light of the foregoing, a reasonable jury could conclude that the Defendants' use of substantial pressure on Mr. Booker's back, a two-minute carotid hold on his neck, and a taser while Mr. Booker was subdued and struggling to breathe in a prone position demonstrated the requisite level of culpability for a due process violation.

* * *

We hold that the Plaintiffs met their **[**56]** burden to show the Defendants violated Mr. Booker's constitutional rights because a reasonable jury could conclude the Defendants engaged in excessive force in violation of the *Due Process Clause*.

b. *Qualified Immunity—clearly established law*

Defendants argue they are entitled to qualified immunity because their actions did not violate clearly established law. We disagree.

HN46 ″Ordinarily, in 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.″ *Fogarty, 523 F.3d at 1161* (quotations omitted). In the *Fourth Amendment* context, we have said that ″because excessive force jurisprudence requires an all-things-considered inquiry with careful attention to the facts and circumstances of each particular case, there will almost never be a previously published opinion involving exactly the same circumstances. We cannot find qualified immunity whenever we find a new fact pattern.″ *Casey, 509 F.3d at 1284* (citation omitted) (quotations omitted). We have therefore ″adopted a sliding scale to determine when law is clearly established″ **[**57]** in which ″[t]he more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation.″ *Id*. (quotations omitted).

Defendants assert that Plaintiffs cannot rely on *Fourth Amendment* case law to show that any violation of Mr. Booker's constitutional rights was clearly established. They argue the ″Plaintiffs failed to identify any due process case involving a use of force in a correctional setting that would have put any of the deputies on **[*428]** notice that

the force that was used—either individually or collectively—was unconstitutional." Aplt. Br. at 46.

The Defendants are mistaken. As noted above, ***HN47*** *Fourth Amendment* case law addressing whether force is "reasonable" is relevant to the first due process excessive force factor: the relationship between the amount of force used and the need presented. *See supra*, note 26. Cases finding force to be unreasonable necessarily imply that the use of force was disproportionate to the need presented. Indeed, the *Graham* *Fourth Amendment* excessive force factors are consistent with the disproportionate force analysis under the *Fourteenth Amendment*: (1) the **[**58]** severity of the offense, (2) whether the subject posed an immediate threat to the safety of officers or others, and (3) whether the subject resists officers. *See Fisher v. City of Las Cruces, 584 F.3d 888, 894 (10th Cir. 2009)* (citing *Graham v. Connor, 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)*).

This "*Fourth* or *Fourteenth Amendment*" issue arose in *Harris v. City of Circleville, 583 F.3d 356, 367 (6th Cir. 2009)*, where defendants argued that excessive force law was not clearly established because it was unclear whether the *Fourth* or *Fourteenth Amendment* applied. The Sixth Circuit rejected this "argument because even if there were some lingering ambiguity as to whether the Fourth or the *Fourteenth Amendment* applies in this precise context, the 'legal norms' underlying [plaintiff's] claims nevertheless were clearly established." *Id*. Specifically, the *Harris* court observed, ***HN48*** "there undoubtedly is a clearly established legal norm" precluding the use of violent physical force against a criminal suspect or detainee "who already has been subdued and does not present a danger to himself or others." *Id*.

We agree with the Sixth Circuit's analysis, which is consistent with Supreme Court law. *See Saucier v. Katz, 533 U.S. 194, 202-03, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001)* **[**59]** (***HN49*** "Assuming, for instance, that various courts have agreed that certain conduct is a constitutional violation under facts not distinguishable in a fair way from the facts presented in the case at hand, the officer would not be entitled to qualified immunity based simply on the argument that courts had not agreed on one verbal formulation of the controlling standard."), *overruled in part on other grounds by Pearson v. Callahan, 555 U.S. 223, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009)*; *see also Bailey v. Pataki, 708 F.3d 391, 405 (2d Cir. 2013)* ("For a right to be clearly established, it is not necessary that courts have agreed 'upon the precise formulation of the standard.'" (quoting *Saucier, 533 U.S. at 202*)).

Here, despite any uncertainty about which constitutional amendment governs the Plaintiffs' excessive force claim, ***HN50*** the "legal norms" underlying the three-factor due process analysis—proportionality, injury, and motive—were clearly established at the time of Mr. Booker's death. *Weigel* (pressure on back), *Casey* (taser), and the weight of authority from other jurisdictions (neck restraint)[29] put **[*429]** Defendants on notice that use of such force on a person who is not resisting and who is restrained in handcuffs is disproportionate. **[**60]** *See also Richman v. Sheahan, 512 F.3d 876, 880 (7th Cir. 2008)* ("[Hypoxia] can also be induced by compressing the lungs, which the weight of several persons on one's back can do. So police are

[29] *See supra* Part III.C.2.a.i.3 (discussing cases from the Second Circuit, Fifth Circuit, and various district courts).

Also as discussed above, *see supra* note 27, we reversed a grant of qualified immunity under similar circumstances in *Gouskos*, 122 F. App'x at 976-76. Although not dispositive of our inquiry because of its unpublished status, *Gouskos* need not be ignored in determining whether the law was clearly established. *See Morris v. Noe*, 672 F.3d 1185, 1197 n.5 (10th Cir. 2012) (***HN51*** A single "unpublished opinion provides little support for the notion that the law is clearly established on a given point," but "we have never held that a district court must ignore unpublished opinions in deciding whether the law is clearly established." (quotations omitted)).

warned not to sit on the back of a person they are trying to restrain. . . ."); *Drummond ex rel. Drummond v. City of Anaheim, 343 F.3d 1052, 1059 (9th Cir. 2003)* ("The officers—indeed, any reasonable person—should have known that squeezing the breath from a compliant, prone, and handcuffed individual despite his pleas for air involves a degree of force that is greater than reasonable."); *Valencia v. Wiggins, 981 F.2d 1440, 1447 (5th Cir. 1993)* (excessive under *Due Process Clause* to use "choke hold and other force . . . to subdue a non-resisting [detainee] and render him temporarily unconscious"). Each of these cases also put the Defendants on notice that significant injury, including death, could result from their use of force. Finally, Defendants were on notice that a reasonable jury could find them liable under *§ 1983* for engaging in "[f]orce inspired by malice or by unwise, excessive zeal amounting to an abuse of official power that shocks the conscience . . . ." *Christiansen v. City of Tulsa, 332 F.3d 1270, 1279 (10th Cir. 2003)* **[**61]** (quotations omitted).

* * *

Mr. Booker was handcuffed, prone on his stomach, and not resisting while much of the disproportionate use of force occurred. We conclude not only that a reasonable jury could find the Defendants violated Mr. Booker's due process right, but also that this right was clearly established at the time of their conduct. We therefore affirm the district court's denial of summary judgment on Plaintiffs' excessive **[**62]** force claim.

D. ***The Defendants Are Not Entitled to Qualified Immunity on Mr. Booker's Claim for Denial of Medical Care***.

The Defendants argue the district court erred by denying their motion for summary judgment on Plaintiffs' due process claim for denial of medical care. We hold otherwise.

1. **Legal Standard**

In *Estelle v. Gamble, 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)*, the Supreme Court held that ***HN52*** "deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain proscribed by the *Eighth Amendment*." *Id. at 104* (citation omitted) (quotations omitted). Prison doctors and prison guards may thus be liable under *§ 1983* for "indifference . . . manifested . . . in their response to the prisoner's needs or by . . . intentionally denying or delaying access to medical care or intentionally interfering with treatment once prescribed." *Id. at 104-05* (footnotes omitted). We have applied the *Estelle* rule to treatment of pretrial detainees, holding that "pretrial detainees are . . . entitled to the degree of protection against denial of medical attention which applies to convicted inmates." *Garcia v. Salt Lake Cnty., 768 F.2d 303, 307 (10th Cir. 1985)*; *see Howard v. Dickerson, 34 F.3d 978, 980 (10th Cir. 1994)* **[**63]** (same). It is therefore "proper to apply a due process standard which protects pretrial detainees against deliberate indifference to their serious medical needs." *Garcia, 768 F.2d at 307*.

HN53 **[*430]** To state a denial of medical care claim, a plaintiff must satisfy "both an objective and a subjective component." *Mata v. Saiz, 427 F.3d 745, 751 (10th Cir. 2005)* (quotations omitted).[30] First, the detainee must "produce objective evidence that the deprivation at issue was in fact sufficiently serious." *Id.* (quotations omitted). "[A] medical need is sufficiently serious if it is one . . . that is so obvious that even a lay person would easily recognize the necessity for a

[30] ***HN54*** Because "pretrial detainees are in any event entitled to the degree of protection against denial of medical attention which applies to convicted inmates," *Garcia, 768 F.2d at 307*, we rely on ***Eighth Amendment*** cases in our discussion of the legal standard for a failure to provide medical care claim. *See also Olsen v. Layton Hills Mall, 312 F.3d 1304, 1315 (10th Cir. 2002)* ("Although pretrial detainees are protected **[**64]** under the ***Due Process Clause*** rather than the ***Eighth Amendment***, this Court applies an analysis identical to that applied in ***Eighth Amendment*** cases brought pursuant to ***§ 1983***." (quotations omitted)).

doctor's attention." *Id.* (quotations omitted); *see also* Sealock v. Colorado, 218 F.3d 1205, 1209 (10th Cir. 2000) (same).

Second, ***HN55*** under the subjective component, the detainee must establish deliberate indifference to his serious medical needs by "present[ing] evidence of the prison official's culpable state of mind." Mata, 427 F.3d at 751. He must show that the prison "official acted or failed to act despite his knowledge of a substantial risk of serious harm." Farmer v. Brennan, 511 U.S. 825, 842, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994). ***HN56*** "The Supreme Court [has] cautioned that 'an inadvertent failure to provide adequate medical care' does not rise to a constitutional violation." Martinez v. Beggs, 563 F.3d 1082, 1088 (10th Cir. 2009) (quoting Estelle, 429 U.S. at 105-06). But "[w]hether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in usual ways, including *inference* from circumstantial evidence." Gonzales v. Martinez, 403 F.3d 1179, 1183 (10th Cir. 2005) (quoting Farmer, 511 U.S. at 842). Although not dispositive, an official's training may undermine his or her claim that **[**65]** he or she was unaware of such a risk. *See* Mata, 427 F.3d at 757 ("While published requirements for health care do not create constitutional rights, such protocols certainly provide circumstantial evidence that a prison health care gatekeeper knew of a substantial risk of serious harm."). In any event, "the factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." Farmer, 511 U.S. at 842.

2. **Analysis**

Because (a) a reasonable jury could find the Defendants were deliberately indifferent to Mr. Booker's serious medical need and (b) this would violate clearly established law, we affirm the district court's denial of qualified immunity.

a. *A reasonable jury could find a due process violation.*

i. Objective component (seriousness of medical need and causation)

Although the Defendants concede Mr. Booker's death is "sufficiently serious" to satisfy the *Due Process Clause*'s objective component, Aplt. Br. at 57, they contend the Plaintiffs failed to put forth sufficient evidence that the three-minute delay in seeking medical attention *caused* Mr. Booker's death. We disagree.

Plaintiffs' experts provided sufficient evidence for a jury to conclude **[**66]** that the ***HN57*** Defendants' delay in seeking medical care **[*431]** contributed to Mr. Booker's death, which is "without doubt, sufficiently serious to meet the objective component necessary to implicate the *Fourteenth Amendment*." Martinez, 563 F.3d at 1088-89 (quotations omitted). Jackie Clark, one of Plaintiffs' experts on the standard of care for nurses, opined that the "failure to provide timely medical assessment and resuscitative effort . . . may well have contributed to Mr. Booker's death." Appx. at 834; *see also id.* at 994-95. Another expert, Dr. Steven B. Bird, concluded that "[h]ad the medical staff at the DDC . . . promptly recognized that [Mr. Booker] was in extremis, resuscitation could possibly have saved Mr. Booker's life." Appx. at 725; *see also id.* at 993-94. In light of this evidence, a reasonable jury could conclude the Plaintiffs established the objective component of a failure to provide medical care claim.

ii. Subjective component (deliberate indifference)

The Defendants argue that because they did not check Mr. Booker's vital signs immediately after placing him in the holding cell, they could not, as a matter of law, have had the subjective knowledge to support a finding of deliberate **[**67]** indifference. We disagree.

"[T]he symptoms displayed by [Mr. Booker] are relevant to the subjective component of deliberate

indifference. ***HN58*** The question is: 'were the symptoms displayed by [Mr. Booker] such that [the Defendants] knew the risk to [Mr. Booker] and chose (recklessly) to disregard it.'" *Martinez, 563 F.3d at 1089* (quoting *Mata, 427 F.3d at 753*). The disputed facts regarding Mr. Booker's condition after the use of force ended preclude summary judgment. The video evidence suggests Mr. Booker was limp and unconscious when the Defendants carried him to the holding cell. Deposition testimony from the Defendants, on the other hand, varies considerably and suggests that Mr. Booker was still struggling after they carried him into the holding cell. Deputy Gomez, for example, testified that Mr. Booker reached up and attempted to grab Sergeant Rodriguez while he was in the cell. On interlocutory review of the denial of summary judgment, we must resolve this conflicting evidence in favor of the Plaintiffs.

The Defendants had a front-row seat to Mr. Booker's rapid deterioration. Unlike many deliberate indifference cases, here the Defendants actively participated in producing Mr. Booker's **[**68]** serious condition through their use of force against him, which included a carotid neck hold, considerable weight on his back, and a taser. Given their training, the Defendants were in a position to know of a substantial risk to Mr. Booker's health and safety. *See Weigel v. Broad, 544 F.3d 1143, 1155 (10th Cir. 2008)* (***HN59*** "[T]he reasonableness of an officer's actions must be assessed in light of the officer's training."). Each of the Defendants received regular training in "first aid/CPR" and "training that any inmate involved in a use of force incident needs to be medically evaluated after the incident." Appx. at 327. They also received specific training on the carotid restraint about "the risks associated with the restraint as well as steps that must be followed should the inmate become unconscious (such as checking for breath and vital signs)." *Id.*; *see also id.* at 547, 812 (instructing officers to "[c]heck vital signs . . . [n]otify EMS and begin CPR if needed" when a subject "is rendered unconscious" by the carotid restraint). Moreover, each of the Defendants received taser training and certification. *See* Appx. at 338-40.

In light of this training and Mr. Booker's limp appearance, **[**69]** a reasonable jury could conclude the Defendants inferred that Mr. Booker was unconscious and **[*432]** needed immediate medical attention. If a jury concludes the Defendants made this inference, then it could also conclude they were deliberately indifferent in failing to respond sooner. *See Lemire v. California Dep't of Corr. and Rehabilitation, 726 F.3d 1062, 1083 (9th Cir. 2013)* (***HN60*** "While the failure to provide CPR to a prisoner in need does not create an automatic basis for liability in all circumstances, a trier of fact could conclude that, looking at the full context of the situation, officers trained to administer CPR who nonetheless did not do so despite an obvious need demonstrated the deliberate indifference required for an *Eighth Amendment* claim."); *McRaven v. Sanders, 577 F.3d 974, 983 (8th Cir. 2009)* ("An officer trained in CPR, who fails to perform it on a prisoner manifestly in need of such assistance, is liable under *§ 1983* for deliberate indifference.").

The Defendants' attempt to avoid liability by conceding they failed to check Mr. Booker's vitals or even look at his face after the incident is therefore misplaced. *See Mata, 427 F.3d at 752* (***HN61*** "An official 'would not escape liability **[**70]** if the evidence showed that he merely refused to verify underlying facts that he strongly suspected to be true, or declined to confirm inferences of risk that he strongly suspected to exist.'") (quoting *Farmer, 511 U.S. at 843 n.8*); *see also Bozeman v. Orum, 422 F.3d 1265, 1273 (11th Cir. 2005)* (denying qualified immunity where "the record evidence would authorize a jury to find that [the prisoner] was unconscious and not breathing while being carried by the [prison guard] Officers from his cell [after being forcibly subdued] to the 4 North corridor and to find that [the prisoner's] condition was known to the

Officers.").

The Defendants' argument that only three minutes elapsed between the end of the use of force and Sergeant Rodriguez's efforts to seek medical assistance is likewise unavailing. Although this fact could support a conclusion that the Defendants were not deliberately indifferent to Mr. Booker's circumstances, it does not establish this fact as a matter of law. We have previously recognized that ***HN62*** "[e]ven a brief delay may be unconstitutional." *Mata, 427 F.3d at 755* (citing *Lewis v. Wallenstein, 769 F.2d 1173, 1183 (7th Cir. 1985)* (15-minute delay)); *see also Bozeman, 422 F.3d at 1273* **[**71]** ("A delay in care for known unconsciousness brought on by asphyxiation is especially time-sensitive and must ordinarily be measured not in hours, but in a few minutes."); *McRaven, 577 F.3d at 983 (8th Cir. 2009)* (seven minute delay); *Bradich ex rel. Estate of Bradich v. City of Chicago, 413 F.3d 688, 691-92 (7th Cir. 2005)* (10-minute delay in summoning assistance for inmate who had hanged himself could support finding of deliberate indifference); *Tlamka v. Serrell, 244 F.3d 628, 633-34 (8th Cir. 2001)* (10-minute delay in providing CPR or any other form of assistance to unconscious inmate could support finding of deliberate indifference).

A brief delay in care is particularly problematic when, as here, the Defendants were responsible for placing Mr. Booker in his vulnerable state and engaged in activity (an eight second taser cycle after he had been placed in a carotid neck hold for over two minutes while in a prone position) that could produce foreseeable, rapid, and deadly consequences. *See Estate of Owensby v. City of Cincinnati, 414 F.3d 596, 600-01, 603-04 (6th Cir. 2005)* (denying qualified immunity where the evidence demonstrated that officers, after beating a suspect, locked him **[**72]** in the back of a police cruiser, and observed him in significant physical distress, "yet made no attempt to summon or provide any medical care" until six minutes later, after greeting each other, preparing for their superiors' arrival, and adjusting their uniforms).

HN63 **[*433]** Because deliberate indifference is assessed at the time of the alleged omission, the Defendants' eventual provision of medical care does not insulate them from liability. *See Mata, 427 F.3d at 756* ("[A]ny assessment of Ms. Mata's condition conducted several hours after her encounter with Ms. Weldon is irrelevant to whether Ms. Weldon knew of and disregarded an excessive risk to Ms. Mata's safety."); *see also McElligott v. Foley, 182 F.3d 1248, 1255 (11th Cir. 1999)* ("Even where medical care is ultimately provided, a prison official may nonetheless act with deliberate indifference by delaying the treatment of serious medical needs."). Even if it could, the parties dispute the sincerity of Sergeant Rodriguez's attempt to alert the facility's nursing staff of Mr. Booker's condition.[31] For example, one reasonable interpretation of the evidence—one we must accept on review of summary judgment—suggests that when she did notify **[**73]** the nursing staff, she failed to convey a sense of urgency, instead merely complaining that Mr. Booker was "acting like he's unresponsive." Appx. at 761.[32]

In any event, the myriad factual disputes preclude summary judgment on this claim because "[t]he factfinder may conclude that [the Defendants] subjectively knew of the substantial risk of harm by circumstantial evidence or 'from the very fact that the risk was obvious.'" *Martinez, 563 F.3d at 1089* (quoting *Farmer, 511 U.S. at 842*); *see also Olsen v. Layton Hills Mall, 312 F.3d 1304, 1317 (10th Cir. 2002)* (reversing grant of summary judgment because factual disputes remained and "our task is not to decide whether [the defendant]

[31] The Defendants concede Sergeant Rodriguez stopped to return the taser before proceeding to the nursing office.

[32] Indeed, Nurse George stated that based on this information, "she did not feel that Mr. Booker's condition was an emergency." Appx. at 761.

was indeed ignorant to [the plaintiff's] apparent pleas for assistance").

b. *Mr. Booker's right to timely medical care was clearly established.*

The Defendants argue the law regarding Mr. Booker's right to timely medical care was not clearly established at the time [**74] of their conduct. We disagree.

We have previously observed ***HN64*** "there is little doubt that deliberate indifference to an inmate's serious medical need [violates] a clearly established constitutional right." *Mata, 427 F.3d at 749*. This principle also clearly "applies to pretrial detainees through the *due process clause of the Fourteenth Amendment*." *Howard v. Dickerson, 34 F.3d 978, 980 (10th Cir. 1994)* (citing *Garcia, 768 F.2d at 307*); *see also Olsen, 312 F.3d at 1315* ("The right to custodial medical care is clearly established."); *Martin v. Bd. of Cnty. Comm'rs of Cnty. of Pueblo, 909 F.2d 402, 406 (10th Cir. 1990)* (upholding denial of qualified immunity on plaintiff's failure to provide medical care claim because *Garcia* "clearly established" that pretrial detainees receive the same protection under the *Fourteenth Amendment* as convicted inmates under the *Eighth Amendment*).

The Defendants argue preexisting authority did not give them adequate notice that they could be deliberately indifferent by failing to summon medical care within a three-minute period. We disagree. ***HN65*** The law can be clearly established even when "the very action in question" has not "previously been held unlawful." *Hope v. Pelzer, 536 U.S. 730, 739, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002)* [**75] (quoting *Anderson v. Creighton, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)*). As long as [*434] the unlawfulness of the Defendants' actions was "apparent" "in light of pre-existing law," then qualified immunity is inappropriate. *Id.* (quoting *Anderson, 483 U.S. at 640*); *see also Weigel v. Broad, 544 F.3d 1143, 1154-55 (10th Cir. 2008)* (citing *Hope* with approval and denying qualified immunity on excessive force claim).

Here, the contours of the right are clearly established such that any reasonable officer in the Defendants' position (and with their training) would have known that failing to check Mr. Booker's vital signs, perform CPR, or seek medical care for three minutes when he was limp and unconscious as a result of the Defendants' use of force could violate the Constitution. *See Estate of Owensby, 414 F.3d at 603* (arresting officers' six-minute delay in seeking medical care for arrestee who died of asphyxiation could evince deliberate indifference); *see also McRaven, 577 F.3d at 983* (denying qualified immunity where officer "made no attempt to resuscitate" the prisoner "for seven minutes before paramedics arrive[d]"); *Bozeman, 422 F.3d at 1273* ("We also conclude that the Officers, who knew [the prisoner] [**76] was unconscious and not breathing and who then failed for fourteen minutes to check [his] condition, call for medical assistance, administer CPR or do anything else to help, disregarded the risk facing [him] in a way that exceeded gross negligence."); *Tlamka, 244 F.3d at 633* ("Based on the obvious and serious nature of [the prisoner's] condition, the corrections officers' alleged failure to even approach Tlamka during the maximum 10-minute period would rise to a showing of deliberate indifference.").

In light of the foregoing, any reasonable officer in the Defendants' position—having rendered Mr. Booker unconscious by use of force with at least a two-minute carotid neck hold, roughly 140 pounds of pressure on his back, and an eight-second taser stun—should have known that failing to check Mr. Booker's vitals or seek immediate medical attention could evince deliberate indifference to a serious medical need. Accordingly, the conduct alleged by the Plaintiffs—if proven at trial and accepted by the jury—violated clearly established law.

* * *

In sum, we conclude the Defendants[33] are not entitled to qualified immunity on Plaintiffs' claim for failure to provide medical care. ***HN66*** Where, as here, [**77] "disputed material facts implicate [both] of the two questions of whether a serious medical need existed [and] whether an officer was deliberately indifferent to it, a court may not grant summary judgment." *Olsen, 312 F.3d at 1315-16*. We therefore affirm the district court's denial of summary judgment on this claim.

To be clear, our decision is based on what a reasonable jury *could* find, not what a reasonable jury *will* find. As the district court found, this case is rife with disputed fact issues—many of which surround the Plaintiffs' claim for failure to provide medical care. For this reason, this issue is appropriate for trial, not summary judgment.

E. ***Sergeant Rodriguez Is Not Entitled to Qualified Immunity on Plaintiffs' Supervisory Liability Claim***.

The Defendants contend Sergeant Rodriguez is entitled to qualified immunity on the Plaintiffs' claim for supervisory liability because she lacked the requisite mental [*435] culpability [**78] and the law was not clearly established. We disagree.

1. **Legal Standard**

HN67 "A *§ 1983* defendant sued in an individual capacity may be subject to personal liability and/or supervisory liability." *Brown v. Montoya, 662 F.3d 1152, 1163 (10th Cir. 2011)*. *Section 1983*, however, "does not authorize liability under a theory of respondeat superior." *Schneider v. City of Grand Junction Police Dept., 717 F.3d 760, 767 (10th Cir. 2013)* (quoting *Brown, 662 F.3d at 1164*); *see also Ashcroft v. Iqbal, 556 U.S. 662, 677, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* ("Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct.").

"The plaintiff therefore must show an 'affirmative link' between the supervisor and the constitutional violation." *Schneider, 717 F.3d at 767* (citing *Dodds v. Richardson, 614 F.3d 1185, 1195 (10th Cir. 2010)*). This requires "more than a supervisor's mere knowledge of his subordinate's conduct." *Id.* (quotations omitted). Rather, a plaintiff must satisfy "three elements . . . to establish a successful *§ 1983* claim against a defendant based on his or her supervisory responsibilities: (1) personal involvement; (2) causation; and (3) state of mind." *Id.*; [**79] *see also Dodds, 614 F.3d at 1195*.

The contours of the first requirement for supervisory liability are still somewhat unclear after ***HN68*** *Iqbal*, which "articulated a stricter liability standard for . . . personal involvement." *Schneider, 717 F.3d at 768*. We need not define those contours here because, even if "direct participation" is not "necessary" to satisfy this element, *Pahls v. Thomas, 718 F.3d 1210, 1225 (10th Cir. 2013)*, surely it is sufficient.

HN69 The second element "requires the plaintiff to show that the defendant's alleged action(s) caused the constitutional violation" by setting "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." *Schneider, 717 F.3d at 768* (quotations omitted); *see also* Martin A. Schwartz, *Section 1983 Litig. Claims & Defenses*, § 7.19[D] (2014) (supervisory liability standards "only survive *Iqbal* to the extent that they authorize *§ 1983* liability against a supervisory official on the basis of the supervisor's own unconstitutional conduct, or at least, conduct that set the unconstitutional wheels in motion").

HN70 The third element "requires the plaintiff to show [**80] that the defendant took the alleged actions with the requisite state of mind," *Schneider, 717 F.3d at 769*, which "can be no less than the

[33] Because each of the Defendants participated in the use of force and had the opportunity to observe Mr. Booker's condition immediately thereafter, *see supra* Part III.B.2, we affirm the district court's denial of summary judgment with respect to all Defendants.

mens rea required" of the subordinates to commit the underlying constitutional violation, *Porro v. Barnes, 624 F.3d 1322, 1328 (10th Cir. 2010)*.

2. **Analysis**

HN71 To establish supervisory liability, the Plaintiffs must show Sergeant Rodriguez's (1) personal involvement, (2) causation, and (3) the requisite state of mind with respect to either the excessive force or failure to provide medical care claims. *See Schneider, 717 F.3d at 767*.

Our earlier conclusions that a reasonable jury could find Sergeant Rodriguez actively participated in—and failed to intervene and prevent—the use of excessive force (*see supra* at Parts III.B.2 & III.C.2.a.i.2),[34] satisfies the first and second [*436] elements. Similarly, our earlier conclusion that a reasonable jury could find Sergeant Rodriguez exhibited excessive zeal—by using the taser on Mr. Booker for 60 percent longer than the recommended time period when he was no longer resisting and fully subdued by handcuffs, Deputy Robinette's weight, and Deputy Grimes's carotid neck hold, *see supra* Part III.C.2.a.i—satisfies the third [**81] element. Finally, our conclusion regarding clearly established law, *see supra* Part III.C.2.b, also precludes summary judgment on this claim. *See* Schwartz, § 7.19[E] (***HN72*** "Under the holding in *Iqbal* that a supervisory official may be held liable under *§ 1983* only for his or her unconstitutional conduct, there is no longer any need to contemplate whether qualified immunity as applied to supervisory officials requires special or separate consideration.").

Accordingly, we hold that Sergeant Rodriguez is not entitled to qualified immunity on the Plaintiffs' claim for supervisory liability.

IV. CONCLUSION

For the foregoing reasons, we affirm the district court's denial of qualified immunity on the Plaintiffs' excessive force, failure to provide medical care, and supervisory liability claims. We deny the Defendants' motion to seal portions of the appendix.[35]

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[34] Although we focus on excessive force here, Sergeant Rodriguez could also be held liable in her capacity as a supervisor on the Plaintiffs' claim for failure to provide medical care because (1) both she and her subordinates failed to provide medical care after using deadly force against Mr. Booker, which a reasonable jury could find (2) deprived Mr. Booker of a constitutional right, and (3) displayed deliberate indifference to Mr. Booker's medical needs by failing to convey the critical nature of his condition to the medical staff. Thus, for the same reasons discussed above in our consideration of the Plaintiffs' claim for failure to provide medical care, *see supra* Part III.D.2, we hold that Sergeant Rodriguez is not entitled to summary [**82] judgment on Plaintiffs' supervisory liability claim.

[35] The Defendants moved to file portions of the appendix under seal. The Clerk of this Court provisionally granted the Defendants' motion, with a final decision to be made by this panel. We now deny that motion.

HN73 Judicial records are presumptively open to the public. *See Colony Ins. Co. v. Burke, 698 F.3d 1222, 1241 (10th Cir. 2012)* ("Courts have long recognized a common-law right of access to judicial records." (quotations omitted)). A party seeking to restrict access must therefore "show 'some significant interest that outweighs the presumption.'" *Id.* (quoting *Mann v. Boatright, 477 F.3d 1140, 1149 (10th Cir. 2007)*). This "burden of justifying that secrecy" remains on the party opposed to access even after a court has previously determined [**83] that sealing is appropriate. *United States v. Pickard, 733 F.3d 1297, 1302 (10th Cir. 2013)*.

The Defendants' only stated reason for filing these documents under seal is that they were submitted under seal to the district court. ***HN74*** "This Court, of course, is not bound by the district court's decision to seal certain documents below, and retains its own 'authority to decide whether the parties may file documents under seal in this Court.'" *Colony, 698 F.3d at 1241* (quoting *Helm v. Kansas, 656 F.3d 1277, 1292 (10th Cir. 2011)*). Because the Defendants fail to make any additional showing of "good cause," we deny their motion to file these portions of the appendix under seal.

Felders v. Malcom

United States Court of Appeals for the Tenth Circuit

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Subsequent History: US Supreme Court certiorari denied by, Motion granted by *Malcom v. Felders, 135 S. Ct. 975, 190 L. Ed. 2d 890, 2015 U.S. LEXIS 197 (U.S., 2015)*

Prior History: [**1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH. (D.C. NO. 2:08-CV-00993-CW).
Felders v. Bairett, 885 F. Supp. 2d 1191, 2012 U.S. Dist. LEXIS 111456 (D. Utah, 2012)

LexisNexis® Headnotes

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

HN1 The law has been clearly established that, absent probable cause, facilitating a dog's entry into a vehicle during a dog sniff constitutes an unconstitutional search.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

HN2 An appellate court reviews a district court's qualified immunity determinations de novo, viewing the evidence in the light most favorable to the plaintiff as the nonmoving party.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

HN3 In the summary judgment context, to defeat an assertion of qualified immunity, the plaintiff bears the burden of showing both (1) a violation of a constitutional right; and (2) that the constitutional right was clearly established at the time of the violation. The burden then shifts to the defendant to show that there are no material issues of fact that would defeat the claim of qualified immunity. This requires the defendant to show that there are no disputes of material fact as to whether his conduct was objectively reasonable in light of clearly established law and the information known to the defendant at the time. In short, although the court reviews the evidence in the light most favorable to the nonmoving party, the record must clearly demonstrate the plaintiff has satisfied his heavy two-part burden; otherwise, the defendants are entitled to qualified immunity.

Civil Procedure > Appeals > Summary Judgment Review > Appealability

Civil Procedure > Appeals > Appellate Jurisdiction > General Overview

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

HN4 Denials of qualified immunity may be directly appealed to the extent they turn on an issue of law. On interlocutory review, an appellate court ordinarily does not consider questions about what facts a jury might reasonably find—that is the exclusive job of the district court. Denial of qualified immunity is not immediately appealable if the order in question resolved a fact-related dispute about the pretrial record, namely, whether the evidence in the pretrial record was sufficient to show a genuine issue of fact for trial.

Civil Procedure > Appeals > Summary Judgment Review > Appealability

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

HN5 In the qualified immunity context, if the district court holds that a reasonable jury could find certain facts in favor of the plaintiff, an appellate court generally takes these facts as true, even if the record would suggest otherwise upon the appellate court's de novo review. Where the case arises from the denial of the officers' motion for summary judgment, the appellate court views the facts in the light most favorable to the nonmoving party. The appellate court's jurisdiction is therefore limited to a review of the district court's abstract legal conclusions, in particular, whether the district court's factual determinations, taken as true, suffice to show a violation of law, and, further, whether that law was clearly established at the time of the alleged violation. Finally, it should be remembered, determining whether there is a genuine issue of material fact at summary judgment is itself a question of law.

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

HN6 The law has been clearly established that facilitating a dog's entry into a car prior to establishing probable cause violates the *Fourth Amendment*.

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

Civil Rights Law > ... > Scope > Law Enforcement Officials > Search & Seizure

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Probable Cause

HN7 In the qualified immunity context, to determine whether an officer conducted an unconstitutional search, a court proceeds under a two-part inquiry: First, the court asks whether the officers had probable cause to search the plaintiff's property. If the court concludes that probable cause was lacking, the court then must determine whether the plaintiff's rights were clearly established, which the court approaches by asking whether the officers arguably had probable cause. Arguable probable cause exists where a reasonable police officer in the same circumstances and with the same knowledge and possessing the same knowledge as the officer in question could have reasonably believed that probable cause existed in light of well-established law.

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Probable Cause

HN8 An officer's mistake of law cannot serve as a basis for probable cause, because a mistake of law by the person charged with enforcing it is not objectively reasonable and therefore violates the *Fourth Amendment*. But this does not disturb the notion that qualified immunity still protects officials from civil liability for mistakes of law if reasonably made.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Probable Cause

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

HN9 A search of a vehicle without probable cause violates the *Fourth Amendment*. Probable cause to search a vehicle is established if, under the totality of the circumstances, there is a fair probability that the car contains contraband or evidence. A police officer has probable cause to conduct a search when the facts available to him would warrant a person of reasonable caution in the belief that contraband or evidence of a crime is present.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Probable Cause

HN10 Probable cause does not require the suspect's guilt to be ″more likely true than false.″ Instead, the relevant question is whether a ″substantial probability″ existed that the suspect committed the crime, requiring something ″more than a bare suspicion.″ Officers must consider the totality of the evidence known to them when considering probable cause, and in cases where they have both inculpatory and exculpatory evidence they must not ignore the exculpatory evidence in order to find probable cause.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Probable Cause

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

HN11 A drug dog sniff outside a car during a lawful traffic stop is not a search. A dog sniff of the exterior of an automobile during a lawful traffic stop does not implicate legitimate privacy interests. A dog sniff of the exterior of a vehicle parked in a public place does not require reasonable suspicion because it is not a *Fourth Amendment* intrusion. An exterior sniff therefore does not require a showing of probable cause, and a positive alert by a drug dog is generally enough, by itself, to give officers probable cause to search the vehicle. The question—similar to every inquiry into probable cause—is whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime. A sniff is up to snuff when it meets that test.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Probable Cause

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

HN12 It is equally well-established that officers cannot rely on a dog's alert to establish probable cause if the officers open part of the vehicle so the dog may enter the vehicle or otherwise facilitate its entry. It is a *Fourth Amendment* violation for a narcotics detection dog to jump into a car because of something the police did, like training the dog to jump into cars as part of the search or facilitating or encouraging the jump but no violation occurs as long as the canine enters the vehicle on its own initiative and is neither encouraged nor placed into the vehicle by law enforcement.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Probable Cause

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

HN13 A trained dog's alert from areas where the motorist has no legitimate expectation of privacy—the exterior of the car or the interior of the car that the motorist has voluntarily exposed to the dog—provides sufficient probable cause to search the interior. But where there is evidence that it is not the driver but the officers who have created the opportunity for a drug dog to go where the officer himself cannot go, the *Fourth Amendment* protects the driver's right to privacy to the interior compartment until the dog alerts from the exterior of the car.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Probable Cause

HN14 The court's cases allow officers as part of a common investigation to pool their collective knowledge in establishing probable cause. For

example, an officer is entitled to rely on a radio request to stop and detain someone suspected of a crime without independently confirming that probable cause to arrest or detain exists. This so-called ″collective knowledge″ or ″fellow officer″ rule encompasses both ″vertical″ and ″horizontal″ components. Vertical collective knowledge exists if one officer actually has probable cause and instructs another officer to act without communicating the information he knows that would justify the action. Horizontal collective knowledge, in contrast, exists when many officers have pieces of the probable cause puzzle, but no single officer possesses information sufficient for probable cause. In the latter situation, courts may consider whether officers who are acting together collectively possess sufficient information to support probable cause, provided that they have actually communicated the information to each other. Horizontal collective knowledge only applies if information is shared.

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Probable Cause

HN16 The ″arguable probable cause″ standard articulates the standard the court uses to determine whether a government officer's conduct violated clearly established law, i.e., whether a reasonable officer could conclude that probable cause existed under the circumstances. In contrast, the ″good faith defense″ may entitle an officer to qualified immunity because, if it applies, the officer did not commit a constitutional violation.

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

HN15 A police officer who acts in reliance on what proves to be the flawed conclusions of a fellow police officer may nonetheless be entitled to qualified immunity as long as the officer's reliance was objectively reasonable. Police officers are entitled to rely upon information relayed to them by other officers in determining whether there is reasonable suspicion to justify an investigative detention or probable cause to arrest but he reliance upon this information must be objectively reasonable.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Exclusionary Rule

HN17 The ″good faith″ an officer must possess in the context of the exclusion of evidence from an illegal search only applies where the police act with an objectively ″reasonable good-faith belief″ that their conduct is lawful. In contrast, where the police exhibit deliberate, reckless, or grossly negligent disregard for *Fourth Amendment* rights, the good faith exception to the exclusionary rule does not apply.

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Exclusionary Rule

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

HN18 The same standard of objective reasonableness from the ″good faith″ exception to the exclusionary rule applies in the qualified immunity context. And the court has applied the same ″objective reasonableness″ standard from the Leon context to qualified immunity appeals. Accordingly, the ″good faith″ defense shields objectively reasonable good faith reliance on the statements of a fellow officer, but does not protect deliberate, reckless, or grossly negligent reliance on the flawed conclusions of a fellow officer.

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Exclusionary Rule

HN19 The law clearly provides that, to be entitled to a good faith defense, reliance on a fellow officer's conclusions must be objectively reasonable.

Criminal Law & Procedure > Criminal Offenses > Obstruction of Administration of Justice > General Overview

HN20 See *Utah Code Ann. § 76-8-306*.

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

HN21 The second prong of the qualified immunity analysis shields a governmental official from liability unless at the time of the challenged conduct, the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right. And for a law to be clearly established in the Tenth Circuit, 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. But still, officers may be on notice that their conduct violates the law even in ″novel factual circumstances.″ The focus is on whether the officer had fair notice that his or her conduct was unlawful.

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

HN22 In the qualified immunity context, in defining the ″clearly established right″ purportedly violated, a court must take special care to define the clearly established right at issue on the basis of the specific context of the case and, in so doing, avoid defining the case's context in a manner that imports genuinely disputed factual propositions.

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Probable Cause

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

HN23 The law has been clearly established that facilitating a dog's entry into a vehicle without first establishing probable cause constitutes an improper search.

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

HN24 When the district court concludes that a reasonable jury could view the facts a certain way, an appellate court takes them as true. An appellate court reviewing a denial of summary judgment for qualified immunity must view the evidence in the light most favorable to the nonmoving party and cannot ignore key evidence offered by the party opposing the summary judgment motion.

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Judges: Before TYMKOVICH, SEYMOUR, and GORSUCH, Circuit Judges.

Opinion by: TYMKOVICH

Opinion

[*875] **TYMKOVICH**, Circuit Judge.

A Utah state trooper stopped Sherida Felders for speeding while on a trip from California to Colorado. Based on Felders's demeanor and several perceived inconsistences in the stories of Felders and her passengers as to why they were traveling to Colorado, the trooper, Brian Bairett, asked to search Felders's car for drugs. After

Felders refused, Bairett called for assistance from K-9 Unit officer Jeff Malcom to conduct a dog sniff on Felders's Jeep. The ensuing two-hour search yielded no drugs.

Felders and her passengers, Elijah Madyun and Delarryon Hansend, subsequently filed suit against Bairett and Malcom under *42 U.S.C. § 1983*. They alleged, among other claims, that both Bairett and Malcom unlawfully searched Felders's car in violation of the *Fourth Amendment*. Malcom moved for [**2] summary judgment on the *Fourth Amendment* unlawful search claim based on qualified immunity.[1]

The district court denied Malcom's motion for summary judgment. The district court found as a matter of law that Malcom could not establish probable cause to search the car prior to conducting the dog sniff and that material facts were in dispute regarding (1) whether Malcom's canine, Duke, alerted prior to jumping into the vehicle; and (2) whether Malcom facilitated Duke's entry into the vehicle prior to establishing probable cause.

Malcom filed this interlocutory appeal from the district court's denial of qualified immunity. He argues that the district court erred in denying his motion for summary judgment because he had probable cause to search the car prior to conducting the dog sniff and, alternatively, that the law did not clearly establish that his actions during the sniff violated the *Fourth Amendment*.

We agree [**3] with the district court that Malcom did not have probable cause to search the vehicle prior to conducting the sniff. The information Bairett provided Malcom at most established a reasonable suspicion justifying the detention, and Malcom did not independently develop additional facts prior to conducting the sniff that could support a search. As to the permissibility of Malcom's actions during the dog sniff, genuine issues of material fact regarding Duke's alert and Malcom's facilitation of Duke's entry into the vehicle preclude us from finding that Malcom is entitled to qualified immunity as a matter of law.

Accordingly, exercising jurisdiction under *28 U.S.C. § 1291*, we AFFIRM the district court's summary judgment decision denying Malcom qualified immunity.

I. Background

On a November morning, Trooper Bairett stopped Sherida Felders, a 54-year-old woman, on Utah's I-15 for speeding. During the traffic stop, Bairett made several observations about Felders. According to Bairett, she was nervous, she would not maintain eye contact with him, a strong odor of air freshener was coming from her vehicle, and affixed to her car was a license plate ring with ″Jesus″ written on it. Based on these [**4] observations, Bairett became [*876] suspicious that Felders was carrying drugs in her car.

After issuing Felders a speeding ticket, Bairett asked to speak with her two passengers, Elijah Madyun and Delarryon Hansend, ages 17 and 18. Madyun and Hansend were friends of Felders's grandson. Based on several perceived inconsistencies between the passengers' narratives and Felders's story regarding the details of their trip, Bairett concluded he had a reasonable suspicion that Felders was transporting drugs. He then directly asked Felders if she had cocaine in the car. Felders replied that she did not. She also denied having other drugs in the vehicle. Following this exchange, Bairett asked Felders if he could search her car. Felders refused. Bairett

[1] Both Bairett and Malcom filed motions for summary judgment based on qualified immunity. Only Malcom appealed the district court's summary judgment order. Accordingly, we focus our attention only on the district court's findings as they relate to Malcom's motion for summary judgment.

then called for a K-9 unit to bring a dog to conduct a sniff of the car. Deputy Malcom responded to Bairett's call and arrived at the site of the traffic stop approximately thirty minutes later.

When Malcom arrived, Bairett told him the facts of the encounter and that Bairett believed he had probable cause to search the car for drugs:

> I wouldn't have called you out on this one if I wasn't pretty dang sure there's something going on. This lady—you know, **[**5]** I walk up to the car and I see air fresheners in the center console and . . . I start talking to her, you know, just ″So where, you heading to?″ ″Oh going to Colorado,″ blah, blah, blah.
>
> You know, she won't look at me when she's talking to me, she looks down, looks away (inaudible) going on here. That's what we're here to (inaudible).
>
> Two kids in the car, about 20, with tats on them. . . . And I go up—she says—I says, ″Who are these two in the car,″ and she says, ″My grandkid's friends.″ I says, ″You're [taking] your grandkids' friends to Colorado? What's the matter with your grandkids going to Colorado″ (inaudible). ″Oh, they already flew out.″ ″So you're just taking your grandkids' friends to meet them up there?″ ″Yeah.″ ″Okay.″
>
> So I go up and talk to them and say, ″So who's this lady back here?″ ″Oh, that's our cousin.″ I asked her when did they plan on coming back to California. She says, ″Oh, we're going to come back—we're going to stay until the 1st of December, through the holiday.″ Okay. So I go up and talk to them. ″Oh, we're coming home Sunday—this Sunday.″ . . . He goes, ″Oh [the **[**6]** grandkids] live in Colorado . . . But she said they already flew out. Just a whole bunch of inconsistencies.
>
> So I come back to her and I said . . . ″Ma'am, do you have cocaine in that vehicle?″ She goes . . . (inaudible) . . . and face rubbing and . . . so I go through the whole thing and she just refuses to answer me on the cocaine question.
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> ***
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> You know, the—all the symptoms are there, just huge symptoms. So if we don't find anything—I said, ″So there's nothing illegal in the vehicle?″ And she says, ″No.″ I said, ″So you won't mind if I search the vehicle, then, will you?″ She goes, ″No, you can't search my vehicle.″ I said, ″Well, I've got enough here to detain you until a dog gets here.″
>
> I basically—to me, I've got probable cause to search the vehicle without her permission or not, so I figured the dog would be the best route to go right now.

Aplt. App. 204. The conversation and subsequent search were captured by the patrol car's dashboard video camera.

After hearing the story, Malcom asked Bairett to ″pull the two kids out of the car.″ *Id*. Bairett responded, ″Yeah, that's **[*877]** what I was planning on doing. When they get out of the car, I'll leave the doors open.″ *Id*. The video footage taken **[**7]** from Bairett's car depicts Bairett opening the passenger doors and physically preventing the rear passenger from closing the door. Bairett also directed Felders to remove her Chihuahua from the rear hatch of the Jeep. In doing so, she left the back hatch open. Prior to initiating the dog sniff, Malcom commented to Bairett, ″[N]ice of them to leave the door open for you,″ to which Bairett responded, ″Yeah it was, wasn't it?″ Aple. Supp. App. 14.

Malcom then conducted the dog sniff on Felders's car. After performing a pre-stimulation routine to

prep the dog, Malcom took Duke on a leash to the right rear bumper and backed along the right side of the car, leaving about one foot of space between his body and the car. Duke almost immediately jumped in the vehicle through the open right rear passenger door, but the video does not show whether Duke made any sounds or movements before jumping into the vehicle. Duke proceeded to the rear of the car and appeared to be ″in odor,″ or taking deep breaths of air to pinpoint an odor. Aple. Supp. App. 32. Duke then alerted in the center console, which contained two bags of jerky. After removing the jerky, Malcom performed the search again. Duke alerted [**8] again between the seat and center console, and eventually sat down and indicated by the driver's door.

The officers then searched the vehicle for several hours but found no drugs.

II. Analysis

Malcom argues that the district court erred in denying him qualified immunity because (1) he had probable cause to search the vehicle prior to conducting the dog sniff and, alternatively, (2) it was not clearly established law that his actions during the dog sniff violated the plaintiffs' *Fourth Amendment* rights.

We agree with the district court that Malcom did not have probable cause to search the car prior to Duke's alert and that ***HN1*** the law was then clearly established that, absent probable cause, facilitating a dog's entry into a vehicle during a dog sniff constitutes an unconstitutional search. Taking the facts in the light most favorable to Felders, we conclude that fact questions exist regarding the timing of Duke's alert and Malcom's possible facilitation prior to an alert. As a result, we affirm the district court's decision to deny Malcom summary judgment on qualified immunity grounds.

A. Qualified Immunity Standard of Review

HN2 We review the district court's qualified immunity determinations de [**9] novo, viewing the evidence in the light most favorable to the plaintiff as the nonmoving party. *Mick v. Brewer, 76 F.3d 1127, 1134-35 (10th Cir. 1996)*; *Kaufman v. Higgs, 697 F.3d 1297, 1300 (10th Cir. 2012)*. ***HN3*** To defeat an assertion of qualified immunity, the plaintiff bears the burden of showing both (1) a violation of a constitutional right; and (2) that the constitutional right was clearly established at the time of the violation. *Kaufman, 697 F.3d at 1300*. The burden then shifts to the defendant to show that there are no material issues of fact that would defeat the claim of qualified immunity. *Brewer, 76 F.3d at 1134*. ″This requires the defendant to show that there are no disputes of material fact as to whether his conduct was objectively reasonable in light of clearly established law and the information known to the defendant at the time.″ *Id*. In short, although we review the evidence in the light most favorable to the nonmoving party, the ″record must clearly demonstrate the [*878] plaintiff has satisfied his heavy two-part burden; otherwise, the defendants are entitled to qualified immunity.″ *Medina v. Cram, 252 F.3d 1124, 1128 (10th Cir. 2001)*.

B. Jurisdictional Prerequisites

HN4 Denials [**10] of qualified immunity may be directly appealed to the extent they turn on an issue of law. *Pahls v. Thomas, 718 F.3d 1210, 1228 (10th Cir. 2013)* (citing *Mitchell v. Forsyth, 472 U.S. 511, 530, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985)*). On interlocutory review, we ordinarily do not consider questions about what facts a jury might reasonably find—that is the exclusive job of the district court. *Lewis v. Tripp, 604 F.3d 1221, 1225 (10th Cir. 2010)*; *see also Johnson v. Jones, 515 U.S. 304, 307, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995)* (holding that denial of qualified immunity is not immediately appealable if ″[t]he order in question resolved a *fact*-related dispute about the pretrial record, namely, whether . . . the evidence in the pretrial record was sufficient to show a genuine issue of fact for trial.″).

As a result, ***HN5*** if the district court holds that a reasonable jury could find certain facts in favor of the plaintiff, we generally take these facts as true, even if the record would suggest otherwise upon our de novo review. *Lewis, 604 F.3d at 1225*; *see also Plumhoff v. Rickard, 134 S. Ct. 2012, 2017, 188 L. Ed. 2d 1056 (2014)* (″Because this case arises from the denial of the officers' motion for summary judgment, we view the facts in the light most favorable **[**11]** to the nonmoving party . . . .″). Our jurisdiction is therefore limited to a review of the district court's abstract legal conclusions, in particular, ″whether the district court's factual determinations, taken as true, 'suffice to show a violation of law,' and, further, 'whether that law was clearly established at the time of the alleged violation.'″ *Pahls, 718 F.3d at 1228* (quoting *Lewis, 604 F.3d at 1225*); *Plumhoff, 134 S. Ct. 2012, 2018, 188 L. Ed. 2d 1056*.[2] Finally, it should be remembered, ″[d]etermining whether there is a genuine issue of material fact at summary judgment is itself a question of law.″ *Lewis, 604 F.3d at 1225* (citing *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*) (internal quotation marks omitted).

Here, the district court found that it was clearly established law that an improper search occurs if an officer facilitates a drug dog's entry into a vehicle before probable cause has been established. The court also found as a matter of law that Malcom did not have probable cause prior to conducting the sniff. But the district court ultimately denied summary judgment because issues of fact remained as to whether Malcom conducted an unconstitutional search, based on the timing of Duke's alert and Malcom's possible facilitation of Duke's entry into the car.

We have jurisdiction to consider Malcom's legal challenges to the district **[*879]** court's determination that (1) he lacked **[**13]** probable cause prior to conducting the dog sniff; (2) facilitating the entry of a drug sniffing dog into a vehicle without probable cause violates clearly established law for purposes of qualified immunity; and (3) viewing the facts in the light most favorable to Felders, issues of material fact existed as to whether Malcom facilitated Duke's entry and whether Duke alerted prior to entering the car. Taking all facts in the light most favorable to Felders, we agree that Malcom did not have probable cause prior to conducting the dog sniff, ***HN6*** the law was clearly established that facilitating a dog's entry into a car prior to establishing probable cause violates the *Fourth Amendment*, and that issues of fact remain regarding the timing of Duke's alert and Malcom's possible facilitation.

We address each issue in that order.

C. Probable Cause to Search

1. Legal Framework

HN7 To determine whether Malcom conducted an unconstitutional search, we proceed under a two-part inquiry: ″First, we ask whether the officers had probable cause [to search the plaintiff's property]. If we conclude that probable cause was lacking, we then must determine whether [the plaintiff]'s rights were clearly established, which **[**14]** we approach by asking whether the officers arguably had probable cause.″

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[2] We have held that this rule permits at least three exceptions. *See Lewis, 604 F.3d at 1225*. In *Lewis*, we stated that we may consider the facts underlying the district court's order where (1) the district court ″fails to identify the particular charged conduct that it deemed adequately supported by the record″; (2) the ″version of events″ the district court found a reasonable jury could believe is ″blatantly contradicted by the record″; and (3) if the ″reasonable factual inferences″ are **[**12]** based on a complaint considered pursuant to a motion to dismiss. *Lewis, 604 F.3d at 1225-26* (internal citations and quotation marks omitted). None of these exceptions apply to the instant case. Although Felders urges us not to adopt Malcom's version of the facts because it is ″blatantly contradicted by the video evidence in the record,″ Aple. Br. at 26 (citing *Scott v. Harris, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007)*), we need not address this issue because we view the facts in the light most favorable to Felders, the nonmoving party.

Kaufman, 697 F.3d at 1300.[3] Arguable probable cause exists where "a reasonable police officer in the same circumstances and with the same knowledge and possessing the same knowledge as the officer in question *could* have reasonably believed that probable cause existed in light of well-established law." *Fleming v. Livingston Cnty., 674 F.3d 874, 880 (7th Cir. 2012)* (citations and internal quotation marks omitted); *see also Cortez v. McCauley, 478 F.3d 1108, 1120 (10th Cir. 2007)* (en banc).

HN9 A search of a vehicle without probable cause violates the *Fourth Amendment*. *United States v. Ludwig, 641 F.3d 1243, 1250 (10th Cir. 2011)*. **[**15]** Probable cause to search a vehicle is "established if, under the totality of the circumstances, there is a fair probability that the car contains contraband or evidence." *United States v. Chavez, 534 F.3d 1338, 1344 (10th Cir. 2008)*; *see also Florida v. Harris, 133 S. Ct. 1050, 1055, 185 L. Ed. 2d 61 (2013)* ("A police officer has probable cause to conduct a search when the facts available to him would warrant a person of reasonable caution in the belief that contraband or evidence of a crime is present." (citations and internal quotation marks omitted)). ***HN10*** Probable cause does not "require the suspect's guilt to be 'more likely true than false.' Instead, the relevant question is whether a 'substantial probability' existed that the suspect committed the crime, requiring something 'more than a bare suspicion.'" *Kerns v. Bader, 663 F.3d 1173, 1188 (10th Cir. 2011)* (citations omitted). "[O]fficers must consider the totality of the evidence known to them when considering probable cause, and in cases where they have both inculpatory and exculpatory evidence they must not ignore the exculpatory evidence in order to find probable cause." *Williams ex rel. Allen v. Cambridge Bd. of Educ., 370 F.3d 630, 637 (6th Cir. 2004)*.

[*880] ***HN11*** A **[**16]** drug dog sniff outside a car during a lawful traffic stop is not a search. *See Illinois v. Caballes, 543 U.S. 405, 409, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005)* (dog sniff of exterior of automobile during lawful traffic stop did not "implicate legitimate privacy interests"); *United States v. Engles, 481 F.3d 1243, 1245 (10th Cir. 2007)* ("A dog sniff of the exterior of a vehicle parked in a public place does not require reasonable suspicion because it is not a *Fourth Amendment* intrusion."). An exterior sniff therefore does not require a showing of probable cause, and a positive alert by a drug dog "is generally enough, by itself, to give officers probable cause to search the vehicle." *Ludwig, 641 F.3d at 1250-51* (citations omitted); *Harris, 133 S. Ct. at 1058* ("The question—similar to every inquiry into probable cause—is whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime. A sniff is up to snuff when it meets that test.").

HN12 But it is equally well-established that officers cannot rely on a dog's alert to establish probable cause if the officers open part of the vehicle so the dog **[**17]** may enter the vehicle or otherwise facilitate its entry. *See United States v. Vazquez, 555 F.3d 923, 930 (10th Cir. 2009)* (no constitutional violation where "(1) the dog's leap into the car was instinctual rather than orchestrated, and (2) the officers did not ask the driver to open the point of entry, such as a hatchback or window, used by the dog."); *see also United States v. Winningham, 140 F.3d 1328, 1331 (10th Cir. 1998)* (dog's jump into car through door officers opened and where evidence indicated a desire to facilitate the dog's entrance into the interior violated the *Fourth Amendment*); *cf. United States v. Stone, 866 F.2d 359, 364 (10th Cir. 1989)*

[3] We recently determined that ***HN8*** an officer's mistake of law cannot serve as a basis for probable cause, because a mistake of law by the person charged with enforcing it is not objectively reasonable and therefore violates the ***Fourth Amendment***. *See United States v. Nicholson*, 721 F.3d 1236, 1239 (10th Cir. 2013). But this does not disturb the notion that qualified immunity still protects officials from civil liability for mistakes of law if reasonably made. *See Herrera v. City of Albuquerque*, 589 F.3d 1064, 1070 (10th Cir. 2009).

(dog's instinctive leap into hatchback of car that defendant opened, absent any evidence that officers encouraged the dog's entry or asked defendant to open door so dog could enter did not violate the *Fourth Amendment*); *United States v. Sharp, 689 F.3d 616, 619-20 (6th Cir. 2012)*, *cert. denied*, *133 S. Ct. 777, 184 L. Ed. 2d 514 (2012)* ("It is a *Fourth Amendment* violation for a narcotics detection dog to jump into a car because of something the police did, like training the dog to jump into cars as part of the search or facilitating or encouraging the [**18] jump" but no violation occurs "as long as the canine enters the vehicle on its own initiative and is neither encouraged nor placed into the vehicle by law enforcement" (citations omitted)); *United States v. Pierce, 622 F.3d 209, 213-15 (3d Cir. 2010)* (same); *United States v. Lyons, 486 F.3d 367, 373-74 (8th Cir. 2007)* (same).

In other words, ***HN13*** a trained dog's alert from areas where the motorist has no legitimate expectation of privacy—the exterior of the car or the interior of the car that the motorist has voluntarily exposed to the dog—provides sufficient probable cause to search the interior. But where there is evidence that it is not the driver but the officers who have "create[d] the opportunity for a drug dog to go where the officer himself cannot go," *Lyons, 486 F.3d at 373* (citations and internal quotation marks omitted), the *Fourth Amendment* protects the driver's right to privacy to the interior compartment until the dog alerts from the exterior of the car. *Compare Winningham, 140 F.3d at 1331* (illegal search where officers opened doors of a van, took the dog off its leash near the open door, and allowed the dog to jump into the van through the open door and sniff the interior) [**19] *and United States v. Forbes, 528 F.3d 1273, 1278 (10th Cir. 2008)* (agents directing defendant to unlock rear [*881] doors without asking for consent to search and then entering trailer with a drug sniffing dog could be an unconstitutional search), *with Lyons, 486 F.3d at 373* (no unconstitutional search where defendant opened window without any verbal order or request and no orders from officer to keep windows open), *and Sharp, 689 F.3d at 618-20* (dog jumping through already open driver's window was not an unconstitutional search, even though the dog had a known habit of jumping into open car windows, absent any evidence that police trained the dog to jump into vehicles or "did something to encourage or facilitate the jump").

2. Probable Cause to Search Prior to Duke's Alert

The district court found that Bairett did not have probable cause to search Felders's car prior to conducting the dog sniff. In response, Malcom contends he did have probable cause to search the car prior to the sniff because (1) he reasonably relied on Bairett's conclusion that probable cause to search the car for drugs existed; and, alternatively, (2) his own observations established probable cause to believe Felders had [**20] violated Utah's obstruction of justice statute by making false statements to Bairett. We examine each justification in turn.

a. Probable Cause—Drugs

Malcom first argues he could reasonably rely on Bairett's conclusion that probable cause existed to search the car for drugs. We disagree.

HN14 Our cases allow officers as part of a common investigation to pool their collective knowledge in establishing probable cause. For example, an officer is entitled to rely on a radio request to stop and detain someone suspected of a crime without independently confirming that probable cause to arrest or detain exists. *See Whiteley v. Warden, 401 U.S. 560, 91 S. Ct. 1031, 28 L. Ed. 2d 306 (1971)*; *United States v. Hensley, 469 U.S. 221, 231, 105 S. Ct. 675, 83 L. Ed. 2d 604 (1985)*. This so-called "collective knowledge" or "fellow officer" rule encompasses both "vertical" and "horizontal" components. Vertical

collective knowledge exists if one officer *actually has* probable cause and instructs another officer to act without communicating the information he knows that would justify the action. *Chavez, 534 F.3d at 1345-46*. Horizontal collective knowledge, in contrast, exists when many officers have "pieces of the probable cause puzzle, but no single officer possesses information [**21] sufficient for probable cause." *Id. at 1345*. In the latter situation, courts may consider whether officers who are acting together *collectively* possess sufficient information to support probable cause, provided that they have actually communicated the information to each other. *See United States v. Shareef, 100 F.3d 1491, 1503-05 (10th Cir. 1996)* (noting that horizontal collective knowledge only applies if information is shared).

The district court found that vertical collective knowledge did not apply because Bairett did not independently have probable cause to search Felders's vehicle. The district court also found that Malcom did not have probable cause based on horizontal collective knowledge because, before searching the car, Malcom only knew what Bairett had told him and therefore could not add anything to the collective "pool" of evidence. *Felders, 885 F. Supp. 2d at 1206*. Finally, the district court found that Malcom could not assert the "good faith defense" of reasonable reliance on information from a fellow officer because Bairett related to Malcom the material facts supporting Bairett's conclusion that probable cause existed and, in light of those facts, [*882] reliance on Bairett's [**22] conclusion was not reasonable because "Deputy Malcom was in a position to judge for himself whether there was probable cause to search the vehicle." *Id. at 1207*. The district court also concluded that Malcom did not actually rely on Bairett's assertion that probable cause existed, and so the good faith defense was unavailable. *Id.*

Malcom contends that the district court incorrectly stated and applied the collective knowledge doctrine. He argues he was entitled to rely on Bairett's flawed conclusions that Bairett had probable cause if Malcom's reliance was "objectively reasonable." Aplt. Br. at 16.[4] In other words, Malcom argues that he relied in good faith on Bairett's probable cause determination and this good faith reliance entitles him to qualified immunity. ***HN15*** A police officer who acts "'in reliance on what proves to be the flawed conclusions of a fellow police officer may nonetheless be entitled to qualified immunity as long as the officer's reliance was objectively reasonable.'" *Stearns v. Clarkson, 615 F.3d 1278, 1286 (10th Cir. 2010)* (quoting *Baptiste v. J.C. Penney Co., 147 F.3d 1252, 1260 (10th Cir. 1998)*); *Oliver v. Woods, 209 F.3d 1179, 1190-91 (10th Cir. 2000)* ("Police officers [**23] are entitled to rely upon information relayed to them by other officers in determining whether there is reasonable suspicion to justify an investigative detention or probable cause to arrest" but that "the reliance upon this information must be objectively reasonable" (citations omitted)).

The Supreme Court has held that ***HN17*** the "good faith" an officer must possess in the context of the exclusion of evidence from an illegal search only applies where the police "act with an objectively 'reasonable good-faith belief' that their conduct is lawful." *Davis v. United States, 131 S. Ct. 2419, 2427, 180 L. Ed. 2d 285 (2011)* [**24] (quoting *United States v. Leon, 468 U.S. 897, 909, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984)*); *accord Herring v. United States, 555 U.S. 135, 142, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009)*. In contrast, where the police "exhibit deliberate, reckless, or

[4] Malcom conflates the "good faith defense" of reasonable reliance upon statements made by other officers with the "arguable probable cause" standard. ***HN16*** The latter articulates the standard we use to determine whether a government officer's conduct violated clearly established law, *i.e.*, whether a reasonable officer could conclude that probable cause existed under the circumstances. *See Kaufman, 697 F.3d at 1300*. In contrast, the "good faith defense" may entitle an officer to qualified immunity because, if it applies, the officer did not commit a constitutional violation. *See Hensley, 469 U.S. at 231*.

grossly negligent disregard for *Fourth Amendment* rights," the good faith exception to the exclusionary rule does not apply. *Davis, 131 S. Ct. at 2427* (citations and internal quotation marks omitted); *Herring, 129 S. Ct. at 702*.

HN18 The same standard of objective reasonableness from the "good faith" exception to the exclusionary rule applies in the qualified immunity context. *See Messerschmidt v. Millender, 132 S. Ct. 1235, 1245, 182 L. Ed. 2d 47 & n.1 (2012)*; *see also Malley v. Briggs, 475 U.S. 335, 344-45, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986)*. And we have applied the same "objective reasonableness" standard from the *Leon* context to qualified immunity appeals. *See Davis v. Gracey, 111 F.3d 1472, 1480 (10th Cir. 1997)*. Accordingly, the "good faith" defense shields objectively reasonable good faith reliance on the statements of a fellow officer, but does not protect deliberate, reckless, or grossly negligent reliance on the flawed conclusions of a fellow officer.

[*883] We agree with the district court that Malcom is not entitled to the "good faith defense" because his **[**25]** reliance on Bairett's conclusion was not objectively reasonable. Although probable cause is based on the totality of the circumstances, all of the facts Bairett relayed to Malcom, even taken together, do not support probable cause. The facts Malcom knew—Felders's nervousness and unwillingness to look at Bairett, possible inconsistencies in travel narratives, a single air freshener, and a religious license plate frame—could justify no more than reasonable suspicion to conduct an investigative stop. A reasonable officer would not conclude that Felders was hauling drugs based on the statements or behavior of either Felders or her two teenage passengers.[5]

In sum, ***HN19*** the law clearly provided that, to be entitled to a good faith defense, reliance on a fellow officer's conclusions must be objectively reasonable. *See, e.g., Stearns, 615 F.3d at 1286*. We agree with the district court that Malcom could not reasonably rely on Bairett's statements to establish probable cause to search the car for drugs, nor would a reasonable police officer in Malcom's position **[**26]** conclude he had probable cause to search for drugs.

b. Probable Cause—Obstruction of Justice

Malcom alternatively argues he independently had sufficient probable cause to search the vehicle on another basis. He contends that Bairett's information gave him enough reason to believe Felders had committed the crime of obstruction of justice by lying to an officer in violation of Utah law.[6] Malcom claims that Bairett's description of the traffic stop and interaction with Felders and the two passengers established they had provided false information with the intent to hinder his efforts to determine if she was hauling drugs.

We agree with the district court that Malcom did not have probable cause to believe Felders obstructed a lawful investigation. Bairett never told Malcom **[**27]** that Felders had provided false information to Bairett. All Malcom knew was that there were "inconsistencies" in the stories of Felders and her passengers. For example, Bairett said that Felders stated the passengers were her grandkids' friends, whereas the two passengers said Felders was their cousin. Aplt. App. 204. Bairett also pointed out that Felders said that her grandkids flew out to Colorado from California, but the passengers said the grandkids

[5] Malcom asserts he could assume Bairett had additional evidence, but it is clear from the record that Bairett supplied all the information he had.

[6] Utah Code § 76-8-306 states: ***HN20*** "(1) An actor commits obstruction of justice if the actor, with intent to hinder, delay, or prevent the investigation, apprehension, prosecution, conviction, or punishment of any person regarding conduct that constitutes a criminal offense . . . (i) provides false information regarding a suspect, a witness, the conduct constituting an offense, or any other material aspect of the investigation."

lived in Colorado. *Id*. And Bairett commented that Felders told him they were planning on coming back to California in early December, whereas the grandkids said they were coming back in late November. *See id*.

A reasonable officer would not conclude these statements, standing alone, established an intent to hinder an investigation. As the district court put it, the statements reflected, at worst, not obfuscation but mere miscommunication. *See Felders, 885 F. Supp. 2d at 1203 & n.5* (noting that ″part of the inconsistencies may have arisen due to cultural differences and miscommunication between the parties″ and that ″[m]ore [*884] careful questioning may have averted the perceived 'lies' and inconsistent stories″). Malcom would use the Utah obstruction [**28] statute as a sword to establish probable cause whenever a motorist told a suspicious story, a concept that stretches far beyond what our cases allow. In fact, on this record it is hard to say that the statements evinced any intent to hinder anything—let alone a drug investigation—especially in the context of a routine traffic stop for speeding.

It is worth pointing out, moreover, that when Bairett began asking Felders questions there was no ongoing investigation of conduct that constituted a criminal offense. A reasonable person would not conclude that Felders's statements, prior to even being asked if she was transporting drugs, would constitute providing ″false information″ with the intent to ″delay [] or prevent the investigation″ of a criminal offense. *Utah Code § 76-8-306*.

Malcom points to our decision in *Oliver v. Woods* as justifying at least arguable probable cause that obstruction of justice had occurred. *209 F.3d at 1190*. In *Woods*, the defendant officer told a responding officer that he had found the plaintiff's car in a parking lot where an alarm had been activated and the plaintiff had driven away after refusing to identify himself to the defendant officer. *Id. at 1191*. We [**29] held, based on this information, the responding officer had probable cause to *arrest* a plaintiff for ″refusing to identify himself and leaving the scene of an investigation″ in violation of *Utah Code § 76-8-305*.[7] But the plaintiff's conduct in *Woods* obviously violated the statute. Here, any potential obstruction of justice committed by Felders based on her explanations regarding her travels to Colorado or relationship to the passengers is only fanciful. A reasonable officer would not have concluded that Felders had committed obstruction of justice.

* * *

In sum, Malcom did not have probable cause to search Felders's vehicle, either in reasonable reliance on Bairett's conclusion that Bairett had probable cause to search for drugs [**30] or independently because he believed Felders had obstructed justice.

D. Facilitation

Malcom also argues the law was not clearly established that his actions in conducting the dog sniff violated Felders's constitutional rights.

HN21 The second prong of the qualified immunity analysis shields a governmental official from liability unless ″at the time of the challenged conduct, the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right.″ *Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2083, 179 L. Ed. 2d 1149 (2011)* (citations [*885] and internal quotation marks omitted). And for a law to be clearly established in this circuit, ″there

[7] Utah Code Ann. § 76-8-305 makes it a misdemeanor if a person with ″knowledge, or by the exercise of reasonable care should have knowledge, that a peace officer is seeking to effect a lawful arrest or detention of that person or another and interferes with the arrest or detention by . . . refus[ing] to perform any act required by lawful order: (a) necessary to effect the arrest or detention; and (b) made by a peace officer involved in the arrest or detention.″

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." *Cortez, 478 F.3d at 1114-15* (citations and internal quotations omitted). But still, officers may be on notice that their conduct violates the law even in "novel factual circumstances." *Id.* (citations and internal quotation marks omitted). The focus is on "whether the officer had fair notice that [his or her] conduct was unlawful." *Lynch v. Barrett, 703 F.3d 1153, 1161 (10th Cir. 2013)* **[**31]** (quoting *Brosseau v. Haugen, 543 U.S. 194, 198, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004))*, *cert. denied*, *133 S. Ct. 2352, 185 L. Ed. 2d 1078 (2013)*.

We further emphasize that ***HN22*** in defining the "clearly established right" purportedly violated, we must take special care to "define the clearly established right at issue on the basis of the specific context of the case" and, in so doing, avoid defining the "case's context in a manner that imports genuinely disputed factual propositions." *Tolan v. Cotton, 134 S. Ct. 1861, 1866, 188 L. Ed. 2d 895 (2014)* (per curiam) (citations and internal quotation marks omitted).

The district court found that the law clearly established "an improper search occurs if an officer facilitates a drug dog's entry into a vehicle before probable cause has been established" and that Bairett "intentionally orchestrated a situation where a drug dog would intrude into the privacy of Ms. Felders' vehicle and that Deputy Malcom may have participated as well." *Felders, 885 F. Supp. 2d at 1209-10* (relying on *Stone, 866 F.2d at 363*; *Winningham, 140 F.3d at 1330-31*; *Kokinda v. Peterson, 245 F. App'x 751, 756 (10th Cir. 2007))*. In other words, the district court held that the law was clearly established that facilitation of a dog's entry into a car **[**32]** without probable cause violates the *Fourth Amendment*, and that questions of fact remained as to whether Malcom facilitated Duke's entry prior to establishing probable cause.

We agree with the district court's conclusion that ***HN23*** the law was clearly established when Malcom conducted the dog sniff that facilitating a dog's entry into a vehicle without first establishing probable cause constitutes an improper search. *See, e.g., Winningham, 140 F.3d at 1330-31* (finding "[a] desire to *facilitate* a dog sniff of the van's interior" where officer who did not conduct sniff opened door of van and officer who conducted sniff unleashed dog as the dog neared the open door); *cf. Stone, 866 F.2d at 363-64* (finding no facilitation where car owner opened hatchback door and no evidence that "police handler encouraged the dog to jump in the car").

Malcom does not contest the district court's holding that the law was clearly established that an officer may not facilitate a dog's entry into the car prior to establishing probable cause. Rather, he argues that the facts in the record do not suggest that he violated this rule. We disagree. ***HN24*** When the district court concludes that a reasonable jury could view the **[**33]** facts a certain way, we take them as true. *Lewis, 604 F.3d at 1225*; *see also Tolan, 134 S. Ct. at 1866-68* (noting that an appellate court reviewing a denial of summary judgment for qualified immunity must view the evidence in the light most favorable to the nonmoving party and cannot ignore "key evidence offered by the party opposing the summary judgment motion"). Thus, at this stage in the litigation, we cannot rule out the possibility that Bairett caused the car doors to remain open, Malcom was aware that Bairett caused the car doors to remain open, and Duke failed to properly alert before entering the vehicle.[8] If that is what

[8] Malcom focuses on the fact that Bairett, not Malcom, opened the doors to the vehicle. He cites *Lyons* for the proposition that a police officer has no affirmative duty to close windows in preparation for a sniff. Aplt. Br. at 22 (citing *Lyons*, 486 F.3d at 373). But in *Lyons*, the court dealt with a situation where the *defendant*, not a fellow officer, had opened the car windows and there were no verbal **[**34]** orders or requests from the officer to keep the windows open. Here, in contrast, the record shows at least some evidence that

actually happened, then Malcom violated clearly established law. Malcom therefore cannot show that no factual disputes stand between him and qualified immunity.

[*886] To avoid this conclusion, Malcom asks us to assume an alternative fact pattern. For instance, he suggests that, because he was unaware of Bairett's involvement in leaving the doors open, it was not clearly established what steps he must take before conducting the dog sniff. Similarly, he asks us to make additional legal determinations about the clearly established law governing the nature of Duke's pre-entry alert based on his asserted fact that, among other things, ″Duke is a big dog that does not like to jump in vehicles and [] had never before jumped in a vehicle when drugs had not been found.″ Aplt. Br. at 24. But, we cannot say, when viewing the facts in the light most favorable to Felders, that Malcom did not know Bairett intentionally held open the doors, or that Duke alerted before jumping in the car in the first place. It follows then that we cannot determine whether qualified immunity applies in this [**36] context.

In sum, although phrased as legal inquiries, Malcom's arguments ultimately dispute the set of facts the district court determined for us and which *Lewis* requires us to assume. Because we conclude that issues of material fact exist as to whether Malcom's conduct violated Felders's clearly established constitutional rights, we agree with the district court that Malcom was not entitled to qualified immunity as a matter of law.

III. Conclusion

We AFFIRM the district court's determination denying Malcom summary judgment on qualified immunity grounds.

Bairett prevented one of the defendants from closing the car door. Unlike in *Lyons*, then, Malcom and Bairett did not necessarily ″[take] the situation as [they] found it.″ *Id.* (internal quotation marks omitted) (second alteration in original); *see also* *Vazquez*, 555 F.3d at 926-27, 930 (defendant opened window of car during initial traffic stop without direction from officers); *United States v. Woods*, 351 F. App'x 259, 261 (10th Cir. 2009) (defendant failed to close door when asked to step out of vehicle). Moreover, in *Winningham*, we held that *both* officers facilitated the dog's entry into the car, even though it was the officer who did not conduct the sniff who actually opened the car doors. 140 F.3d at 1330-31. It is therefore irrelevant whether Malcom actually physically opened the door if he was aware that Bairett had intentionally kept the doors open to facilitate Duke's entry into the car. There is at least some evidence that Malcom knew Bairett intentionally opened the door, and although Malcom stated that he did not hear Bairett say that he was planning [**35] on leaving the doors open and that he did not observe Bairett taking any action to keep the door open, the district court found that it was ″for the jury to weigh the credibility of Deputy Malcom against the evidence from the dash cam video.″ *Felders*, 885 F. Supp. 2d at 1207.