

No. 14-2035

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

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

Plaintiffs/Appellees,

vs.

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

Defendants/Appellants.

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

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ORAL ARGUMENT IS REQUESTED

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There are no prior or related appeals.

STATEMENT OF ISSUES¹

1. Did the district court, viewing the evidence and drawing all reasonable inferences therefrom in the light most favorable to Plaintiffs/Appellees, correctly hold that Officer White's use of force on Samuel Pauly was objectively unreasonable under the totality of the circumstances?

2. Did the district court, viewing the evidence and drawing all reasonable inferences therefrom in the light most favorable to Plaintiffs/Appellees, correctly hold that Officer Mariscal's reckless or deliberate conduct unreasonably created the need to use deadly force?

3. Did the district court, viewing the evidence and drawing all reasonable inferences therefrom in the light most favorable to Plaintiffs/Appellees, correctly hold that Officer Truesdale's reckless or deliberate conduct unreasonably created the need to use deadly force?

¹ Pursuant to Fed. R. App. P. 28(b), Plaintiffs/Appellees do not provide a jurisdictional statement, course of proceedings, or the disposition below.

STATEMENT OF THE CASE

Around eleven o'clock at night on October 4, 2011, Samuel and Daniel Pauly were playing video games and getting ready for bed in their rural home in Glorieta, New Mexico. They looked out their windows and saw multiple individuals approaching their home under cover of dark. The individuals would turn on their flashlights for just a few seconds at a time to briefly light their way before turning them back off. The brothers did not know who was approaching and feared they were under attack. Daniel Pauly had been involved in a road rage incident earlier in the evening and believed that the other driver was now coming to his home.

The brothers called out several times "Who are you?" and "What do you want?" But the individuals did not identify themselves and did not approach the door. The people outside began yelling profane and threatening statements, including "Open the door!" and "Hey, motherf**kers, we got you surrounded. Come out or we're coming in!"

The brothers decided to retreat to the master bedroom with their dogs and call the police but before they could get to a phone, they heard "We're coming in! We're coming in!" Scared and believing that their lives were in imminent danger, Samuel Pauly grabbed an antique pistol and handed his brother an antique shotgun. The brothers tried to scare the intruders away by yelling out "We got guns." Daniel Pauly

fired warning shots into the air from the rear of the home and Samuel Pauly pointed the pistol out a window in the front of the house.

Unbeknownst to the Pauly brothers, the intruders they saw approaching their home in the middle of the night were actually New Mexico State Police Officers who had decided to follow-up on an earlier reported road rage incident involving a car registered to Daniel Pauly. Inexplicably, rather than making their identities known by using their police lights or announcing their presence, the officers parked their cars in an area that was not visible from the home and surreptitiously approached the home intentionally concealing their identities.

Officer White, who was one of the three officers in the dark outside the Pauly home, was crouched behind a rock wall nearly fifty feet away from the front of the Pauly home when Daniel Pauly fired his warning shots from the rear of the home. Officer White saw Samuel Pauly standing in front of a well-lit window in his living room holding the antique pistol. Even though Officer White and the other officers were in protected positions, Officer White gave no warning that he was about to shoot and made no effort to evaluate the evolving circumstances to determine whether deadly force was warranted. Officer White focused solely on killing Samuel Pauly, which he did with a single bullet that struck Samuel Pauly in the aorta.

The officers' reckless or deliberate conduct during the encounter, including surreptitiously approaching an isolated rural residence in the middle of the night, concealing their identities, and yelling profane and hostile threats, imminently created the perceived need to use deadly force. Absent the officers' reckless and deliberate conduct, there would have been no need to use deadly, or any other, force and Samuel Pauly would still be alive.

STATEMENT OF FACTS

On October 4, 2011, Daniel Pauly was driving from Albuquerque, New Mexico, to his home in Glorieta, New Mexico, when he became involved in an incident with another car on Interstate 25. [Aplt. App. at 549, ¶¶ 1 & 2.] The incident involved allegations of tailgating, shining bright lights, abrupt braking, and other inappropriate driving. [*Id.* at ¶ 3.] The two women in the other car, Sabrina Ireland and Augusta Arrellanes, called 911 to report the incident. [Aplt. App. at 549-550, ¶ 4.] At the time they called 911, Ireland and Arrellanes were pursuing Daniel Pauly and the first words on the 911 tape are “Stay on his ass!” [*Id.*] When Daniel Pauly exited the interstate for his home in Glorieta, Ireland and Arrellanes asked the 911 operator if they should follow him and the operator said “Yeah.” [Aplt. App. at 550, ¶ 7.]

When the car that had been chasing him up the interstate followed him off the interstate at the exit to his home, Daniel Pauly got out of his car and yelled at the people in the car that was following him. [Aplt. App. at 550, ¶ 8.] He did not know who they were and he did not know their intentions. [*Id.*] Daniel Pauly returned to his car, left the exit, and drove the quarter of a mile to his house. [Aplt. App. at 550, ¶ 10.]

Daniel Pauly arrived home a little after 11:00 p.m. [*Id.*] Daniel's brother, Samuel Pauly, was on the couch playing video games. [*Id.*] Daniel Pauly began getting ready for bed. [*Id.*]

Three New Mexico State Police Officers, Kevin Truesdale, Michael Mariscal and Ray White, were dispatched to respond to the 911 call. [Aplt. App. at 550, ¶ 6.] On the instructions of the 911 dispatcher, Ireland and Arrellanes waited at the exit for an officer to arrive. [Aplt. App. at 538-39, ¶¶ 2 & 6.] When Officer Truesdale arrived on the scene, Daniel Pauly had already left the exit ramp. [Aplt. App. at 550-51, ¶ 11.] Officer Truesdale spoke with Ireland and Arrellanes, understood that they were safe, and watched them drive off the exit ramp and northbound up the interstate toward their home. [*Id.*] At this point, the officers knew that both cars had participated in the road rage incident, that the incident was over, that Ireland and Arrellanes were not in danger, and that no crime was in progress. [*Id.*]

Nonetheless, the officers decided to proceed to the address obtained from the license plate information provided by Ireland and Arrellanes and attempt to speak to the other party to the incident to get his "side of the story." [Aplt. App. at 551, ¶ 12.] At the time the police officers made their way to the Pauly home, no crime was in progress, no cause for an arrest existed, and no exigent circumstances

were present to justify an entry into the Pauly home. [*Id.* at ¶ 13.] Further, nothing had been reported to the police officers about Daniel Pauly having any criminal history or presenting any known danger. [*Id.* at ¶ 12.]

While Officers Truesdale and Mariscal went to locate Daniel Pauly, Officer White was instructed to wait at the exit ramp in case the vehicle attempted to re-enter the interstate. [*Id.* at ¶ 14.] Officers Truesdale and Mariscal drove to the address associated with the license plate number and parked in front of the residence, leaving on their headlights and take-down lights (flood lights used to illuminate an area and demonstrate police presence). [*Id.* at ¶ 15.] The officers were not attempting to hide their presence from the occupants of the residence. [*Id.* at ¶ 16.]

The officers determined that the front residence at the address listed on the car's registration was not the correct residence but saw a secondary residence behind the front residence that was accessible by a gravel road. [Aplt. App. at 551-52, ¶¶ 17-19.] The two residences are located approximately 250 feet apart. [Aplt. App. at 552, ¶ 19.] In between the two properties are several trees, a shed-type building and other obstructions that prevent the people in the rear residence from seeing lights or vehicles in front of the main residence. [*Id.*]

The Glorieta area where the Pauly brothers lived has no street lights, no traffic, and is rural property. [Aplt. App. at 553, ¶ 28.] The Pauly property itself is very dark with one exterior light on the porch and a security light. [*Id.* at ¶ 26.] When the officers approached, the porch light was on, but the security light was off. [*Id.*]

Despite the initial approach to the lower residence in patrol cars with headlights on and take-down lights activated, Officers Mariscal and Truesdale inexplicably decided to approach the upper residence surreptitiously--on foot, under cover of night, and only illuminating the road when necessary by momentarily turning on their flashlights. [Aplt. App. at 552, ¶¶ 20-22.]

The Pauly brothers saw people sneaking up the drive to their home intermittently using their flashlights. [Aplt. App. at 552-53, ¶¶ 23 & 25.] The brothers feared that the persons outside their home were from the road incident earlier in the night. [*Id.*] The unreasonable police action in sneaking up on the property while concealing their identities created a fear for the Pauly brothers that their home was being invaded. [*Id.*]

Officers Mariscal and Truesdale walked around the side of the house where Daniel Pauly had parked his truck about five feet from the side of the house. [Aplt. App. at 553, ¶ 27.] The officers identified the license plate as the same one

that had been called in earlier in the evening. [*Id.* at ¶ 29.] They informed dispatch that the vehicle had been identified. [*Id.*] Officer White then left the exit and proceeded the quarter of a mile to the property, which took less than a minute. [*Id.*] The officers acknowledge that up to this point they had not announced their presence in any way and had concealed their identity as police officers as they walked from the lower house to the Pauly home and then around the side of the Pauly home. [Aplt. App. at 554, ¶ 32.]

Upon locating the subject vehicle, the officers knew several facts:

- * The alleged victims were safe and had driven up Interstate 25 towards their home in Las Vegas, New Mexico;
- * The alleged aggressor's vehicle was parked at the residence where it was registered and was causing no threat;
- * Nothing about the appearance of the home or the activities that could be seen by the police suggested that anything criminal was occurring at the home;
- * Any perceived threat that had occurred on the road was over;
- * No exigent circumstances existed.

[Aplt. App. at 553-54, ¶ 30.] Despite these known facts, the police continued to maintain the secrecy of their presence.

The Pauly brothers did not know who was outside their home. [Aplt. App. at 555, ¶ 37.] They sought to have the intruders identify themselves by repeatedly yelling “Who’s out there?” and “What do you want?” [Aplt. App. at 554, ¶ 34.] Despite hearing the brothers’ inquiries, the officers did not identify themselves and did not approach the front door to knock and announce. [*Id.* at ¶ 35.] Instead, the police escalated the situation by yelling coercive, aggressive and profane commands, like “Open the door!” and “Hey, motherf**kers, we’ve got you surrounded. Come out or we’re coming in!” [Aplt. App. at 555-56, ¶¶ 42-44.]

When Officer White arrived, Officer Truesdale and Officer Mariscal were yelling threatening commands. [Aplt. App. at 556, ¶ 43.] Officer White also began to yell coercive commands. [*Id.*] Officers White and Mariscal were yelling “Open the door” and Officer Truesdale was yelling “Come outside.” [*Id.*] The officers yelled to the Pauly brothers to “Come out or we are coming in!” [*Id.* at ¶ 44.]

After hearing “Come out or we’re coming in!” and other profane and aggressive language, the Pauly brothers did not feel comfortable opening the door and did not feel that they were safe taking shelter in their home. [*Id.* at ¶ 46.] The Pauly brothers felt threatened by these unknown intruders and felt that their “lives were in near threat of being killed.” [*Id.*] They decided to call the police and then

stay together in the master bedroom with their dogs until the police arrived. [Aplt. App. at 82.] Before they could call the police, they heard “We’re coming in! We’re coming in!” [Id.]

Scared and believing that they needed to protect themselves and their home from intruders, Samuel Pauly grabbed an antique pistol and handed Daniel Pauly an antique shotgun. [Aplt. App. at 556, ¶ 47.] The Pauly brothers tried to scare the intruders away by yelling out “We got guns.” [Id. at ¶ 48.] When the officers heard the statement from inside the home of “We got guns,” Officer Truesdale ran around the side of the house, Officer Mariscal took shelter behind a full size pick-up truck and Officer White took shelter fifty feet away from the house behind a rock wall. [Id.] While the officers were concealed outside in the darkness, the lights inside the home were on and the activities of Samuel and Daniel Pauly were clearly visible to the officers. [Id.]

Daniel Pauly walked to the rear of the house, fired a shotgun in the air two times and yelled “Hey, get the f**k out of here.” [Id. at ¶ 49.] The shotgun blast was not near any of the officers and was directed up toward a large tree. [Aplt. App. at 556-57, ¶ 51.]

Officer White says that he saw a person walk to the front window and lower the top portion of the window. [Id. at ¶ 53.] Officer White asserts that he shouted

out a warning and identified himself at this point, stating “State Police, hands up, hands up, hands up!” (White audio interview: time stamp 13:36:50-13:37:00, tape time - 5:40-5:50). The audio from the incident, however, did not record any such statements. [Aplt. App. at 557, ¶ 55.]

After allegedly seeing the person in the window fire one round, Officer White stopped looking at what the person was doing and focused on the sights of his gun. [*Id.* at ¶ 56.] His only objective was to fire a round at the center mass of the person who he saw standing in the window. [*Id.*] Officer White does not know what the person in the window was doing after he allegedly saw a round being fired as he was concentrating on getting a kill shot. [*Id.*]

Officer White fired one round from fifty feet away, in the darkness, behind the cover of a rock wall. [Aplt. App. at 558, ¶ 58.] The one round pierced Samuel Pauly’s aorta as he stood in his living room and killed him almost instantly. [*Id.*]

Officer Mariscal asserts that he was behind the pickup truck at the time of the shot gun blasts. He saw a person in the front window holding a pistol. [Aplt. App. at 557, ¶ 52.] At this point, Officer Mariscal claims that he fired one round at the person in the window. [*Id.*] The evidence supports a finding that Officer Mariscal fired his weapon. Officer Mariscal maintained his gun at fully loaded capacity, as he had been trained. [Aplt. App. at 558-59, ¶ 65.] Officer Mariscal is

not aware of any reason that he would have had less than a full capacity gun on the night of the Pauly shooting and reported that he started the shift with the full sixteen rounds in his duty weapon. [Aplt. App. at 559, ¶ 66.] Officer Mariscal turned in his gun after the shooting and “he was missing one in his cartridge in the magazine that was in the duty weapon.” [*Id.* at ¶ 67.] Officer Mariscal testified that he will continue with the belief that he fired his gun “until the end of his days.” [*Id.* at ¶ 70.]

Officer Mariscal and Officer White claim that Samuel Pauly fired a shot in Officer White’s direction. [Aplt. App. at 557, ¶¶ 52 & 54.] Samuel Pauly’s gun had an empty casing in the firing chamber, but there is no way to determine whether the gun had been fired a long time ago or whether it was fired on the night of his death. [*Id.*] No bullet impact site was found despite a police search. [*Id.*]

The audio from Officer Mariscal’s belt recorder picked up the events starting about ten seconds before the first shot was fired. [Aplt. App. at 558, ¶ 59.] The audio recording reveals that four shots were fired. [*Id.*] It is undisputed that the first two shots were from Daniel Pauly’s shotgun blast at the rear of the house. [*Id.* at ¶ 61.] It is also undisputed that the fourth shot was Officer White’s shot that killed Samuel Pauly. [*Id.*] It is disputed whether the third shot was fired by Samuel Pauly or Officer Mariscal. If the third shot is Officer Mariscal’s shot, then

Samuel Pauly never fired at the police officers as Officer White and Officer Mariscal claimed. [*Id.* at ¶ 64.] If the third shot is Samuel Pauly's shot, then Officer Mariscal never fired as he claims. [*Id.*]

The third shot was fired by either Officer Mariscal or Samuel Pauly, not both. [*Id.* at ¶ 62.] Officer Mariscal's account that both he and Samuel Pauly discharged their weapons would require five shots, which is inconsistent with the audio recording, which indisputably establishes that only four shots were fired. [*Id.* at ¶ 59.]

Daniel Pauly did not hear "State Police" or any notification that the intruders were State Police before shots were fired. [Aplt. App. at 554, ¶ 36.] Daniel Pauly first heard "State Police" after his brother was dead. [Aplt. App. at 555, ¶ 37.] The officers claim that they announced their presence using words of "State Police" multiple times. The officers, however, failed to engage their audio recording devices during much of this encounter. [*Id.* at ¶ 39.] There is one audio that can be heard on the tape about 90 seconds before shots were fired in which Officer Truesdale can be heard saying "State Police open the door." [*Id.*] At the time of the statement by Officer Truesdale, no one was in the front of the house. [*Id.* at ¶ 40.] Other than the one announcement of "State Police," no other announcement is heard on any tape before the gun shots. [*Id.*] None of the audio

from the night picked up announcements by either Officer Mariscal or Officer White before the shots were fired. [*Id.*] No police audio recorded any warnings that deadly force would be used. [Aplt. App. at 558, ¶ 60]

The entire incident lasted less than five minutes. [Aplt. App. at 615.]

SUMMARY OF ARGUMENT

The evidence, viewed in the light most favorable to Plaintiffs, supports the district court's finding that the officers are not entitled to qualified immunity because the officers' reckless or deliberate conduct during the encounter, including deliberately approaching the Paulys' rural residence in a surreptitious manner that concealed their identities, failing to effectively identify themselves, and then yelling profane and hostile threats that caused the Pauly brothers to fear for their safety and feel the need to defend themselves, unreasonably created the need to use deadly force in violation of Samuel Pauly's clearly established rights under the Fourth Amendment. The officers' actions set in motion a series of events that a reasonable officer should have known would create a dangerous situation that could result in the need to use deadly force on an occupant of the house. The officers' conduct was the but-for and proximate cause of Samuel Pauly's death.

ARGUMENT

I. Standard for Appellate Review of Denial of Qualified Immunity.

A denial of qualified immunity on summary judgment is appealable to the extent that the appeal is based on purely legal questions. *Fogarty v. Gallegos*, 523 F.3d 1147, 1153 (10th Cir. 2008). A qualified immunity appeal raises a purely

legal question when it asserts that accepting the plaintiff's version of the facts as true, there is no violation of clearly established law. *Johnson v. Jones*, 515 U.S. 304, 311 (1995); *York v. City of Las Cruces*, 523 F.3d 1205, 1209 (10th Cir. 2008).

The denial of a summary judgment motion asserting the defense of qualified immunity is reviewed *de novo*, viewing the evidence and drawing all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Nelson v. McMullen*, 207 F.3d 1202, 1205 (10th Cir. 2000); *see also Brammer-Hoelter v. Twin Peaks Charter Academy*, 492 F.3d 1192, 1201 (10th Cir. 2007) (summary judgment motion raising qualified immunity is reviewed *de novo* applying the same standard as the district court).

II. Legal Standard for Assessing Claim of Qualified Immunity.

Qualified immunity shields government officials performing discretionary functions from liability for civil damages unless their conduct violates “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)). When a defendant asserts qualified immunity through a motion for summary judgment, the plaintiff must demonstrate that: (1) the defendant's actions violated a constitutional right and (2) the constitutional right was clearly established at the time of the conduct at issue. *See*,

e.g., *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Riggins v. Goodman*, 572 F.3d 1101, 1107 (10th Cir. 2009). The two prongs of the qualified immunity analysis may be considered by courts in any order. *Pearson*, 555 U.S. 223.

At the summary judgment stage, when determining whether the plaintiff has met his burden to show that a clearly established constitutional right has been violated, a court must construe the facts in the light most favorable to the plaintiff. *See Scott v. Harris*, 550 U.S. 372, 378–80 (2007); *Riggins*, 572 F.3d at 1107 (noting that the Tenth Circuit “accept[s] the facts as the plaintiff alleges them”). This standard means that the court must adopt “the plaintiff’s version of the facts.” *Scott*, 550 U.S. at 378

III. The Evidence Supports a Finding that the Officers Are Not Entitled to Qualified Immunity Because the Officers’ Reckless or Deliberate Conduct Precipitated the Use of Excessive Force in Violation of Samuel Pauly’s Clearly Established Rights Under the Fourth Amendment.

The district court properly denied the officers’ motions for summary judgement based on qualified immunity because the evidence, construed in the light most favorable to Plaintiffs, supports a finding that the officers’ reckless or deliberate conduct precipitated the use of excessive force in violation of Samuel Pauly’s rights under the Fourth Amendment.

A. The Officers Violated Samuel Pauly’s Right to Be Free of Excessive Force Under the Fourth Amendment.

i. Legal Standard for Assessing Excessive Force Claims

Excessive force claims are evaluated under the Fourth Amendment standard of objective reasonableness. *Graham v. Connor*, 490 U.S. 386, 394-97 (1989).

The evaluation of an excessive force claim requires a highly factual analysis of the totality of the relevant circumstances. *Id.* at 396; *Sevier v. City of Lawrence*, 60 F.3d 695, 699 (10th Cir. 1995) (“We pay careful attention to the facts and circumstances of the particular case and ask whether the totality of the circumstances justified the use of force.”)(internal citations omitted). Among the factors to consider are the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether the suspect is actively resisting arrest or attempting to evade arrest by flight. *Graham*, 490 U.S. at 396 (citing *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985)).

The reasonableness of the use of force depends not only on whether the officers were in danger at the precise moment that they used force, but also on whether the officers’ own “reckless or deliberate conduct during the seizure unreasonably created the need to use such force.” *Sevier*, 60 F.3d at 699 (internal footnote omitted). The Court’s inquiry is not limited to the “split-second moment

when officers make a decision about whether to use deadly force,” but includes “an officer’s conduct prior to the suspect’s threat of force if the conduct is immediately connected to the suspect’s threat of force.” *Allen v. Muskogee, Okla.*, 119 F.3d 837, 840 (10th Cir.1997) (internal citation and quotations omitted); *see also Bella v. Chamberlain*, 24 F.3d 1251, 1256 & n. 7 (10th Cir. 1994) (“Obviously, events immediately connected with the actual seizure are taken into account in determining whether the seizure is reasonable.”).

In addition, if it was feasible for the officer to warn a suspect not to use force, the failure to issue such a warning could create an unreasonable need to use deadly force. *Thomson v. Salt Lake County*, 584 F.3d 1304, 1321 (10th Cir. 2009).

Determining whether an officer’s reckless or deliberate conduct unreasonably created a need to use force “is simply a specific application of the ‘totality of the circumstances’ approach inherent in the Fourth Amendment’s reasonableness standard.” *Medina v. Cram*, 252 F.3d 1124, 1132 (10th Cir. 2001).

The Tenth Circuit has further noted that courts must be particularly stringent when late night encounters occur, stating “our Fourth Amendment jurisprudence counsels that, when a knock at the door comes in the dead of the night, the nature and effect of the intrusion into the privacy of the dwelling place must be examined

with the greatest of caution.” *United States v. Reeves*, 524 F.3d 1161, 1168, n. 7 (10th Cir. 2008) (citing *United States v. Jerez*, 108 F.3d 684, 690 (7th Cir. 1997)).

ii. The Force Used Was Objectively Unreasonable Under the Totality of the Circumstances Because the Officers’ Reckless or Deliberate Actions During the Encounter Created the Need for Deadly Force.

The evidence supports a finding that the officers recklessly and deliberately created the circumstances that led to the Pauly brothers reasonably fearing for their lives from unknown intruders and feeling the need to protect themselves and their property by threatening force.

The entire encounter, from the officers approaching the home to the shooting of Samuel Pauly, lasted approximately five minutes. Accordingly, all of the officers’ conduct is immediately connected to the Pauly brothers’ threat of force for purposes of determining if the officers’ own reckless or deliberate conduct unreasonably created the need to use deadly force. *See Allen*, 119 F.3d at 840 (court considers an officer’s conduct prior to the suspect’s threat of force if the conduct is immediately connected to the suspect’s threat of force).

The officers made the decision to follow-up on an alleged road rage encounter reported by two women, who were aggressors at times during the encounter, by going to the Pauly home late at night. It was after 11:00 p.m., no

crime was in progress, and the officers had no suspicion that any criminal activity was occurring. Inexplicably, on a dark, rainy night in a rural wooded area, the police officers decided to approach the home surreptitiously and intentionally conceal their identities.

The Pauly brothers saw people sneaking up on their home in the middle of the night, intermittently using flashlights. The Pauly brothers thought the intruders might be related to the earlier road rage incident and were scared. The brothers asked repeatedly “Who is out there?” and “What do you want?” Even though they were within feet of the Pauly home and heard the Pauly brothers’ inquiries, the officers did not identify themselves. Instead, the officers began yelling hostile threats, including “Come out,” “Come out or we are coming in” and “Hey, motherf**kers, we got you surrounded!”

After hearing “Come out or we’re coming in!” and other profane and aggressive language, the Pauly brothers did not feel comfortable opening the door and did not feel that they were safe taking shelter in their home. The Pauly brothers felt that their “lives were in near threat of being killed.” They decided to retreat to the master bedroom with their dogs and call the police. Before they could call the police, however, they heard “We’re coming in! We’re coming in!”

Scared and believing that they needed to protect themselves and their home from hostile intruders, Samuel Pauly grabbed an antique pistol and handed Daniel Pauly an antique shotgun. The Pauly brothers then tried to scare the intruders away by yelling out “We got guns.”

When the officers heard the statement from inside the home of “We got guns,” Officer Truesdale ran around the side of the house, Officer Mariscal took shelter behind a full size pick-up truck and Officer White took shelter fifty feet away from the house behind a rock wall. While the officers were concealed outside in the darkness, the lights inside the home were on and the activities of Samuel and Daniel Pauly were clearly visible to the officers.

Daniel Pauly walked to the rear of the house, fired a shotgun in the air two times and yelled “Hey, get the f**k out of here.” The shotgun blast was not near any of the officers and was directed up toward a large tree.

Samuel Pauly pointed the pistol out a window at the front of the house. Officer Mariscal shot at Samuel Pauly but missed. Samuel Pauly did not return fire. Five seconds later, Officer White who was fifty feet away outside the home behind a stone fence and under cover of darkness, shot and killed Samuel Pauly, who was clearly visible in the illuminated window of his living room. The Pauly

brothers did not know it was the police outside their home until after Samuel Pauly had been killed.

The Tenth Circuit has considered Section 1983 claims where police officers' reckless and deliberate conduct, like that of the officers who snuck up on the Pauly home, created the need to use deadly force in several cases. In *Sevier*, the parents of a suicidal twenty-two-year-old man called the police for assistance. *Sevier*, 60 F.3d at 695. Three police officers arrived at the home in the middle of the night, opened the door to the son's bedroom, and, when he emerged, confronted him with their guns drawn. *Id.* at 698. When the son allegedly lunged at one of the officers, the officer shot and killed him. The officers had no reason to suspect that the man posed any threat to others while he remained in his room. *Id.* Nonetheless, the officers opened the bedroom door and approached with their guns drawn. *Id.* The parents subsequently filed an excessive force claim against the officers alleging that the officers' conduct was reckless and deliberate and impermissibly created the need to use force. The district court denied the officers' claim of qualified immunity, finding that genuine issues of material fact precluded summary judgment. *Id.* at 699.

Similarly, in *Allen*, the police received information that an armed man was threatening suicide. One police officer, Lt. Smith, proceeded to the location and

found Mr. Allen sitting in the driver's seat of his car with one foot out of the vehicle. Mr. Allen had a gun in his right hand, which was resting on the console between the seats. As Lt. Smith repeatedly told Mr. Allen to drop his gun, other officers arrived. Lt. Smith attempted to seize Mr. Allen's gun, while another officer held Mr. Allen's left arm, and a third officer attempted to open a passenger side door. When Mr. Allen started swinging the gun toward Lt. Smith and Officer McDonald, Lt. Smith and Officer McDonald fired a total of twelve rounds into the vehicle, striking Mr. Allen four times. The entire sequence, from the time Lt. Smith arrived to the time Mr. Allen was killed, lasted approximately ninety seconds.

Mr. Allen's wife subsequently brought an excessive force claim against the police officers. The district court granted summary judgment in favor of the officers. The Tenth Circuit reversed, finding material disputed facts due to differences among the eyewitness depositions regarding whether Lt. Smith ran "screaming" up to Mr. Allen's car and immediately began shouting at Mr. Allen to get out of his car or whether Lt. Smith approached cautiously and tried talking Mr. Allen into giving up the gun.

The Tenth Circuit found that these disputes were significant because:

[T]he entire incident, from the time Lt. Smith arrived to the time of the shooting, took only ninety seconds. Clearly, the officers' preceding actions were so 'immediately connected' to Mr. Allen's threat of force that they should be included in the reasonableness inquiry . . . [A] reasonable jury could conclude on the basis of some of the testimony presented that the officers' actions were reckless and precipitated the need to use deadly force.

Allen, 119 F.3d at 841; *see also Hastings v. Barnes*, 252 F. App'x 197 (10th Cir.

2007) (unpublished) (police officers responding to a call from an individual contemplating suicide unreasonably escalated the situation to the point deadly force was required by crowding into the man's bedroom, issuing loud and forceful commands and pepper-spraying him).

While the Tenth Circuit does not appear to have addressed a case involving use of deadly force after police officers surreptitiously approach a home in the middle of the night without identifying themselves, courts in other circuits have found such conduct to be objectively unreasonable and constitute excessive force.

In a seminal case, *Yates v. City of Cleveland*, 941 F.2d 444 (6th Cir. 1991), an officer entered a dark hallway at a private residence at approximately 2:45 a.m., without identifying himself, without shining a flashlight, and without wearing his hat. The plaintiff and his brothers discovered the officer in the dark hallway and, believing the officer to be an intruder, knocked the officer back through the door.

The officer fired his weapon in response, killing plaintiff. *Id.* at 445, 447. The Sixth Circuit concluded that it was objectively unreasonable for the officer to enter the area in that manner, and thus he was not entitled to qualified immunity from suit. *Id.* at 47. The Sixth Circuit drew this conclusion notwithstanding the officer's argument that, at the time he shot the plaintiff, he reasonably believed that his life was in danger. *Id.* According to the Sixth Circuit, the act of entering a private residence late at night with no indication of identity was enough to show that the officer had unreasonably created the encounter that led to the use of force. *Id.* at 47.

The Seventh Circuit has also held that in a situation where a person has no reason to know that someone is a police officer, the normal rules governing use of deadly force and right to resist are modified. In *Sledd v. Lindsay*, 102 F.3d 282 (7th Cir. 1996), seven police officers began executing a search warrant at the plaintiff's residence around 10:30 p.m. No exigent circumstances existed. None of the officers was in full uniform and it was disputed whether there was any visible insignia that would have led a person to believe that they were police officers and not intruders. When the officers arrived at the house, they began bashing the door, eventually breaking it down. Plaintiff heard no announcements that they were police officers, and did not hear any attempted knocking. Whether

or not the police made such efforts was a disputed fact, because the officers claimed that they had knocked and announced that they were police officers before they broke in.

At the time the police started to enter the house, plaintiff was upstairs about to take a shower. He heard the banging on the door and started to go downstairs, wearing only a towel. By the time he was halfway down the stairs, the police broke through the door. Fearing that they were intruders, plaintiff raced back up the stairs and retrieved his .22 caliber sport rifle. When he turned back to the doorway of the room, he saw a man wearing blue jeans and a blue jacket standing there with a gun. After a split second, the man turned and ran. Plaintiff followed, hoping to run him out the broken front door. As soon as Plaintiff turned into the stairwell outside the front door, still holding his rifle across his chest, the man turned and shot multiple rounds at plaintiff. At no time during the encounter did the man identify himself as a police officer.

The court denied qualified immunity for the police officers because there were jury issues as to whether the officers announced their presence and whether a reasonable police officer would have thought plaintiff posed such a risk under all the circumstances that the immediate use of deadly force was justified. *Id.* at 288. The court noted that even assuming that the police still had some right of self-

defense after they had broken into the house and failed to identify themselves or to announce their purpose, the evidence, construed in plaintiff's favor, showed that the officer's act of shooting plaintiff at the top of the stairs was unjustified. *Id.* The court found that the police officers had unreasonably created a situation in which plaintiff felt the need to arm himself and resist people he believed to be intruders. *Id.*

Similarly, in *Estate of O'Bryan v. Town of Sellersburg*, No. 4:02-CV-238, 2004 WL 1234215, 2004 U.S. Dist. LEXIS 10160 (S.D.Ind. May 20, 2004), police officers investigating a battery approached O'Bryan's home after midnight, concealing their presence. O'Bryan's mother encountered some of the officers in the garage and screamed. O'Bryan heard his mother scream, grabbed a gun and walked out of the basement entrance to his apartment. Once on the steps, O'Bryan encountered an armed man in civilian clothing. The man did not identify himself as a police officer but shouted at O'Bryan to drop his gun. When O'Bryan refused, the officer shot him three times.

The court denied qualified immunity finding that if the officer shot O'Bryan on the steps of his home without warning and without identifying himself, a jury could find the use of deadly force objectively unreasonable. *Id.* at *12-13. The court also found that the law was clearly established that officers who failed to

identify themselves in situations where they could be easily mistaken as intruders would not be entitled to the same deference in their use of force against those who reasonably feared them. *Id.* at *12.

Here, the Pauly brothers were in the sanctity of their home, late at night, and the officers had no suspicion that anything illegal was occurring inside the home. The officers approached the house surreptitiously, intentionally concealing their identity, surrounded the house, and shouted coercive and profane threats. While the officers were wearing uniforms, it was raining and dark outside and the Pauly brothers could not see the persons outside, much less discern what they were wearing. A reasonable jury could find that, under the totality of the circumstances, the officers' conduct in this case reflected a reckless disregard to the occupants of the house being subject to deadly force in the course of attempting to protect themselves and their property against threatening and unknown persons. As such a jury could find that the officers' conduct was immediately connected to Daniel Pauly firing two warning shots and Samuel Pauly arming himself and pointing a handgun out the window.

Further, a reasonable jury could find that it was feasible for Officer White and Officer Mariscal to identify themselves and warn Samuel Pauly prior to the use of deadly force and that the failure to issue such a warning created or

contributed to the unreasonable need to use deadly force. *See Thomson*, 584 F.3d at 1321. At the time Samuel Pauly approached the window with the pistol, Officer White was behind a rock wall under cover of darkness. Officer Mariscal was also in a protected, concealed position. The officers knew that they had approached the home concealing their identities and had not identified themselves to the residents of the home. Nonetheless, neither officer attempted to identify himself or provide a warning prior to the use of deadly force. Officer Mariscal almost immediately fired at Samuel Pauly and five seconds later Officer White shot and killed Samuel Pauly.

Officer White originally asserted that he shouted out a warning and identified himself at this point, stating “State Police, hands up, hands up, hands up!” (White audio interview: time stamp 13:36:50-13:37:00, tape time - 5:40-5:50). The audio from the incident, however, did not record any such statements.

A jury could also find that a reasonable police officer would not have thought that Samuel Pauly posed such a risk under all the circumstances that the immediate use of deadly force was justified. Tenth Circuit law is clear that “circumstances may change within seconds eliminating the justification for deadly force.” *Fancher v. Barrientos*, 723 F.3d 1191, 1199 (10th Cir. 2013). Officer White, after hearing the warning shots from the rear of the house and seeing

Samuel Pauly at the window with a handgun, decided to use deadly force.

Although all the officers in the front of the house were in protected, concealed positions, Officer White did not monitor the actions of Samuel Pauly to see if he was a threat. Indeed, even though Officer Mariscal had fired his weapon at Samuel Pauly, Samuel Pauly had not returned fire. As he acknowledges, Officer White simply focused on getting a kill shot.

- a. Officer White's use of deadly force was not objectively reasonable under the totality of the circumstances.**

Officer White asserts that his use of deadly force was objectively reasonable under the circumstances because Samuel Pauly was pointing a handgun in his direction and Daniel Pauly had fired two shotgun blasts from the rear of the house. Officer White's argument ignores his role in the reckless and deliberate actions that led Samuel and Daniel Pauly to feel that they needed to protect themselves and their property against threatening and unknown persons.

Officer White initially waited at the interstate exit. When Officer White received information from the other officers that the car involved in the incident was parked at the home where it was registered, he proceeded from the exit to the Pauly home, which took approximately a minute. Officer White parked his car where it was concealed from the upper residence and did not activate any

emergency lights. Officer White, like the other officers, approached the home surreptitiously and concealing his identity.

At this time, Officer White knew that the alleged victims of the road rage incident were safe and had left the scene to drive home; that the alleged aggressor's vehicle was parked at the residence where it was registered and was causing no threat; that there was nothing about the appearance of the home or the activities of its occupants that suggested anything criminal was occurring; that any threatening activities that had occurred on the road were over; and that no exigent circumstances existed.

When Officer White arrived at the home, Officer Mariscal and Officer Truesdale were yelling "Come out or we are coming in!" and "Open the door!" Officer White heard the hostile and threatening statements being made by Officer Mariscal and Officer Truesdale and knew that there were no exigent circumstances that would permit the officers to enter the home. Officer White did not identify himself as a police officer and began yelling threats at the Pauly brothers.

Thus, prior to the Pauly brothers threatening to use force, Officer White knew that officers had approached a rural, isolated home surreptitiously in the middle of the night, that he had not identified himself as a police officer, that the officers were standing in the dark and may not be visible to the occupants of the

home, that the officers had been yelling hostile and profane threats at the occupants of the home, and that the occupants had tried to scare the officers away. Under these circumstances, there was no basis for a reasonable officer to believe that the occupants of the home knew it was the police outside their home. In addition, as discussed above, Officer White failed to provide a warning regarding the use of deadly force and failed to monitor the evolving circumstances after Samuel Pauly appeared at the window with a pistol to determine if deadly force was warranted.

b. All of the officers recklessly and deliberately created the circumstances that necessitated the use of deadly force.

All three officers are appropriately held responsible for the reckless and deliberate conduct that led to Officer White shooting and killing Samuel Pauly because each of the officers participated as a team in the substandard conduct that precipitated the use of deadly force. The fact that it happened to be Officer White who fired the fatal shot does not relieve the other officers of liability for the reckless conduct that precipitated the use of deadly force.

A governmental actor may be liable for the constitutional violations that another committed where the actor “set in motion a series of events that the defendant knew or reasonably should have known would cause others to deprive

the plaintiff of her constitutional rights.” *Trask v. Franco*, 446 F.3d 1036, 1046 (10th Cir. 2006); *see also Martinez v. Carson*, 697 F.3d 1252, 1255 (10th Cir. 2012) (§ 1983 liability should be “read against the background of tort liability that makes a man responsible for the natural consequences of his actions”)(quoting *Monroe v. Pape*, 365 U.S. 167, 187 (1961)); *Estate of Booker v. Gomez*, 745 F.3d 405, 422 (10th Cir. 2014) (“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.”) (quoting *Bletz v. Gribble*, 641 F.3d 743, 754 (6th Cir. 2011)).

The officers in this case all approached the home surreptitiously, intentionally concealing their identities. None of the officers effectively identified himself. Officer White and Officer Mariscal did not identify themselves at all during the encounter. Approximately ninety seconds before shots were fired, Officer Truesdale identified himself once at the front of the house. At the time no one was in the front of the house to hear the identification. All the officers worked in concert to surround the home and shouted coercive and threatening commands to the Pauly brothers that made the Pauly brothers believe their lives were in jeopardy from unknown intruders. Accordingly, all of the officers are liable for the use of deadly force in violation of Samuel Pauly’s constitutionally protected

rights because they jointly recklessly and deliberately created the circumstances that necessitated the use of deadly force.

The fact that Officer White, rather than either of the other two officers, fired the fatal shot does not change the analysis. Officers have been held liable in excessive force cases even when they did not personally use deadly force. In *Stewart v. City of Prairie Vill., Kan.*, 904 F. Supp. 2d 1143, 1155-59 (D. Kan. 2012), five officers forcibly entered the home of a mentally unstable woman who was suicidal. When the woman allegedly reached for a knife, one of the officers shot and killed her. Plaintiff asserted that all of the officers who entered the apartment were individually liable for use of excessive force. The non-shooting officers argued that the excessive force claims against them should be dismissed because they did not personally use any excessive force against the woman. The district court found that although only one officer used deadly force, all of the officers caused her to be deprived of her constitutional rights by participating in a substandard operation, and their actions were not objectively reasonable. *Id.* at 1157-1158. Accordingly, all the officers were liable for the shooting officer's use of excessive force. *Id.*

In *Strachan v. City of Federal Heights*, 837 F.Supp. 1086 (D. Colo. 1993),

the court found that all the officers could be liable for excessive force when the officers entered the plaintiff's apartment as a team, but only one defendant actually fired his weapon. The non-firing officers argued that they could not be liable because they did not personally harm the plaintiff. Disagreeing, the court found that because the entire operation was substandard and likely to result in the use of deadly force, the non-shooting officers could be liable by participating in an operation that caused the plaintiff to be deprived of his constitutional rights and that the officers' conduct was not objectively reasonable. *Id.* at 1091.

Similarly, Plaintiffs here have alleged facts showing that the entire operation was substandard and in reckless disregard to the occupants of the house being subject to deadly force in the course of protecting themselves and their property against threatening and unknown persons. While Officers Mariscal and Officer Truesdale did not fire fatal shots, they were active participants in the reckless and deliberate conduct that was objectively unreasonable and precipitated the use of deadly force by Officer White. This point is punctuated by the fact that Officer Mariscal also fired his weapon at Samuel Pauly. It was simply happenstance that Officer White's bullet rather than Officer Mariscal's bullet killed Samuel Pauly. The evidence demonstrating that all of the officers engaged in conduct that led to the use of deadly force, including approaching the Pauly

home surreptitiously in the middle of the night without identifying themselves as police officers and shouting profane and coercive threats at the Paulys, is sufficient to support a finding that all of the officers are liable under Section 1983 for Officer White's use of deadly force.

Courts in other circuits have held participating officers liable in excessive force cases involving similar facts even though their actions did not directly cause the plaintiff's injuries. In *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 557 (1st Cir. 1989), plaintiff was parked alongside the road admiring the view with his girlfriend. Around 11:30 p.m., four plain clothes officers exited an unmarked police vehicle and approached plaintiff's car with guns drawn. Upon seeing unidentified men brandishing firearms approaching his car, plaintiff started his engine and began to drive away. Without warning, the officers fired at the vehicle. One of their bullets struck plaintiff's spinal cord, rendering him a paraplegic.

Two of the officers argued that they were not the proximate cause of plaintiff's injuries. They alleged that since the bullet that entered plaintiff's body came from another officer, that officer's action must be seen as an intervening, superceding cause of the constitutional deprivation. The First Circuit disagreed, noting that liability under § 1983 extends to those who “ ‘subject or *cause to be subjected*, any citizen ... to a deprivation of rights ... secured by the Constitution.’ ”

Id. at 560–61 (quoting 42 U.S.C. § 1983) (emphasis added). The court explained that:

A person “subjects” another to the deprivation of a constitutional right, within the meaning of section 1983, if he does an affirmative act, participates in another’s affirmative acts, or omits to perform an affirmative act which he is legally required to do, that causes the deprivation of which complaint is made. Moreover, personal participation is not the only predicate for section 1983 liability. Anyone who “causes” any citizen to be subjected to a constitutional deprivation is also liable. The requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury.

Id. at 560-61 (citations omitted)

The First Circuit concluded that the injury to the plaintiff was a reasonably foreseeable consequence of each officer’s conduct because “[i]t was eminently foreseeable that an encounter with a civilian by four policemen with weapons drawn and ready to fire might result in a discharge of the firearms and an injury to the civilian.” *Id.* at 561.

In *Grandstaff v. Borger*, 767 F.2d 161 (5th Cir. 1985), police officers pursued a fleeing motorist down a private ranch road at 4:30 a.m. The fleeing motorist abandoned his vehicle about 200 yards from a home on the ranch. When a truck subsequently drove down the road from the home, the officers opened fire

from a protected position without knowing who was in the truck and killed the ranch manager who was driving down to investigate the disturbance. The officers asserted that without knowing which officer's bullets struck the ranch manager, none of them could be liable for excessive force. The Fifth Circuit disagreed, finding that because it was a joint operation with the same recklessness, the same circumstances, and the same object, each participant was as much at fault as the others, and all were liable for the foreseeable consequences. *Id.* at 168.

c. The officers' reckless and deliberate conduct was the but-for and proximate cause of Samuel Pauly's death.

The officers dispute that they were the proximate cause of Samuel Pauly's death. According to the officers, either Daniel Pauly's "warning shots" at the rear of the home or Samuel Pauly's alleged act of pointing a weapon out the window of the home, was a superseding event that proximately caused Officer White's use of deadly force and relieved the officers of any liability for their prior reckless or deliberate conduct. Under applicable law, it is clear that there was no superseding event.

In civil rights cases, a superseding cause, as traditionally understood in tort law, may relieve a defendant of liability. *Trask*, 446 F.3d at 1046. A superseding cause is one that is "not within the scope of the risk created by the actor's

conduct.” Restatement (Second) of Torts § 442B (1965). Foreseeable intervening forces, however, are within the scope of the original risk, and will not supersede the defendant’s responsibility. *Trask*, 446 F.3d at 1047 (citing William Lloyd Prosser *et al.*, *Prosser and Keeton on Torts* § 44, at 303–04 (5th ed.1984)); *Marshall v. Perez Arzuaga*, 828 F.2d 845, 848 (1st Cir.1987) (an actor is responsible for those consequences attributable to reasonably foreseeable intervening forces, including the acts of third parties).

If the reasonable foreseeability of an intervening act’s occurrence is a factor in determining whether the intervening act relieves the actor from liability for his antecedent wrongful act, and under the undisputed facts there is room for reasonable difference of opinion as to whether such act was wrongful or foreseeable, the question should be left for the jury. *Trask*, 446 F.3d at 1047 (citing Restatement (Second) of Torts § 453 cmt. b (1965)).

The officers assert that they could not have possibly foreseen that the residents of the home would act with “hostile intent” and with acts that “were so wholly disproportionate and unexpected that they clearly constituted superseding events.” BIC at 30. This argument defies credibility.

The officers decided to investigate a prior road rage incident by proceeding to the alleged perpetrator’s home in the middle of the night. The officers parked

their cars where they were concealed from view and surreptitiously approached the Pauly residence, intentionally concealing their identities. The Pauly brothers saw persons sneaking up on their home intermittently using flashlights. The Pauly brothers repeatedly asked the intruders to identify themselves and why they were there. Despite hearing the brothers' requests to know who was outside their home, the officers did not identify themselves.

At this time, the officers knew that the alleged victims of the road rage incident were safe and had left the scene to drive home; that the alleged aggressor's vehicle was parked at the residence where it was registered and was causing no threat; that there was nothing about the appearance of the home or the activities that could be seen by the police that suggested anything criminal was occurring at the home; that any perceived threat that had occurred on the road was over; and that no exigent circumstances existed.

Rather than identify themselves, the officers escalated the situation by yelling coercive, aggressive and profane commands, like "Open the door!" and "Hey, motherf**kers, we've got you surrounded!" The officers yelled to the Pauly brothers to "Come out or we are coming in!"

After hearing "Come out or we're coming in!" and other profane and aggressive language, the Pauly brothers did not feel comfortable opening the door

and did not feel that they were safe taking shelter in their home. The Pauly brothers felt that their “lives were in near threat of being killed.” They decided to call the police. Before they could call the police, they heard “We’re coming in! We’re coming in!” Scared and believing that they needed to protect themselves and their home from intruders, Samuel Pauly grabbed an antique pistol and handed Daniel Pauly an antique shotgun.

The Pauly brothers’ actions were not unexpected or unforeseeable. It is reasonable for police officers to anticipate that if they sneak up on a home in the middle of the night, fail to identify themselves despite requests to do so by the residents of the home, and shout profane and threatening commands that they will be entering the home, the residents of the home may fear for their safety and defend themselves with deadly force. Accordingly, the Pauly brothers’ use of force is not a superceding event that absolves the officers of liability for their antecedent reckless and deliberate conduct.

The officers’ reliance on *Thomas v. Durastanti*, 607 F.3d 655 (10th Cir. 2010), is misplaced. In *Durastanti*, the parties disputed whether two undercover officers identified themselves. The court found that the dispute was immaterial because it was not reckless for undercover officers to fail to identify themselves when the undercover officers were accompanied by a uniformed state trooper, the

trooper's marked patrol car was parked behind the suspects' car with its emergency lights operating, and one of the car's occupants complied with the trooper's directive that he get back into the car. Furthermore, the incident at issue in *Durastanti* happened in the daylight and there was no question that the officer and patrol car were visible. *Id.* at 659.

In contrast, in this case, the officers knew that the police cars were concealed behind the lower residence, that they had approached the home surreptitiously only using flashlights intermittently as needed, that they were standing outside the home under the cover of darkness, that they had not effectively identified themselves despite the residents' repeated requests to do so, and that they had been yelling profane and threatening commands at the persons in the residence. Under these circumstances, a reasonable officer would not presume that the occupants of the home knew it was the police outside.

While the court must analyze the events from the perspective of the officer, it must construe the disputed facts in the light most favorable to the plaintiff. Many of the officers' arguments improperly construe disputed facts, such as whether the officers effectively identified themselves or whether the brothers could identify the officers as police in the lighting conditions outside the home, in their favor.

A finding that the Pauly brothers' use of force was foreseeable and not a superseding act is consistent with Tenth Circuit law. In *Trask*, probation officers summoned police officers to a home occupied by Trask. *Trask*, 446 F.3d 1036. When Trask appeared at the door with knives, he was detained and arrested. The Tenth Circuit declined to find that Trask's armed appearance at the door was a "superseding act that limited the probation officer's liability," because the probation officers might have "reasonably foresaw when they first called for police backup" that Trask would be armed when the police officers arrived. *Id.* at 1047. The Tenth Circuit noted that the criminality of Trask's acts did not preclude the probation officers from liability, as even "an intervening criminal act is not a superseding act to limit the probation officer's liability if the criminal act was foreseeable." *Id.*

The Tenth Circuit recently addressed a factually similar situation in *James v. Chavez*, 511 F. App'x 742 (10th Cir. 2013) (unpublished). In *James*, police officers engaged in a confrontation with Mr. Murphy who was reported to be armed with a knife. Mr. Murphy fled into his home. At one point Mr. Murphy came out of his home, threw various items at the uniformed police officers and then retreated back into his home. At some point in the encounter, one of the officers, believing that Mr. Murphy was threatening his daughter with a knife, fired a shot

at Mr. Murphy through a window and then immediately ordered the SWAT team to enter. When Mr. Murphy attacked a SWAT team member with a knife, he was shot and killed. Plaintiff asserted that the officer who fired the first shot and ordered the SWAT team to enter was liable for Mr. Murphy's death because he knew or should have known that Mr. Murphy would react violently to the SWAT team's entry into his home.

The Tenth Circuit acknowledged that the officer's conduct was the "but-for" cause of Mr. Murphy's death since the chain of events culminating in the fatal shooting would not have occurred "but for" the officer's conduct. *Id.* at 747. The Court noted, however, that a defendant is not liable for harm produced by a "superseding cause." *Id.* The Court found that Mr. Murphy did not have a legal right to defend his home with deadly force because he was not defending his home against unknown intruders but, rather, knew that the persons outside his home were police officers.² *Id.* The court therefore found that Mr. Murphy's unlawful

² The Court noted that in New Mexico,

"Homicide is justifiable when committed by any person in any of the following cases:

A. when committed in the necessary defense of his life, his family or his property, or in necessarily defending against any unlawful action directed against himself, his wife or family;

B. when committed in the lawful defense of himself or of another and when there

and deliberate attack on the SWAT team constituted a superseding cause of his death that defeated liability for the officer. *Id.* at 750.

In this case, in contrast, the Paulys did not know it was police officers threatening to invade their home in the middle of the night. Under applicable New Mexico law, NMSA §§ 30-2-7A and 7B, the Pauly brothers were entitled to defend their home with deadly force and their decision to do so cannot be a superseding cause. *See also Gutierrez-Rodriguez*, 882 F.2d at 560-61 (conduct of officer whose bullet struck the plaintiff was not a superseding intervening event because it was eminently foreseeable that an encounter with a civilian by four unidentified policemen with weapons drawn and ready to fire might result in a discharge of the firearms and an injury to the civilian.).

The Tenth Circuit has cited the following example of a superseding-intervening cause:

Suppose that three police officers go to a suspect's house to execute an arrest warrant and that they improperly enter without knocking and announcing their presence. Once inside, they encounter the suspect, identify themselves, show him the warrant, and tell him that they are

is a reasonable ground to believe a design exists to commit a felony or to do some great personal injury against such person or another, and there is imminent danger that the design will be accomplished[.]

NMSA §§ 30-2-7A and 7B.” *James*, 511 F. App'x at 747.

placing him under arrest. The suspect, however, breaks away, shoots and kills two of the officers, and is preparing to shoot the third officer when that officer disarms the suspect and in the process injures him. Is the third officer necessarily liable for the harm caused to the suspect on the theory that the illegal entry without knocking and announcing rendered any subsequent use of force unlawful? The obvious answer is “no.” The suspect’s conduct would constitute a “superseding” cause, *see* Restatement (Second) of Torts § 442 (1965), that would limit the officer’s liability. *See id.* § 440.

Trask, 446 F.3d at 1046 (citation omitted).

This example underscores the lack of a superseding intervening cause in this case. As the district court noted, if the jury finds that the Pauly brothers knew it was the police outside and fired upon them, it may be a superseding cause. Construing the disputed facts in the light most favorable to Plaintiffs, however, the Pauly brothers never knew who was outside their home. Under New Mexico law, the Pauly brothers use of force to defend themselves and their home from unknown intruders was lawful and cannot be a superseding intervening cause absolving the officers of liability for their reckless and deliberate conduct that precipitated the use of deadly force. *See* NMSA §§ 30–2–7A and 7B.

B. The Evidence Is Sufficient to Demonstrate That Samuel Pauly's Rights Were Clearly Established at the Time of the Challenged Unlawful Activity.

1. Standard for Determining Whether a Right Is Clearly Established.

In evaluating whether a right was clearly established at the time of the challenged conduct, a district court must consider whether the right was sufficiently clear that a reasonable government employee in the defendant's position would understand that the challenged conduct violated that right. *See, e.g., Casey v. W. Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323, 1327 (10th Cir. 2007). "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." *Currier v. Doran*, 242 F.3d 905, 923 (10th Cir. 2001). However, as the Supreme Court has observed, a right can be clearly established without a controlling decision declaring the "very action in question ... unlawful." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). A court should inquire into "whether the law put officials on fair notice that the described conduct was unconstitutional" and not engage in "a scavenger hunt for cases with precisely the same facts." *Pierce v. Gilchrist*, 359 F.3d 1279, 1298 (10th Cir. 2004).

2. Samuel Pauly's Right to Be Free from Unreasonable Deadly Force Was Clearly Established.

Samuel Pauly's right to be free from excessive force that was necessitated by the officers' reckless and deliberate behavior was clearly established at the time of the events at issue in this case.

As an initial matter, the Fourth Amendment objective reasonableness standard "is 'clearly established' in the context of § 1983 actions" involving claims of excessive force. *Gross v. Pirtle*, 245 F.3d 1151, 1158 (10th Cir. 2001); *Saucier*, 533 U.S. at 201-202 ("there is no doubt that *Graham v. Connor* . . . clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness.").

Since at least 1995, it has been clearly established in the Tenth Circuit that officers are potentially liable where their reckless or deliberate conduct precipitates the need to use deadly force. *Sevier*, 60 F.3d at 699 (officers violate the Constitution when the officers' own "reckless or deliberate conduct during the seizure unreasonably created the need to use such force")(internal footnote omitted); *Allen*, 119 F.3d at 841 (reasonable jury could have found that the officers' conduct in approaching the suspect was objectively unreasonable,

reckless, and could have precipitated the need to use deadly force); *Murphy v. Bitsoih*, 320 F. Supp. 2d 1174, 1193 (D.N.M. 2004) (recognizing that “[c]learly established law in this Circuit also holds that an officer is responsible for his or her reckless conduct that precipitates the need to use force.”). It was also clearly established in the Tenth Circuit that the requisite causal connection for establishing a Section 1983 violation “is satisfied if the defendants set in motion a series of events that the defendants knew or reasonably should have known would cause others to deprive the plaintiff of his constitutional rights.” *Trask*, 446 F.3d at 1046.

It is also clear that an officer may not use deadly force unless there is an immediate need to use such force. *Fancher*, 723 F.3d at 1199 (“circumstances may change within seconds eliminating the justification for deadly force”). The factual record would support a finding that there was no such need in this case.

CONCLUSION

Plaintiffs Daniel T. Pauly, as Personal Representative of the Estate of Samuel Pauly, deceased, and Daniel B. Pauly, individually, respectfully request that the Court affirm the decision of the district court.

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs/Appellees request oral argument to provide this Court with an opportunity to seek any necessary clarification of the issues from counsel for the parties.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 11,188 words, excluding the parts of the brief exempted by Fed. R. App. P. 32 (a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2014, I mailed one copy of Appellees' Brief via U.S. Mail to Mark D. Jarmie, Jarmie & Associates, P.O. Box 26416, Albuquerque, NM 87125-6416.

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