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United States Court of Appeals
Tenth Circuit

November 9, 2023

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ESTATE OF ALLAN GEORGE, by and through its personal representative Sarra George; SARRA GEORGE, individually; KENNETH ALLAN GEORGE, individually; NICOLE LYNN WALLACE, individually; M.E.G., a minor, by and through their legal guardian Sarra George; T.A.G, a minor, by and through their legal guardian Sarra George,

Plaintiffs - Appellees,

v.

CITY OF RIFLE, Colorado, a municipality; DEWEY RYAN, Police Corporal, in his individual capacity; TOMMY KLEIN, Police Chief, in his individual capacity,

Defendants - Appellants.

No. 22-1355

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:20-CV-00522-CNS-GPG)

Eric M. Ziporin (Jonathan N. Eddy, with him on the briefs), SGR, LLC, Denver, Colorado, appearing for Appellants.

David A. Lane (Darold W. Killmer, Liana G. Orshan, and Reid R. Allison, with him on the brief), Killmer, Lane & Newman, LLP, Denver, Colorado, appearing for Appellees.

Before **ROSSMAN**, **KELLY**, and **BRISCOE**, Circuit Judges.

BRISCOE, Circuit Judge.

The plaintiffs in this case, which include the estate and surviving family members of Allan Thomas George, filed this 42 U.S.C. § 1983 action against the City of Rifle, Colorado (the City), Tommy Klein, the chief of the Rifle Police Department (RPD), and Dewey Ryan, a corporal with RPD, alleging that the defendants violated George's Fourth Amendment rights by employing excessive and deadly force against him in the course of attempting to arrest him on a felony warrant. Plaintiffs also asserted a Colorado state law claim of battery causing wrongful death against Ryan.

Defendants moved for summary judgment with respect to all of the claims asserted against them. Defendants Ryan and Klein asserted, in particular, that they were entitled to qualified immunity from the § 1983 excessive force claim. The district court denied defendants' motion in its entirety. Defendants have now filed an interlocutory appeal challenging the district court's ruling. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we reverse and remand with directions to enter summary judgment in favor of defendants as to all of the plaintiffs' claims.[1]

[1] Judge Rossman would remand the plaintiffs' state law wrongful death claim to the district court with instructions to dismiss for lack of supplemental jurisdiction. *See* 28 U.S.C. § 1367.

I

Factual history

The facts of this case are, in large part, undisputed. In 2009, George, a Colorado resident, pleaded guilty in the District Court of Lake County, Colorado, to one count of Sexual Exploitation of a Child, in violation of Colo. Rev. Stat. § 18-6-403, a class five felony. George was placed on probation and was required to register as a sex offender for four years. George successfully completed the terms and conditions of his sentence. As a result, his original felony case was dismissed and no felony conviction entered.

On April 10, 2019, a Federal Bureau of Investigation (FBI) Child Exploitation and Human Trafficking Task Force reported that during a recent criminal investigation of suspected illegal possession and distribution of child pornography by individuals using "Kik Messenger," a "cross-platform mobile application used for instant messaging," George, who at that time was a resident of Rifle, Colorado, was positively identified as an active participant in those illegal activities. Aplt. App., Vol. I at 112. Following the Task Force's report, a local FBI agent and an investigator with the 9th Judicial District Attorney's Office in Colorado performed a follow-up investigation into George's activities, including obtaining and executing search warrants for George's home. As a result, they determined George to be in possession of pornographic and/or sexually exploitive images of children.

On June 20, 2019, the same day the search warrants were executed at George's home in Rifle, Colorado, law enforcement officers personally contacted George at a

construction site in Vail, Colorado. When law enforcement officers informed George of the investigation, he told them he "knew it was wrong," but that he "explored several groups on Kik" looking for images of child pornography. *Id*. at 113.

At some point after June 20, 2019, George's wife, Sarra George (Sarra), left Colorado with George's two minor children and traveled to another state. Sarra informed multiple people, including members of George's family, that George was being criminally investigated for possessing child pornography.

On July 12, 2019, George purchased a .45 caliber handgun from a licensed firearms dealer. Because George's 2009 Colorado state felony conviction had been dismissed, the background check that the firearms dealer ran did not reveal anything that would disqualify George from purchasing the firearm.

On or about July 30, 2019, Sarra contacted the RPD and requested what the RPD classified as a "welfare check" due to a "suicidal party" at George's residence in Rifle. *Id*. Sarra, who was still out of state, informed the RPD that George was being investigated for child pornography and had recently made suicidal statements to her. Sarra also informed the police that George had recently purchased a gun and had told her "that he was not 'going back to jail without a fight.'" *Id*. The information that Sarra conveyed on the phone call to the RPD was in turn conveyed to RPD officers during a "pass-down," which "is a routine beneficial practice" that "occurs at the end of each shift so that officers from a previous shift can update and inform other officers of critical information at the time such other officers take over a follow-on subsequent shift." *Id*.

On August 5, 2019, a judge in the 9th Judicial District in Colorado determined that there was probable cause to conclude that George committed the criminal offense of sexual exploitation of a child, in violation of Colo. Rev. Stat. § 18-6-403, and, as a result, issued a warrant for George's arrest. That same day, officers from the Vail Police Department attempted to contact George at his jobsite to make the arrest. George's supervisor informed the officers that George failed to show up for work that day.

On the afternoon of August 5, 2019, officers from the RPD visited George's residence and spoke with Sarra. Sarra told the officers that George had a firearm that he carried at work and at home, and that he recently returned from a trip out of state. Sarra also told the officers that George recently told her that he was "not going to be a sex offender" and "wasn't going to jail." *Id*. Sarra told the officers that she interpreted these statements to mean that George would not be arrested without a fight. In addition, Sarra told the officers that, while she was out of state, George had installed a video surveillance camera at their home that fed video directly to his cell phone and would allow him to observe visitors approaching the residence.

At approximately 6 p.m. on August 5, 2019, a dayshift RPD officer who was concluding her shift conducted a "pass-down" of information to Corporal Dewey Ryan (Ryan) and Officer Shelby McNeal (McNeal), the two (and only) officers who were scheduled for that evening's night shift. *Id*. at 83, 92, 114. This "pass-down" included "the information regarding the arrest warrant for . . . George and the statements relayed to law enforcement earlier that day by" his wife. *Id*. at 114. "At

or near the time of this pass-down, Corporal Ryan and Officer McNeal both viewed a photograph of . . . George." *Id*. Ryan subsequently obtained a copy of the arrest warrant and reviewed it.

Based upon the information they received during the pass-down, Ryan and McNeal decided to conduct a felony traffic stop if George returned to Rifle that evening, rather than waiting for him to return to his residence. Accordingly, Ryan and McNeal each drove their own marked patrol cars and parked at the intersection of I-70 and Colorado State Highway 13.[2] To the south of that intersection lies a small portion of the City of Rifle, comprised mostly of businesses. To the north of that intersection lies the main portion of the City of Rifle.

At approximately 7:11 p.m. that evening, Ryan observed a white Ford F-150 truck exit from I-70 westbound at Exit 90. The truck, which was clearly marked with the name of the company where George worked, matched the description of George's truck given to law enforcement by his wife. Ryan was also able to positively identify George as the driver of the truck.

Upon positively identifying George, both Ryan and McNeal activated the emergency lights on their patrol vehicles and positioned their vehicles directly behind George's truck as soon as he exited I-70 and turned northward onto Colorado State Highway 13. Within seconds, George pulled his truck to the side of the road and

[2] Ryan requested assistance from a Garfield County Sheriff's deputy who parked his patrol vehicle near Ryan's and McNeal's vehicles. That deputy, however, was subsequently dispatched to another location, leaving Ryan and McNeal alone to attempt to arrest George.

stopped approximately 200 yards from the offramp. When stopped, George's truck was on a bridge that spans the Colorado River, which is commonly referred to as the "River Bridge." *Id*. at 25, 84. Ryan parked his patrol vehicle approximately five to ten yards behind George's truck and McNeal parked her patrol vehicle less than five to ten yards from Ryan's vehicle.

Ryan retrieved his patrol rifle, got out of his patrol vehicle, and stood in the gap between his open driver's-side door and the main vehicle frame of his patrol vehicle. Ryan then began giving loud verbal commands to George to place his hands outside of the driver's side window of his truck. George used his driver's side mirror several times to look directly at Ryan, but did not place his hands outside of his truck as directed by Ryan. George then, without being directed to do so by Ryan, got out of his truck and walked towards the rear of his truck and Ryan's vehicle. Although Ryan ordered George "to stop walking toward" Ryan's vehicle "and return to his" truck, George ignored those commands. *Id*. at 85. While he was walking towards the back of his truck and the front of Ryan's vehicle, George reached behind his back and retrieved a handgun. Ryan could see that George's handgun had an extended magazine that provided for a larger capacity of ammunition.

George, continuing to ignore verbal commands from Ryan to put the handgun down, moved the handgun up to his chest area. George then, again in defiance of verbal commands from both Ryan and McNeal, walked between the rear of his truck and the front of Ryan's patrol vehicle and towards a guardrail on the east side of the River Bridge. George engaged in conversation with Ryan and McNeal and

repeatedly stated to them, "It's over!" and "I'm not going to jail!" *Id*. at 117. According to Ryan, McNeal, and citizen witnesses passing by in their vehicles, George appeared agitated and angry. On at least two occasions, George began to verbally count down by saying "3, 2, 1," as if demonstrating the intent to shoot himself. *Id*. at 116.

When he got to the guardrail, George stepped over it, turned around (with his back towards the river below and his head and chest facing towards the road), and pressed the front of his calves against the guardrail. Using his right hand, George held the gun at or near his upper chest area with the muzzle pointing at his chest and his thumb on the trigger while he continued talking to Ryan and McNeal. Ryan and McNeal continued to urge George to put his handgun down, to climb back over the guardrail, and to speak with them. In response to Ryan and McNeal's pleas, George continued to state, "It's all over!" and "It's over!" *Id*. at 117.

After remaining in the same position by the guardrail for several minutes while talking to Ryan and McNeal, George turned around and faced the river below. Initially after doing so, George continued to hold the handgun in his right hand as he peered down at the river. After a brief period, however, George placed his handgun in the right front pocket of his jeans with the butt of the handgun protruding outside and never again held it in his hand for the remainder of the encounter. George then stared down at the river, bent down slightly, and appeared to be getting ready to jump into the river. George did this several times, interspersed with talking to the officers and refusing to obey their commands. At some point, George removed from his jeans

pockets his wallet, some cash, two knives, and his glasses and threw these items on the ground.

Up to this point in the encounter, Ryan and McNeal had together ordered George approximately forty-six times to drop his handgun. Despite these orders, and despite disposing of other personal items on his person, George never surrendered possession of his handgun. And, during the entire encounter, there was a steady stream of traffic in both directions over the River Bridge.

After crouching several times while facing the river, George stood up straight, looked to his left towards downtown Rifle, stepped back over the guardrail, first with his left leg and then with his right leg, and effectively positioned himself facing away from the two officers and towards downtown Rifle. George then began walking along the shoulder of the road next to the guardrail in a northerly direction towards downtown Rifle and away from the two officers. As George did so, both Ryan and McNeal shouted at George to stop. More specifically, Ryan shouted, "Allan, stay, don't do it," and McNeal shouted, "Stay on that side." *Id*. at 156; Combined audio/video of stop at approx. 9:25–9:28. George, however, continued walking away and, after taking approximately five steps, began jogging or running. Ryan twice yelled, "Allan," in an attempt to get George to stop. Aplt. App., Vol. I at 156. McNeal yelled, "Just stop right there. Stop. Stop." Combined audio/video of stop at approx. 9:28–9:33.

As George began walking and then running away, Ryan responded by moving forward around his patrol car to the shoulder of the road by the guardrail and

following George. Using his patrol rifle, Ryan then shot George two times in the back. According to Ryan, "[t]he fact that George had the opportunity to attempt suicide by either shooting himself or jumping off the bridge, but did not, . . . led [him] to believe that [George] was not suicidal but would instead use the gun against [the police] or the public." Aplt. App., Vol. I at 87. Ryan alleges that he "fired at the last possible opportunity to safely do so given that George was running into an area where [Ryan's] backstop would have been the populated area of the City." *Id*. at 88. McNeal similarly stated that she was "worried that [George] was running towards . . . more people and residences" and "d[id]n't know what his plan was there." *Id*. at 199.

George, who at that point was approximately fifty-five feet in front of his own truck and approximately thirty yards or less north of Ryan's location, immediately fell to the ground upon being struck by the two bullets. The distance from where George fell to the nearest populated area of Rifle at 1st Street and Riverwhite Avenue was approximately four hundred and twenty-two yards. In addition, the place where George fell to the ground was past the northern edge of the Colorado River, meaning there was only a small drop from the River Bridge to the land below.

After George fell to the ground, Ryan and McNeal moved forward and performed a pat-down search of George's body. Ryan removed the handgun from George's right front jeans pocket and placed it on the curb underneath the guardrail. A Garfield County Sheriff's deputy who had arrived on the scene during the encounter inspected the handgun taken from George's pocket and determined that it was locked and loaded, with a round loaded inside the firing chamber.

After disarming George, Ryan placed George into handcuffs and began to provide George with emergency medical treatment, including applying pressure to the bullet wounds on his torso. The officers called for an ambulance and, while waiting for the ambulance to arrive, continued to talk to George. Emergency medical providers then arrived on the scene. Despite the efforts of the officers and the emergency medical providers, George died at approximately 7:38 p.m. and was pronounced dead at Grand River Hospital in Rifle. An autopsy concluded that George suffered two gunshot wounds "on the right aspect of [his] back" and that "[b]oth gunshot wounds perforated [his] right lung and resulted in internal bleeding in [his] right chest cavity." *Id*. at 121.

Klein, the Chief of Police for RPD at the time of the incident, "was at home asleep during the incident and received a phone call from a telecommunicator letting [him] know there were officers on the [R]iver [B]ridge, a subject with a firearm, and that they requested [he] respond to the scene." *Id*. at 97. Klein subsequently "heard on [his] police radio that shots were fired." *Id*. Klein "arrived at the scene approximately 10 minutes later and observed a deputy blocking traffic on the north side of the [R]iver [B]ridge." *Id*. "George had already been transported away from the scene." *Id*. Klein "conducted a safety briefing with . . . Ryan . . . who gave [him] a broad overview of what had happened." *Id*.

Klein then "contacted the Sheriff and the District Attorney to have the Critical Incident Team ('CIT') respond." *Id*. "CIT is a group of local law enforcement agencies who, along with the Colorado Bureau of Investigation, investigates

officer-involved shootings on behalf of the District Attorney's Office." *Id.* On November 4, 2019, the District Attorney for the Ninth Judicial District of Colorado issued a lengthy letter outlining the CIT's investigatory findings and explaining his decision to "decline to charge anyone with a crime for the death of . . . George." *Id.* at 129.

Procedural history

On February 25, 2020, several of George's family members—Sarra, two of George's adult children (Kenneth Allan George and Nicole Lynn Wallace), and two of George's minor children (T.A.G. and M.E.G.)—initiated these federal proceedings by filing a complaint against the City, Ryan, and Klein. On February 26, 2020, plaintiffs filed an amended complaint correcting certain errors in the original complaint. The first claim for relief, which was asserted solely by the Estate of Allan George pursuant to 42 U.S.C. § 1983, alleged that defendant Ryan "seized . . . George by means of objectively unreasonable and excessive, deadly force when he shot him to death without any prior warning without having reasonable belief [that] . . . George posed a significant threat to . . . Ryan, . . . McNeal, or any other person if not immediately apprehended." *Id.* at 34. The first claim further alleged that Ryan's use of deadly force "was excessive under the circumstances" and "objectively unreasonable in light of the facts and circumstances confronting him." *Id.* The first claim also alleged that Ryan's "acts and omissions . . . were because of and pursuant to the custom, policy, training, and/or practice of Defendants Rifle and Klein." *Id.* at 35.

The second claim for relief, which was asserted by the individual plaintiffs (i.e., Sarra, Kenneth Allan George, Nicole Lynn Wallace, M.E.G., and T.A.G.), alleged that defendant Ryan committed battery causing wrongful death, in violation of Colorado state law, by "intentionally sh[ooting] . . . George twice in the back with the intent to inflict harmful contact on . . . George, and which such contact caused injury to . . . George, namely his death." *Id*. at 37.

On April 25, 2022, defendants filed a motion for summary judgment. Defendants argued that defendants Ryan and Klein were entitled to qualified immunity. Defendants also argued that plaintiffs' wrongful death claim should be dismissed, "[g]iven the lack of evidence rising to the level of willful and wanton conduct." *Id*. at 76. Lastly, defendants argued that plaintiffs' claim against the City should also be dismissed.

The district court held a hearing on defendants' motion for summary judgment on October 3, 2022. Counsel for both parties agreed that the material facts were not in dispute. After hearing argument from both sides, the district court orally ruled in favor of plaintiffs and denied defendants' motion for summary judgment. The following is a complete recitation of the district court's ruling:

> In defendants' motion for summary judgment, the defendant moves for summary judgment as to the two claims brought by the plaintiff in this case. We will deal with the first claim first, excessive force in violation of the Fourth Amendment. This claim was brought against all three defendants, which are Officer Ryan, Sheriff Klein, and the City of Rifle.
>
> It's clear—the law that defines the boundaries of this claim is clear, and that is, to use deadly force, an officer must believe that the suspect poses a serious threat to the officer or others around the officer.

In looking at that threat and in assessing the objective reasonableness of that threat, the Court must look at the severity of the crime underlying the seizure, the immediate threat to the safety of officers or others, and whether with [sic] the suspect resisted or evaded seizure. That doesn't end the inquiry, however. And this Court believes, as I think the parties do believe, that the key issue is, what was the level of the threat faced by Officer Ryan at the time?

In reviewing that threat, other factors come into play, as identified by the parties, including whether there were hostile motions attributed to George at the time, the distance between the parties, the intentions of the subject—which is George, here. And those three factors the Court finds most compelling.

As with respect to Officer Ryan, he needed to have probable cause to believe that the suspect posed a threat of serious physical harm to him or others. And he did not have that, and I believe a jury could find that he did not have that. If we look at the video—which I did several times and outlined what went on in the video—here is what we have: We have a 58-year-old man, clearly frail. He looks to be, frankly, to this Court's view, in his 60s, with some sort of physical disability. Officer Ryan and Officer [McNeal] pleaded with him for minutes to put down the gun and not take his own life. It is clear from the video, at no time did this turn from a potential suicide to a potential homicide.

Indeed, throughout the entire nine minutes before—before George left the guardrail, he was looking up at the sky, seeming to be pleading with a higher power, making utterances of, he doesn't know what to do, he's embarrassed for his family, his family won't talk to him. These are clearly signs this individual is suicidal, not homicidal.

That the officers did not believe there was a serious threat is evidenced in several ways. One, traffic was not stopped; and there was no effort to control any level of traffic. Granted, there may not have been time to get backup; but certainly they could have positioned a car to stop traffic, and that was not done. During the nine minutes where—well, I guess it's only seven minutes where George was wielding a gun, pointed always at himself, there was no effort to even remotely stop people from passing by this scene. That defeats the argument that there was some level of threat at that time.

You can also tell the officers did not believe there was a threat of harm to others by the comments they were making to George, which included, 'Don't shoot yourself.' 'You have kids.' 'It's not over.' 'Put the gun away.' 'Let's talk about this.' None of that indicated any level of threat posed by George.

At seven minutes into the video, he puts the gun into his pocket. He still looks like he's going to jump. And, in fact, Officer Ryan makes a call indicating that he's going to jump. He calls into the station, saying, 'He's going to jump.' He continues this way for another two minutes, again, gun in pocket, actively looking like he's going to take his own life, making no hostile movements towards the officers, until at 9 minutes and 27 seconds, he steps over the rail, gun in pocket, no hostile leanings, no words of hostility, no threats made, and begins jogging towards town, apparently. A mere eight seconds later, the first shot was fired.

Officer Ryan waited eight seconds before using deadly force on the suspect. There was no warning by Officer Ryan to stop; there was no effort to get him to stop. A second shot was fired, apparently ending George's life.

Viewing those facts, a reasonable jury could determine that Officer Ryan did not possess—that George did not pose any serious risk of harm to the officer or anybody else other than himself. He made no hostile moves; he never pointed a gun at anyone but himself; he never threatened an officer or anyone else; he remained hopelessly resigned with only suicidal statements throughout the entire encounter. The gun remained in his pant pocket throughout the encounter; he never once made a move for the gun while he turned and ran—jogged towards town.

And, again, let me say, he was not running. Again, from my view of the video, this looks like a gentleman who would never have made it to town. So I know there has been evidence that in a minute and some seconds he would have got there. I think a jury could find, he never would have made it to town. This was not an able man.

Again, Ryan did not warn or even tell George to stop. And there was time to warn. There was absolutely no reason the shot needed to be fired at eight seconds. Additional efforts could have been made to negotiate and get him to stop.

So in that regard, unlike what is represented in the defendants' brief, this gun was not fired at the last possible moment. This gun was fired at the first possible moment when George turned and ran.

Regarding the training in this case, it appears that all defendants agree that what Ryan did was completely in accord with policy of the City of Rifle, that he had actually been trained for just this sort of encounter and to lead to just this sort of result. So unlike defendants' argument, I don't find this to be a hazy case; it's not a close call; and the jury could find that the conduct above was not reasonable and constituted excessive force in violation of the Fourth Amendment.

Having found that, the issue then becomes, was the law clearly established? The Court finds it was clearly established. If this does not fit within the direct confines of *Tennessee v. Garner*, [471 U.S. 1 (1985),] the plaintiff has cited additional cases from which we could find clearly established, including *Walker v. City of Orem*, [451 F.3d 1139 (10th Cir. 2006),] including [*Cole v. Carson*, 935 F.3d 444 (5th Cir. 2019)]. Though understanding that was issued after the fact, it is clear to me that the analysis that the Court undertook there is directly relevant. And as plaintiffs' counsel noted, the Court found that to be an obvious violation; and the facts are dramatically similar. You have a suicidal person pointing a gun to his own head, where it remained; he never pointed the weapon at the officers; never made a threatening or provocative gesture; and the officers, importantly, had time and opportunity to give a warning before using deadly force.

Given the similarity of those facts, the Court's conclusion there that that was clearly established law that would be a violation of the suspect's right to the Fourth Amendment is not surprising.

Additional support is found in *Cooper v. Sheehan*, [735 F.3d 153 (4th Cir. 2013),] again, where the officers fired on a suspect when he was holding a shotgun in one hand with its muzzle pointed at the ground, had made no sudden moves and no sudden threats.

I do want to talk about *White v. City of Topeka*, [489 F. Supp. 3d 1209 (D. Kan. 2020),] which was raised by the defendant on this regard. The Court, even though that's a District Court case, does find it important to distinguish that case. I think the important distinguishment there is that the suspect was using more aggressive means to defy the police officers there. He had reached toward the gun at one point; reluctantly complied and put it away; he refused to lay down; and then picked up and ran and

did make a gesture towards the gun. Those facts are not here. Again, this is a situation where a clearly suicidal man in desperate straits has turned, given up all hope, jogged towards town with a gun in his pocket, with no objective intent to use it on officers or anyone else.

Cordova v. Aragon[, 569 F.3d 1183 (10th Cir. 2009)] I find has some limited relevance in terms of clearly established. The facts are quite different, but it does highlight a more dramatic situation where the law was found to be clearly established. And the suspect there engaging in more dangerous behavior, and the Tenth Circuit found that the—that the officers were not entitled to qualified immunity. So in that regard, Defendant Ryan may not get the benefit of qualified immunity.

And we will turn to Defendant Klein. In looking at the link for supervisory liability for a constitutional violation, the focus can be on personal involvement and causation and state of mind, but it can also be on the failure to train or negligent training. And this Court concludes it's the latter factors that matter most. Defendant Klein is responsible for training in the department regarding use of deadly force and confirmed in his deposition that what happened here is what the training that he conducted mandates. In fact, he was so sure of that, this court questions whether this incident could replay itself over and over, given that apparently officers in the City of Rifle are not being trained properly that the use of deadly force is only available when there is an imminent and serious risk of bodily harm to the officer or others.

Officer Ryan similarly testified that his decision was dictated by that training. And there is some reference to Officer Ryan having shot a fleeing suspect before. The Court finds that has limited relevance, but it does highlight the concern that the level of training at the City of Rifle is not in accord with the Fourth Amendment.

In that regard, summary judgment is denied as to Defendant Klein's motion.

Turning to municipal liability, the analysis really is identical. Clearly, there was a policy or custom in the form of this training on the use of deadly force that led to this incident. Defendant ratified Officer Ryan's conduct by refusing to discipline him and, in fact, finding no discipline was warranted because this—the result here was dictated by the training, and the training was appropriate in this instance.

> In terms of the wrongful death claim, summary judgment is also denied on that claim. It appears the parties are simply arguing over whether this could be construed as a willful and wanton violation. The Court concludes that under Colorado state law, conscious disregard of the danger of the conduct is sufficient to demonstrate a question of fact as to willful and wanton. In this Court's opinion, what occurred here is the definition of a conscious disregard of the danger. Officer Ryan fired a shot eight seconds after an unarmed man jogged in the other direction with no sign of immediate threat whatsoever. That is conscious disregard of the conduct.
>
> So given those findings of fact, defendants' motion for summary judgment is denied in its entirety.

Id., Vol. II at 303–311.

Defendants Ryan and Klein filed a notice of appeal on October 19, 2022. On November 2, 2022, all of the defendants filed an amended joint notice of appeal.

II

Defendants argue in their appeal that the district court erred in denying summary judgment in their favor on each of the claims asserted against them by plaintiffs. For the reasons that follow, we agree with defendants.

A. Plaintiffs' § 1983 excessive force claim against defendant Ryan

In their first issue on appeal, defendants argue that the district court erred in denying defendant Ryan's motion for summary judgment on qualified immunity grounds with respect to plaintiffs' § 1983 excessive force claim. More specifically, defendants argue that "[t]he District Court erred in its analysis of whether Officer Ryan's decision to use deadly force violated George's Fourth Amendment rights, given its consideration of various subjective factors, its narrow focus on the threat

facing officers as opposed to the public, as well as its failure to consider the totality of the circumstances." Aplt. Br. at 16.

1) Qualified immunity principles

"Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 7 (2021) (quoting *White v. Pauly*, 580 U.S. 73, 79 (2017) (per curiam)) (internal quotation marks omitted). "Qualified immunity protects all but the plainly incompetent or those who knowingly violate the law." *Surat v. Klamser*, 52 F.4th 1261, 1270 (10th Cir. 2022) (quoting *White*, 580 U.S. at 73) (internal quotation marks omitted). "To overcome a qualified immunity defense, the onus is on the plaintiff to demonstrate (1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct." *Id*. at 1270–71 (quoting *Quinn v. Young*, 780 F.3d 998, 1004 (10th Cir. 2015)) (internal quotation marks omitted).

"We have discretion to decide the order in which to engage the two prongs of the qualified immunity standard." *Andersen v. DelCore*, 79 F.4th 1153, 1163 (10th Cir. 2023) (cleaned up). "If we conclude that the plaintiff[s] ha[ve] not met [their] burden as to either part of the two-prong inquiry, we must grant qualified immunity to the defendant." *Id*.

2) The scope of our appellate jurisdiction and our standard of review

Before we address defendants' arguments on the merits, we must first determine the scope of our appellate jurisdiction. "Generally, we may exercise

jurisdiction only over appeals from final decisions of the district courts of the United States[,] 28 U.S.C. § 1291," which means that "[o]rders denying summary judgment are ordinarily not appealable final decisions for purposes of § 1291." *Surat*, 52 F.4th at 1269 (quoting *Duda v. Elder*, 7 F.4th 899, 909 (10th Cir. 2021)) (internal quotation marks omitted). "Under the collateral order doctrine, however, we may also review decisions that are conclusive on the question decided, resolve important questions separate from the merits, and are effectively unreviewable if not addressed through an interlocutory appeal." *Id*. (quoting *Duda*, 7 F.4th at 909) (internal quotation marks omitted). "This doctrine allows us to review interlocutory appeals from the denial of qualified immunity to a public official to the extent it involves abstract issues of law." *Id*. (quoting *Duda*, 7 F.4th at 909) (internal quotation marks omitted). "Abstract issues of law are limited to (1) whether the facts that the district court ruled a reasonable jury could find would suffice to show a legal violation and (2) whether that law was clearly established at the time of the alleged violation." *Id*. (internal quotation marks omitted). "Because of this limitation, we generally lack jurisdiction to review factual disputes in this interlocutory posture, including the district court's determination that the evidence could support a finding that particular conduct occurred." *Id*. (quoting *Vette v. K–9 Unit Deputy Sanders*, 989 F.3d 1154, 1162 (10th Cir. 2021)) (internal quotation marks omitted).

"[I]n *Johnson v. Jones*," 515 U.S. 304, 313 (1995), "the Supreme Court indicated that, at the summary judgment stage at least, it is generally the district court's exclusive job to determine which *facts* a jury could reasonably find from the

evidence presented to it by the litigants." *Lewis v. Tripp*, 604 F.3d 1221, 1225 (10th Cir. 2010). In other words, the district court outlines "the 'version of events'" that it "holds a reasonable jury could credit." *Id*. at 1225–26 (quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007)). "After doing so, the district court and we may then consider the 'abstract' *legal* questions whether those facts suffice to show a violation of law and whether that law was clearly established at the time of the alleged violation." *Id*. at 1225. "Ordinarily speaking, it is only these latter two questions—and not questions about what facts a jury might reasonably find—that we may consider in appeals from the denial of qualified immunity at summary judgment." *Id*.

There are, however, exceptions to the rule announced by the Supreme Court in *Johnson*. In particular, "when the 'version of events' the district court holds a reasonable jury could credit 'is blatantly contradicted by the record,' we may assess the case based on our own *de novo* view of which facts a reasonable jury could accept as true." *Id*. at 1225–26 (quoting *Scott*, 550 U.S. at 380); *see Ching as Trustee for Jordan v. City of Minneapolis*, 73 F.4th 617, 620–21 (8th Cir. 2023) (applying the same exception based on the appellate court's own review of a video of the shooting incident at issue); *Finch v. Rapp*, 38 F.4th 1234, 1241 (10th Cir. 2022) (discussing the exception); *Vette*, 989 F.3d at 1162 ("This standard is 'a very difficult one to satisfy.' We will not 'look beyond the facts found and inferences drawn by the district court' unless those findings 'constitute visible fiction.'" (internal citation omitted)); *see also Rudlaff v. Gillispie*, 791 F.3d 638, 639 (6th Cir. 2015) (holding, in

the context of an interlocutory appeal involving an issue of qualified immunity, that an appellate court must "view the facts in the light depicted by the videotape").

We conclude that this narrow exception applies in the case at hand. The district court, in its oral ruling denying summary judgment in favor of defendant Ryan, focused much of its discussion on whether Ryan "ha[d] probable cause to believe that [George] posed a threat of serious harm to him or others." Aplt. App., Vol. II at 304. And, in discussing that question, the district court made a number of statements of purported fact that we conclude are "blatantly contradicted by the record" in this case. *Lewis*, 604 F.3d at 1226 (quoting *Scott*, 550 U.S. at 380).

To begin with, the district court described George as "clearly frail" and "with some sort of physical disability." Aplt. App., Vol. II at 304. The district court also stated, relatedly, that "this looks like a gentleman who would never have made it to town." *Id*. at 307. Those descriptions, however, are clearly contradicted by the record. According to the record, George worked at a construction site in Vail, Colorado. More importantly, the combined audio/video of the attempted arrest of George indicates he was a tall, relatively thin man who had no trouble walking, running, or physically maneuvering his body over the railing of the River Bridge. In short, nothing in the combined audio/video, or any other part of the record, would allow a jury to reasonably find that George was frail, physically disabled, or would

have been unable to make it to the town had he been allowed to keep running away from Ryan and McNeal.[3]

The district court also stated that "there was no effort" by Ryan or McNeal "to control any level of traffic" over the River Bridge. *Id*. at 305. In fact, however, the record is undisputed that Ryan requested assistance from a Garfield County Sheriff's deputy who initially parked his patrol vehicle near Ryan's and McNeal's vehicles on the River Bridge. That deputy, however, was subsequently dispatched to another location, leaving Ryan and McNeal alone to attempt to arrest George, and with no real way to control traffic over the River Bridge during the course of the attempted stop.

Further, the district court stated that it could "tell the officers did not believe there was a threat of harm to others" based upon the statements they made to George during the attempted arrest, including "You have kids," "It's not over," "Put the gun away," and "Let's talk about this." *Id*. We reject this statement for two reasons. First, it was not the district court's role, in determining whether defendant Ryan was entitled to summary judgment on his qualified immunity defense, to make factual findings. Rather, the district court's task was "to determine which *facts* a jury could reasonably find from the evidence presented to it by the litigants." *Lewis*, 604 F.3d at 1225. Second, even if the district court's statement was intended as a determination of a fact the jury could reasonably find based upon the officers'

[3] Notably, plaintiffs do not assert that George was physically disabled in any way.

statements to George, we reject that determination as contrary to the record. In our view, a jury could not reasonably infer, based on the statements that Ryan and McNeal made to George during the stop, that Ryan and McNeal did not believe that George posed a threat of harm to them or others.

Lastly, and perhaps most significantly, the district court stated that after George stepped back over the rail and began "jogging towards town," "Ryan waited eight seconds before using deadly force on" George, and during those eight seconds "[t]here was no warning by . . . Ryan [to George] to stop" and "no effort to get [George] to stop." Aplt. App., Vol. II at 306. A review of the combined audio/video of the attempted arrest, however, reveals that during the time period referred to by the district court, both Ryan and McNeal repeatedly yelled at George to stop before Ryan fired the two shots at George. Ryan initially yelled, "Allan, stay, don't do it," and then yelled, "Allan" twice as he ran after George. McNeal, for her part, yelled, "Stay on that side," "Just stay right there," and "Stop" twice. Combined audio/video of stop at approx. 9:25–9:33. Thus, contrary to the district court's statements, a jury could not reasonably find that Ryan or McNeal made no effort to get George to stop after he stepped back over the railing and began running away from the officers.

Ordinarily, when a district court denies summary judgment on qualified immunity grounds, we "accept the version of facts the district court assumed true" and "our review [is] limited to purely legal issues." *Surat*, 52 F.4th at 1270 (first quoting *Quinn*, 780 F.3d at 1004; and then quoting *Vette*, 989 F.3d at 1162). Here, however, because the version of facts the district court assumed true is belied in key

respects by the record, we conclude that our appellate jurisdiction in this unusual situation is more expansive. Specifically, it "falls on us to review [de novo] the entire record, construing the evidence in the light most favorable to" the plaintiffs. *Lewis*, 604 F.3d at 1228. Relatedly, we must "ask *de novo* whether sufficient evidence exists for a reasonable jury to conclude that" defendant Ryan violated George's constitutional rights. *Id*. Lastly, if we conclude that sufficient evidence exists for a reasonable jury to conclude that defendant Ryan violated George's constitutional rights, we must then determine de novo whether "the rights in question were clearly established at the time of the[] alleged violation." *Id*. at 1226. Only by doing so can we properly "undertake the job of answering the question whether [defendant Ryan] is entitled to qualified immunity" from the plaintiffs' excessive force claim. *Id*.

3) Did Ryan violate George's Fourth Amendment rights?

"In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force." *Graham v. Connor*, 490 U.S. 386, 394 (1989). "Where, as here, the excessive force claim arises in the context of an arrest . . . of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment." *Id*.; *accord Tennessee v. Garner*, 471 U.S. 1, 7 (1985) ("[T]here can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment."). Under the Fourth

Amendment, "the 'reasonableness' of a particular seizure depends not only on *when* it is made, but also on *how* it is carried out." *Graham*, 490 U.S. at 395.

"To establish a constitutional violation, the plaintiff must demonstrate the force used was objectively unreasonable." *Estate of Taylor v. Salt Lake City*, 16 F.4th 744, 759 (10th Cir. 2021) (quoting *Estate of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1259 (10th Cir. 2008) (*Larsen*)). "Under this standard, we carefully balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Andersen*, 79 F.4th at 1163 (quoting *Cavanaugh v. Woods Cross City*, 625 F.3d 661, 664 (10th Cir. 2010)) (internal quotation marks omitted).

"We assess the reasonableness of an officer's use of force by applying the three nonexclusive factors first set forth by the Supreme Court in *Graham*." *Id.* These include "[1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. "The *Graham* factors are nonexclusive and not dispositive; the inquiry remains focused on the totality of the circumstances." *Palacios v. Fortuna*, 61 F.4th 1248, 1256 (10th Cir. 2023).

"Our 'calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.'" *Andersen*, 79 F.4th at 1163 (quoting *Graham*,

490 U.S. at 396–97). "So, we assess the reasonableness of 'a particular use of force' from 'the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.'" *Id*. (quoting *Graham*, 490 U.S. at 396). "Our review . . . looks at the facts and circumstances as they existed at the moment the force was used, while also taking into consideration the events leading up to that moment." *Id.* (quoting *Emmett v. Armstrong*, 973 F.3d 1127, 1135 (10th Cir. 2020)).

Graham Factor 1: The severity of the crime at issue

"[O]ur binding precedent indicates the first *Graham* factor weighs against the plaintiff when the crime at issue is a felony, irrespective of whether that felony is violent or nonviolent." *Vette*, 989 F.3d at 1170 (collecting cases); *see Surat*, 52 F.4th at 1274 (holding that plaintiff's criminal offenses "were not severe crimes" because they were "both class 2 misdemeanors"); *Arnold v. City of Olathe*, 35 F.4th 778, 792 (10th Cir. 2022) (holding that plaintiff's "warrants for felony supervision violations and aggravated escape from custody [we]re serious because the latter is a felony"). Here, it is undisputed that an arrest warrant had been issued for George based on a probable cause showing that he had committed the criminal offense of sexual exploitation of a child, in violation of Colo. Rev. Stat. § 18-6-403. It is further undisputed that this criminal offense is a felony. *See* Colo. Rev. Stat. § 18-6-403(5) (providing that sexual exploitation of a child is either a class 3 or class 4 felony, depending on the specific details of the crime). Thus, we conclude that the first *Graham* factor, severity of the crime, favors defendant Ryan as a matter of law.

Graham Factor 3: Was George actively resisting or attempting to evade arrest?

The third *Graham* factor asks "whether [the individual] is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. Here, there is no question that George was fleeing and thereby attempting to evade arrest at the time force was used against him. Consequently, we conclude as a matter of law that the third *Graham* factor weighs in favor of defendant Ryan.

Graham Factor 2: Was there an immediate threat to the safety of the officers or others?

The second, and what we have deemed the "most important," *Graham* factor focuses on whether George posed an immediate threat to the safety of the officers or others. *Pauly v. White*, 874 F.3d 1197, 1216 (10th Cir. 2017). "[T]he use of deadly force," such as that employed by defendant Ryan in this case, "is only justified if the officer had probable cause to believe that there was *a threat of serious physical harm to [himself] or others*." *Id*. (quoting *Larsen*, 511 F.3d at 1260) (internal quotation marks omitted). "To determine whether" an officer had probable cause to believe that "there was an immediate threat to the officers or to others," a court must "consider the four nonexhaustive *Larsen* factors." *Palacios*, 61 F.4th at 1258 (citing *Larsen*, 511 F.3d at 1260); *Arnold*, 35 F.4th at 789 (noting that the *Larsen* factors are non-exclusive). "These factors are (1) whether the suspect was given orders and the suspect's compliance with the orders; (2) whether any hostile motions were made toward the officers; (3) the physical distance between the officers and the suspect;

and (4) the manifest intentions of the suspect." *Palacios*, 61 F.4th at 1258. We proceed to consider the *Larsen* factors in light of the evidence before us in this case.

(a) Orders and compliance

"If a suspect was given orders and did not comply, this weighs in the officers' favor." *Id.* at 1259. Here, it is undisputed that Ryan and McNeal initially stopped George by pulling behind his truck and activating the emergency lights on their marked patrol cars. It is further undisputed that George initially complied by pulling his truck to the side of the road on the River Bridge. The combined audio/video of the stop shows, indisputably, that George thereafter repeatedly refused to comply with the verbal orders issued by the two officers. To begin with, Ryan initially ordered George to show his hands out of his truck window. George failed to comply with that order and instead exited his truck, walked towards Ryan's vehicle, pulled out a handgun from behind his back, and then turned and walked towards and stepped over the guardrail on the River Bridge. After that point, George was ordered to drop his weapon by Ryan and McNeal approximately thirty-three times but refused to do so. Ryan also told George, "Don't do it," or similar phrases, approximately thirty-nine times, and George refused to comply by dropping the gun and allowing himself to be arrested. Lastly, after George stepped back over the guardrail and began walking and then running towards downtown Rifle, both Ryan and McNeal shouted at George multiple times in an attempt to get him to stop, but he refused to do so. Thus, the undisputed evidence establishes that after George stopped his

vehicle, he was given numerous warnings over the course of the ensuing encounter and failed to comply with all of them.

Notably, we "ha[ve] held the warning does not need to be specifically that officers are about to open fire." *Id*. (citing *Thomson v. Salt Lake City*, 584 F.3d 1304, 1318–19 (10th Cir. 2009)). Therefore, the fact that Ryan did not warn George that he was about to fire his weapon does not alter our analysis of this factor.

We therefore conclude as a matter of law that this factor weighs in favor of defendant Ryan.

(b) Hostile motions

The second *Larsen* factor asks "whether any hostile motions were made with the weapon towards the officers." *Larsen*, 511 F.3d at 1260. The undisputed evidence in this case establishes that George never pointed his handgun at either officer or anyone besides himself. Thus, viewed in isolation, this factor would weigh in favor of the plaintiffs.

But, as we have noted, the *Larsen* factors are "non-exclusive" and we must always consider "the totality of the circumstances." *Id.* Despite the fact that George never pointed his handgun at anyone besides himself, it is undisputed that George ignored numerous verbal orders from both Ryan and McNeal to drop his weapon. And, despite discarding other personal items at the scene before attempting to flee, George intentionally kept his gun with him during his attempted flight. Notably, we have recognized that "simply because a suspect has not yet fired a weapon does not mean that he will not do so in the future, particularly when intentionally keeping his

gun with him." *Palacios*, 61 F.4th at 1259. Lastly, it is undisputed that George's wife, Sarra, had informed the RPD that George told her "that he was not 'going back to jail without a fight,'" and that this information was passed along to Ryan and McNeal prior to their encounter with George. Aplt. App., Vol. I at 113. We therefore conclude as a matter of law that, although the lack of a hostile motion weighs in favor of plaintiffs, the other related circumstances weigh in favor of defendant Ryan.

(c) Physical distance

The third factor identified in *Larsen* focuses on "the distance separating the officers and the suspect." *Larsen*, 511 F.3d at 1260. Notably, *Larsen* involved a situation where two police officers approached a suspect on foot and found him to be in possession of a long knife. One of the officers, who came within seven to twelve feet of the suspect, told the suspect at least four times to drop the knife, but the suspect refused to do so. Fearing for his life, the officer who gave those commands shot the suspect twice in the chest and killed him. Thus, *Larsen* involved a situation where the suspect posed a threat of serious physical harm to the officer who fired the gun. Naturally, then, the court in *Larsen* focused on the distance between the shooting officer and the suspect at the time of the shooting.

Here, in contrast, there was not a close-range confrontation between George and Ryan that led to Ryan discharging his weapon. Instead, it is undisputed that when Ryan shot George, George was running in a northerly direction along the side of the River Bridge and attempting to flee from Ryan and McNeal and evade arrest.

Because the facts of this case are significantly different than *Larsen*, we conclude that we must modify the physical distance factor to take into account other considerations relevant to this case. To begin with, unlike the situation in *Larsen*, this case involved a suspect who, while armed and fleeing, was physically close to members of the general public. More specifically, it is undisputed that George, as he fled in a northerly direction along the River Bridge, was within feet of a steady stream of passing motorists. It is also undisputed that George was approximately four hundred and twenty-two yards away from the nearest populated area of Rifle at 1st Street and Riverwhite Avenue. Had George continued running unabated, he likely could have reached the nearest populated area of Rifle within approximately two to three minutes.

The undisputed evidence in this case also indicates that George, by fleeing in the direction that he did, effectively gained access to a location that could have provided him with cover from the officers. Defendants' expert witness, Charles Key, Sr., a retired member of the Baltimore Police Department who now works as an independent consultant and expert witness in police misconduct litigation, states in his declaration that, prior to being shot by Ryan,

> George had run past the northern edge of the Colorado [R]iver, which is significant because the drop from the bridge to land decreases rapidly to the point where . . . George would have been able to step over the bridge rail onto the land and use the steel rail as cover while firing on responding officers.

Aplt. App., Vol. I at 158. Plaintiffs offered no evidence that contradicts this statement.

We therefore conclude that George's proximity to members of the general public, combined with his access to locations on the River Bridge that would have provided him with cover from Ryan and McNeal, weighs in favor of defendant Ryan as a matter of law.

(d) Manifest intentions of suspect

The fourth *Larsen* factor focuses on "the manifest intentions of the suspect." *Larsen*, 511 F.3d at 1260. It is beyond dispute in this case that George knew that two police officers in separate marked patrol cars stopped him as he exited I-70 on his way home from work. Although it is not clear from the record whether George was aware that an arrest warrant had been issued for him, it is undisputed that he was aware that he was under investigation by law enforcement officials for possessing child pornography. Further, it is undisputed that, prior to the encounter, George had told his wife Sarra that he was not going back to prison, and he repeated that sentiment, as well as saying that his life was over, to Ryan and McNeal during the course of the encounter. All of this set the stage for what transpired during the course of George's encounter with Ryan and McNeal. Between the beginning of the encounter and just before he stepped back over the guardrail and began walking and then running away from the officers, George's manifest intentions appear to have been to commit suicide, either by shooting himself in the chest or by jumping from the River Bridge into the Colorado River. Conversely, during that time period, it does not appear that George intended to harm the officers or members of the public who were driving by on the River Bridge.

But, importantly, the combined audio/video of the incident reveals that George's manifest intentions changed near the end of the encounter. At or just before the moment when George stepped back over the guardrail and began walking and then running away from the officers and in the direction of downtown Rifle, he clearly abandoned, at least temporarily, any intention of killing himself. We conclude as a matter of law that a reasonable officer in Ryan's position, observing George's actions, would have concluded that George's intention had shifted to escaping and evading arrest.

(e) Other evidence

Because the *Larsen* factors are non-exclusive, we must take into account additional evidence in the record relevant to whether a reasonable officer in Ryan's position would have had probable cause to believe that George posed a threat of harm to the officers or the public.

The declaration from defendants' expert witness Key includes several relevant statements that were unopposed by the plaintiffs. First, Key states: "Any objectively reasonable officer would interpret [George] retaining possession of the gun as an indication that he intended to use it." *Id*. at 157. Key further states, in the same vein:

> Any objectively reasonable and well trained officer would . . . assess the risks of pursuing a fleeing, armed felony suspect who had rebuffed multiple pleas and commands to surrender peacefully and drop the gun in an environment that exposed them to gunfire without the advantage of cover as presenting a significant, imminent risk of serious injury or death to themselves or passing, uninvolved citizens.

Id. at 158. Key also states, relatedly, that "when George continued to run" after being told to stop by Ryan, Ryan

> had to make the split second decision to stop him by using lethal force to prevent him from initiating a gun battle on the bridge and subjecting passing motorist[s] to potential injury or advancing so close to Rifle that innocent persons would be put at risk should a gunfight ensue in a densely populated area of Rifle.

Id. at 156. In addition, Key notes that "the bridge curved toward the northwest, which prompted Ryan to shoot prior to George reaching a place on the bridge which would create a hazardous backstop from his rifle fire for traffic traveling on Route 13 and/or people in Rifle." *Id*. Lastly, Key notes that, prior to being shot by Ryan,

> George had run past the northern edge of the Colorado [R]iver, which is significant because the drop from the bridge to land decreases rapidly to the point where . . . George would have been able to step over the bridge rail onto the land and use the steel rail as cover while firing on responding officers.

Id. at 158.

(f) Summary

Considering the *Larsen* factors in this case as a whole, we conclude as a matter of law that a reasonable officer in Ryan's position would have had probable cause to believe that George, as he began running away from Ryan and McNeal, posed a threat of serious bodily injury both to the officers and to the public at large. We in turn conclude that the second *Graham* factor weighs in favor of defendant Ryan as a matter of law.

Totality of the circumstances and conclusion

As we have discussed, all three *Graham* factors favor defendant Ryan. We therefore conclude as a matter of law that defendant Ryan's action in shooting George was objectively reasonable and did not violate George's Fourth Amendment right against unreasonable seizures. In reaching this conclusion, we emphasize, as we recently did in *Palacios*, that "pursuing a fleeing felon does not automatically mean that a decision to use deadly force is objectively reasonable." 61 F.4th at 1262. Nevertheless, under the totality of the circumstances unique to this case, i.e., an armed fleeing felon who had repeatedly refused to comply with officers' commands, was determined not to be arrested, and who represented a threat of bodily harm to both the officers and the general public, we conclude that it was objectively reasonable for defendant Ryan to use deadly force against George.

4) Clearly established law

"Having determined that" defendant Ryan did not violate George's Fourth Amendment rights, "it is unnecessary" for us "to consider whether the law was clearly established at the time of the incident." *Id*. at 1263.

B. Plaintiffs' § 1983 claim against defendant Klein

In their second issue on appeal, defendants challenge the district court's denial of summary judgment in favor of defendant Klein with respect to his claim of qualified immunity from plaintiffs' § 1983 claim.

"A § 1983 defendant sued in an individual capacity may be subject to personal liability and/or supervisory liability." *Estate of Booker v. Gomez*, 745 F.3d 405, 435

(10th Cir. 2014) (quoting *Brown v. Montoya*, 662 F.3d 1152, 1163 (10th Cir. 2011)) (internal quotation marks omitted). "Section 1983, however, does not authorize liability under a theory of respondeat superior." *Id*. (quoting *Schneider v. City of Grand Junction Police Dept.*, 717 F.3d 760, 767 (10th Cir. 2013)) (internal quotation marks omitted). Instead, supervisory liability may be imposed under § 1983 only "when a supervisor's subordinates violated the Constitution and the plaintiff can demonstrate an affirmative link between the supervisor and the violation, which includes showing (1) personal involvement, (2) sufficient causal connection, and (3) culpable state of mind." *Valdez v. McDonald*, 66 F.4th 796, 834 (10th Cir. 2023) (quoting *Dodds v. Richardson*, 614 F.3d 1185, 1195–98 (10th Cir. 2010)) (internal quotation marks omitted).

Having concluded as a matter of law that defendant Ryan did not violate George's Fourth Amendment rights, we conclude that plaintiffs' § 1983 supervisory liability claim against defendant Klein necessarily lacks merit. That is because, without an underlying constitutional violation, a claim of supervisory liability is fatally infirm. *Cf. Hinton v. City of Elwood, Kan.*, 997 F.2d 774, 782 (10th Cir. 1993) ("A municipality may not be held liable where there was no underlying constitutional violation by any of its officers.").

We therefore conclude that the district court erred in denying Klein's motion for summary judgment with respect to plaintiffs' § 1983 claim.

C. Plaintiffs' § 1983 claim against the City

In their third issue on appeal, defendants argue that the district court erred in denying summary judgment to the City with respect to plaintiffs' § 1983 claim.

We briefly note, as a threshold matter, that because the City did not, and indeed cannot, assert qualified immunity, the collateral order doctrine does not afford us appellate jurisdiction over the district court's denial of the City's motion for summary judgment. *See Crowson v. Washington Cnty. Utah*, 983 F.3d 1166, 1185, 1192 (10th Cir. 2020). But we nevertheless conclude that we may properly exercise pendent appellate jurisdiction over that ruling because the record firmly establishes that plaintiffs' § 1983 claim against the City depends on Ryan having violated George's constitutional rights.[4] *See id.*

"Because municipalities act through officers, ordinarily there will be a municipal violation only where an individual officer commits a constitutional violation." *Id*. at 1191. In other words, "[t]he general rule . . . is that there must be a constitutional violation, not just an unconstitutional policy, for a municipality to be held liable." *Id*. Thus, "[i]n most cases, this makes the question of whether a municipality is liable dependent on whether a specific municipal officer violated an individual's constitutional rights." *Id*.

[4] Plaintiffs' complaint alleged two alternative theories of municipal liability, i.e., that (a) there was a direct causal link between a City policy and Ryan's alleged use of excessive force against George, and (b) that the City failed to adequately train its police officers, including Ryan, in the use of deadly force, and that this inadequate training resulted in Ryan depriving George of his constitutional rights.

Having determined that defendant Ryan did not violate George's Fourth Amendment rights, we conclude that plaintiffs' § 1983 municipal liability claim against the City necessarily fails. *See Palacios*, 61 F.4th at 1263. We therefore conclude that the district court erred in denying summary judgment in favor of the City.

D. Plaintiffs' wrongful death claim against defendant Ryan

In their final issue on appeal, defendants argue that the district court erred in denying summary judgment in favor of defendant Ryan on plaintiffs' wrongful death claim.

Typically, a district court's denial of summary judgment on a state law tort claim is not "immediately appealable under the collateral order[] doctrine." *Hensley on behalf of N.C. v. Price*, 876 F.3d 573, 586 n.7 (4th Cir. 2017); *see Fogarty v. Gallegos*, 523 F.3d 1147, 1154 (10th Cir. 2008). That general rule does not apply, however, where the summary judgment motion was based on state-law immunity from suit. *See Sawyers v. Norton*, 962 F.3d 1270, 1287 (10th Cir. 2020). In this case, Ryan argued in his motion for summary judgment that the wrongful death claim was effectively barred by the Colorado Governmental Immunity Act (CGIA), Colo. Rev. Stat. Ann. § 24-10-102. The district court rejected that argument. We therefore conclude that the collateral order doctrine affords us with appellate jurisdiction over the district court's denial of Ryan's motion for summary judgment on the wrongful death claim. *See Sawyers*, 962 F.3d at 1287.

In their complaint, plaintiffs alleged a claim against defendant Ryan for "Battery Causing Wrongful Death" in violation of Colorado state law. Aplt. App., Vol. I at 37. The claim alleged that "Ryan's shooting of . . . George *did not constitute the use of reasonable force because the shooting was in excess of the amount of force that an officer in . . . Ryan's position would have reasonably believed necessary to arrest . . . George or prevent his escape*." *Id*. (emphasis added). In addition, the claim alleged that "Ryan's intentional infliction of physical harm upon . . . George, causing his death, was without legal authorization, privilege, or consent." *Id*. The claim also alleged that "Ryan consciously disregarded a substantial and unjustifiable risk of danger of death or serious bodily injury to . . . George" and "Ryan's willful and wanton conduct caused . . . George's death and the Plaintiffs' damages." *Id*. at 37–38. Finally, the claim alleged that "Ryan's conduct was attended by circumstances of malice, or willful and wanton conduct, which . . . Ryan must have realized was dangerous, or that was done heedlessly and recklessly, without regard to the consequences to . . George or his family, his safety and life and their lives." *Id*. at 38.

Ryan argued in his motion for summary judgment that the wrongful death claim was barred by the CGIA. The CGIA provides, in relevant part, that "no public employee shall be liable for injuries arising out of an act or omission occurring during the performance of his or her duties and within the scope of his or her employment, unless such act or omission was willful and wanton." Colo. Rev. Stat. § 24-10-105(1). As Ryan noted in his motion, the CGIA does not define the phrase

"willful and wanton," but the Colorado Supreme Court has held that "willful and wanton conduct is not merely negligent," but rather "must exhibit a conscious disregard for the danger." *Martinez v. Estate of Bleck*, 379 P.3d 315, 323 (Colo. 2016). Ryan argued that "[t]he undisputed facts" in this case "establish[ed] that [his] conduct d[id] not rise to the level of willful and wanton" because he "attempted all means to peacefully end the situation by ordering George to drop the gun numerous times over a roughly nine-minute period" and then, "[w]hen George ignored those commands and started to escape," he "waited until the last possible moment to use deadly force hoping that George would stop." Aplt. App., Vol. I at 76.

Plaintiffs argued in their response to Ryan's motion for summary judgment that "[t]he fact that . . . Ryan tried to talk George out of killing himself d[id] not mean that his subsequent act of shooting George in the back was not willful and wanton." *Id*. at 186. Plaintiffs argued that "[a]ny reasonable officer in . . . Ryan's position would have known that shooting George was unjustified and nearly certain to result in George's serious bodily injury or death." *Id*. at 186–87. Plaintiffs further argued that "after ample time to deliberate and choose various non-deadly options that would have comported with George's clearly established constitutional rights, . . . Ryan . . . intentionally pulled the trigger, intentionally shot [George] in the back, intending to kill him." *Id*. at 187. Plaintiffs also argued that "Ryan did so in conscious disregard of the fact his actions were unjustified and the danger his actions inflicted upon George." *Id*. Ultimately, plaintiffs argued that the district court

should deny Ryan's motion for summary judgment "[b]ecause a jury could reasonably determine that . . . Ryan willfully and wantonly killed George." *Id.*

The district court, in its oral ruling, denied Ryan's motion for summary judgment with respect to the wrongful death claim:

> In terms of the wrongful death claim, summary judgment is also denied on that claim. It appears the parties are simply arguing over whether this could be construed as a willful and wanton violation. The Court concludes that under Colorado state law, conscious disregard of the danger of the conduct is sufficient to demonstrate a question of fact as to willful and wanton. In this Court's opinion, what occurred here is the definition of a conscious disregard of the danger. Officer Ryan fired a shot eight seconds after an unarmed man jogged in the other direction with no sign of immediate threat whatsoever. That is conscious disregard of the conduct.

Id., Vol. II at 310–311.

We conclude that our resolution of defendant Ryan's appellate challenge to the district court's denial of his motion for summary judgment with respect to plaintiffs' § 1983 excessive force claim effectively resolves the plaintiffs' wrongful death claim against defendant Ryan. As we have noted, plaintiffs' wrongful death claim hinges, in relevant part, on plaintiffs' allegation that "Ryan's shooting of . . . George did not constitute the use of reasonable force because the shooting was in excess of the amount of force that an officer in . . . Ryan's position would have reasonably believed necessary to arrest . . . George or prevent his escape." Aplt. App., Vol. I at 37. That allegation, however, is incompatible with, and effectively undercut by, our conclusion that defendant Ryan's shooting of George was objectively reasonable and did not violate George's Fourth Amendment right against unreasonable seizures.

We also conclude, relatedly, that where, as here, a police officer's employment of deadly force against a fleeing felony suspect was objectively reasonable under the Fourth Amendment, the officer's use of force cannot, as a matter of law, be deemed to be in "conscious disregard of the danger" for purposes of the CGIA. *Martinez*, 379 P.3d at 323; *see Duke v. Gunnison Cnty. Sheriff's Office*, 456 P.3d 38, 44 (Colo. Ct. App. 2019) ("For willful and wanton conduct to subject a public employee to liability for a tort claim, the conduct must be more than merely negligent; the conduct must exhibit a conscious disregard of the danger to another."). More specifically, we conclude that if a police officer's exercise of force was objectively reasonable under the Fourth Amendment, the officer necessarily cannot be deemed to have acted in conscious disregard of the danger posed by that exercise of force. *See Rodeman v. Foster*, 767 F. Supp. 2d 1176, 1187–88 (D. Colo. 2011) ("as the Court has found that Sgt. Foster employed only reasonable force in arresting plaintiff, no reasonable jury could find that Sgt. Foster acted willfully and wantonly in tasing her").

We therefore conclude that the district court erred in denying summary judgment in favor of defendant Ryan with respect to plaintiffs' wrongful death claim.[5]

III

The district court's decision denying defendants' motion for summary judgment is REVERSED and the matter is REMANDED to the district court with

[5] Judge Rossman would remand this state law claim to the district court with instructions to dismiss for lack of supplemental jurisdiction. *See* 28 U.S.C. § 1367.

directions to enter summary judgment in favor of defendants as to all claims asserted against them.