SUMMARY
April 25, 2024

2024COA42

No. 23CA0420, *Woodall v. Godfrey* — Civil Action for Deprivation of Rights — Excessive Force; Colorado Constitution — Article II — Searches and Seizures

This case concerns a plaintiff who brought claims against a police officer under section 13-21-131, C.R.S. 2023, alleging the use of excessive force during a seizure in violation of his rights under article II, section 7 of the Colorado Constitution. The district court dismissed the plaintiff's claims under C.R.C.P. 12(b)(5).

A division of the court of appeals holds that, for purposes of evaluating an excessive force claim under section 13-21-131, courts should apply the objective reasonableness standard established in *Graham v. Connor*, 490 U.S. 386, 395 (1989). The division further holds that where, as here, the plaintiff alleges that the defendant indirectly caused the application of excessive force, the plaintiff

must establish the following elements: (1) the force used against the plaintiff was excessive; (2) the defendant's actions set in motion a series of events that caused others to use excessive force against the plaintiff; (3) the defendant knew or reasonably should have known that their actions would cause others to use excessive force against the plaintiff; and (4) the application of excessive force caused the plaintiff's injuries.

Applying these standards and elements, the division concludes that the district court erred by dismissing the plaintiff's complaint for failure to state a claim.

COLORADO COURT OF APPEALS **2024COA42**

Court of Appeals No. 23CA0420
Douglas County District Court No. 22CV30088
Honorable Andrew C. Baum, Judge

James Woodall,

Plaintiff-Appellant,

v.

Luke Godfrey,

Defendant-Appellee.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division VI
Opinion by JUDGE LUM
Welling and Yun, JJ., concur

Announced April 25, 2024

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¶ 1 Plaintiff, James Woodall, appeals the district court's dismissal of his section 13-21-131, C.R.S. 2023, excessive force claim against defendant, Luke Godfrey. We reverse and remand with directions.

I. Background

¶ 2 The allegations in Woodall's complaint, taken as true, establish the following facts. One evening, Woodall suffered a mental health crisis that prompted a police dispatch to his home. Godfrey, a Town of Castle Rock police officer, was one of the officers who responded. On arriving, Godfrey saw Woodall standing in the street with a knife. Godfrey also saw fellow officer James Dinges pointing an "AR-15 [rifle]" at Woodall. Godfrey fired a specialty impact munitions (SIM) shotgun, a nonlethal weapon. After Godfrey fired, Dinges shot Woodall four times with his rifle. Woodall was seriously injured but survived.

¶ 3 Woodall brought two claims for civil rights violations under section 13-21-131 against Godfrey: use of excessive force and violation of due process. His basic theory was that Godfrey acted unreasonably by firing the SIM shotgun without alerting other officers that he was about to use less than lethal force, and those actions predictably resulted in Dinges firing his own (lethal) weapon

under a mistaken belief that Woodall had also fired a lethal weapon. Woodall also asserted that Godfrey's actions were willful and wanton such that the Colorado Governmental Immunity Act (CGIA) did not shield him from liability.[1]

¶ 4 The district court granted Godfrey's C.R.C.P. 12(b)(5) motion to dismiss Woodall's claims. As relevant here, the court specifically

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[1] Under the CGIA, public employees are

> immune from liability in any claim for injury . . . which lies in tort or could lie in tort . . . and which arises out of an act or omission of such employee occurring during the performance of his duties and within the scope of his employment unless the act or omission causing such injury was willful and wanton.

§ 24-10-118(2)(a), C.R.S. 2023. Woodall styled his CGIA argument as a separate "claim for relief," though it is more accurately construed as an argument in anticipation of a defense that Godfrey might have raised. The district court "dismissed" Woodall's CGIA "claim," ruling that Woodall had not filed it within the applicable one year statute of limitations. *See* § 13-80-103(1)(c), C.R.S. 2023 (general one year statute of limitations for actions against police officers); *see also* § 24-10-118(1)(a) (limitations periods in title 13, article 80 apply to suits against public employees). Woodall doesn't appeal that ruling, and it has no bearing on our analysis because (1) the CGIA doesn't apply to Woodall's excessive force claim, *see* § 13-21-131(2)(a), C.R.S. 2023; and (2) Godfrey does not argue here, and did not argue below, that Woodall failed to bring his excessive force claim within the two year limitations period set forth in section 13-21-131(5).

found that Woodall had alleged insufficient facts to support his excessive force claim.

¶ 5 Woodall appeals the district court's dismissal of his excessive force claim. He does not appeal the dismissal of the due process claim.

II. C.R.C.P. 12(b)(5)

¶ 6 "We review a C.R.C.P. 12(b)(5) motion to dismiss de novo and apply the same standards as the trial court." *Norton v. Rocky Mountain Planned Parenthood, Inc.*, 2018 CO 3, ¶ 7.

¶ 7 The purpose of a complaint is to provide a short and plain statement that gives notice of the claim for relief. *Hemmann Mgmt. Servs. v. Mediacell, Inc.*, 176 P.3d 856, 859 (Colo. App. 2007); *see* C.R.C.P. 8(a)(2). A complaint is sufficient if it "state[s] a claim for relief that is plausible on its face." *Warne v. Hall*, 2016 CO 50, ¶ 1 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). A claim is facially plausible when its factual allegations "raise a right to relief above the speculative level," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007), and allow a "court to draw the reasonable inference that the defendant is liable for the misconduct alleged," *Iqbal*, 556 U.S. at 678.

¶ 8 In evaluating a motion to dismiss under C.R.C.P. 12(b)(5), we accept a claim's factual allegations as true and view them in the light most favorable to the plaintiff. *Norton*, ¶ 7. We do not require a plaintiff to present direct evidence or "allege 'specific facts' beyond those necessary to state [a] claim." *Twombly*, 550 U.S. at 570 (quoting *Swierkiewicz v. Soerma N. A.*, 534 U.S. 506, 508 (2002)). However, "we are not required to accept as true legal conclusions that are couched as factual allegations," *Fry v. Lee*, 2013 COA 100, ¶ 17, or "bare, conclusory assertions" that are unsupported by factual allegations, *Warne*, ¶ 27. In other words, a plaintiff can't rely on "'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557).

¶ 9 Motions to dismiss for failure to state a claim are generally viewed with disfavor. *Bly v. Story*, 241 P.3d 529, 533 (Colo. 2010). "We will uphold the grant of a C.R.C.P. 12(b)(5) motion only when the plaintiff's factual allegations do not, as a matter of law, support the claim for relief." *Norton*, ¶ 7.

III. Standard for Excessive Force Claim

¶ 10 Woodall first contends that the standard for evaluating an excessive force claim brought under section 13-21-131 is "objective reasonableness." He also contends that the district court failed to appropriately apply that standard in dismissing his complaint. We agree with both contentions.

A. Applicable Law

¶ 11 Section 13-21-131(1) authorizes a private right of action against a peace officer "who, under color of law, subjects or causes to be subjected . . . any other person to the deprivation of any individual rights . . . secured by the bill of rights, article II of the state constitution." *See also Ditirro v. Sando*, 2022 COA 94, ¶ 1.

¶ 12 Article II, section 7 of the Colorado Constitution guarantees the right to be free from unreasonable searches and seizures. A "seizure" occurs when an "officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *Outlaw v. People*, 17 P.3d 150, 154 (Colo. 2001) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968)). A claim that an officer used excessive force when restraining a citizen's liberty therefore implicates the reasonableness requirement of article II, section 7.

Cf. Estate of Larsen v. Murr, 511 F.3d 1255, 1259 (10th Cir. 2008) ("We treat excessive force claims as seizures subject to the reasonableness requirement of the Fourth Amendment.").

¶ 13 While this is the first time we have addressed an excessive force claim brought under section 13-21-131, we are not without guidance. Section 13-21-131 is similar to 42 U.S.C. § 1983, which authorizes a private right of action against a person "who, under color of any statute . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."[2] In addition, the Fourth Amendment of the United States Constitution is "almost identical" to article II, section 7 of the Colorado Constitution.[3] *People v. Rister*, 803 P.2d 483, 489 (Colo. 1990). Accordingly, we may look to cases analyzing § 1983 claims

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[2] We note that, in contrast to 42 U.S.C. § 1983 claims, qualified immunity is not available as a defense in claims brought under section 13-21-131(1). § 13-21-131(2)(b). However, this distinction does not affect our analysis in this appeal.

[3] Article II, section 7 of the Colorado Constitution guarantees that "[t]he people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures." The Fourth Amendment of the United States Constitution similarly protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."

for excessive force as persuasive authority. *See P.W. v. Child.'s Hosp. Colo.*, 2016 CO 6, ¶ 23 ("With no Colorado case directly on point, we look to the decisions of other jurisdictions for persuasive guidance."); *see also People v. Dunaway*, 88 P.3d 619, 630 (Colo. 2004) ("Where the analogous federal and state constitutional provisions are textually identical, we have always viewed cases interpreting the federal constitutional provision as persuasive authority.").

¶ 14 The United States Supreme Court has held that § 1983 claims asserting "that law enforcement officers have used excessive force — deadly or not — in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *Graham v. Connor*, 490 U.S. 386, 395 (1989). Determining if a seizure is unreasonable requires "a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Id.* at 396 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)). This balancing recognizes that "[t]he test of reasonableness under the Fourth

Amendment is not capable of precise definition." *Id.* (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)).

¶ 15 Additionally, "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* (citing *Terry*, 392 U.S. at 20-22). "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation." *Id.* at 396-97.

¶ 16 *Graham* also cautioned that an officer's subjective intent is not relevant to the reasonableness inquiry. Rather, the question is "whether [an officer's] actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397.

¶ 17 When considering whether an officer's actions are reasonable in the context of a § 1983 claim, courts consider the following factors: (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 [the suspect] is actively resisting arrest or

attempting to evade arrest by flight." *Id.* at 396. But these factors are not exclusive, and courts must focus on the totality of circumstances confronting an officer in each particular case, rather than relying on a mechanically applied test. *Id.*; *see also Kingsley v. Hendrickson*, 576 U.S. 389, 397 (2015); *Palacios v. Fortuna*, 61 F.4th 1248, 1256 (10th Cir. 2023).

¶ 18 Divisions of this court have already applied *Graham* when evaluating § 1983 excessive force claims. *See, e.g.*, *Sebastian v. Douglas County*, 2013 COA 132, ¶ 22, *aff'd*, 2016 CO 13; *Martinez v. Harper*, 802 P.2d 1185, 1187 (Colo. App. 1990). And as best we can discern, the parties agree that *Graham* should also apply to excessive force claims brought under section 13-21-131. Given the similarities between section 13-21-131 and § 1983 — and between the United States and Colorado Constitutions relating to the protection against unreasonable searches and seizures — we agree, as well. We therefore conclude that, when determining whether the force used to effect a seizure is reasonable under article II, section 7 of the Colorado Constitution, courts should apply the "objective reasonableness" standard articulated in *Graham*.

B. Analysis

¶ 19 We acknowledge that the district court referred to *Graham* multiple times throughout its order dismissing Woodall's claim, and at times, it appeared to agree with *Graham*'s approach. However, the court later determined that one of the reasons Woodall's complaint did not sufficiently state a claim was that Woodall failed to allege that Godfrey's actions "[were] grossly disproportionate to the need for action; [were] inspired by malice rather than merely carelessness; or demonstrated unwise, excessive zeal amounting to an abuse of official power that shocks the conscience." To the extent that the district court dismissed Woodall's complaint based on this reasoning, it erred.

¶ 20 First, *Graham* explicitly states that whether an officer's actions are the product of malice is irrelevant to the reasonableness inquiry. 490 U.S. at 397 ("[S]ubjective motivations of the individual officers . . . [have] no bearing on whether a particular seizure is 'unreasonable' under the Fourth Amendment.").

¶ 21 Next, allegations that an officer's actions amounted to an abuse of power that "shocks the conscience" are only required when a plaintiff alleges that he was denied his right to due process under

the Fourteenth Amendment.[4] *Mahdi v. Salt Lake Police Dep't*, 54 F.4th 1232, 1236 (10th Cir. 2022) (quoting *Doe v. Woodard*, 912 F.3d 1278, 1300 (10th Cir. 2019)). However, *Graham* held that challenges to the use of force in the course of a seizure "should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." 490 U.S. at 395. Indeed, the case on which the district court relied as support for the need to allege such facts, *Wise v. Bravo*, 666 F.2d 1328, 1333 (10th Cir. 1981), predated *Graham* and involved a claim for violation of due process.

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[4] Although federal excessive force claims relating to unreasonable seizures must be analyzed under the Fourth Amendment, *Graham v. Connor*, 490 U.S. 386, 395 (1989), a plaintiff's excessive force claim is cognizable as a due process violation under the Fourteenth Amendment when the plaintiff has "not been seized in the constitutional sense." *Mahdi v. Salt Lake Police Dep't*, 54 F.4th 1232, 1236 (10th Cir. 2022) (holding that, "[t]o bring a substantive-due-process claim of excessive force under § 1983, [the plaintiff] must show that the complained-of action 'shocks the conscience'" (quoting *Doe v. Woodard*, 912 F.3d 1278, 1300 (10th Cir. 2019))); *see also Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1243 (10th Cir. 2003) ("Force inspired by malice or by 'unwise, excessive zeal amounting to an abuse of official power that shocks the conscience . . . may be redressed under [the Fourteenth Amendment].'" (quoting *Hewitt v. City of Truth or Consequences*, 758 F.2d 1375, 1379 (10th Cir. 1985))).

¶ 22 Finally, we cannot discern any requirement that a plaintiff allege "grossly disproportionate action" to plausibly allege an excessive force claim. *Graham* only requires facts sufficient to plausibly support a claim that the use of force was "objectively unreasonable" under the circumstances. 490 U.S. at 397.

¶ 23 For these reasons, we conclude that the district court erred to the extent it dismissed Woodall's claim based on Woodall's failure to allege malice, "gross disproportionality," or that Godfrey's actions "shocked the conscience."

¶ 24 We next turn to whether Woodall's complaint is sufficient to raise a plausible claim for relief under the standard articulated in *Graham*.

IV. Plausible Claim for Relief

A. Unreasonableness and Causation

¶ 25 In addition to establishing that the use of force was objectively unreasonable, a plaintiff claiming a deprivation of civil rights under § 1983 must establish a "cause in fact between the conduct complained of and the constitutional deprivation." *Snell v. Tunnell*, 920 F.2d 673, 700 (10th Cir. 1990).

¶ 26 However, the defendant's "direct participation is not necessary" to establish cause in fact. *Id.* Rather, "[t]he requisite causal connection is satisfied if the defendant 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." *Halley v. Huckaby*, 902 F.3d 1136, 1148 (10th Cir. 2018) (affirming denial of official's summary judgment motion because "[a] reasonable jury could find [the official] set in motion a series of events that she should have known would cause others to violate [plaintiff]'s Fourth Amendment rights").

¶ 27 Thus, to survive a motion to dismiss when Woodall has alleged an excessive force claim with "indirect participation," Woodall's complaint must allege facts that, taken as true and drawing all reasonable inferences in his favor, establish the following elements: (1) the force used against Woodall was excessive — that is, objectively unreasonable under the circumstances; (2) Godfrey's actions set in motion a series of events that caused Dinges to use excessive force against Woodall; (3) Godfrey knew or reasonably should have known that his actions would result in Dinges using excessive force against Woodall; and (4) the application of the

excessive force caused Woodall's injuries.[5] *See Graham*, 490 U.S. at 396; *Halley*, 902 F.3d at 1148; *see also Valdez v. Macdonald*, 66 F.4th 796, 832 (10th Cir. 2023) ("In § 1983 cases, courts employ general tort principles of causation to determine whether a defendant's alleged constitutional violation caused the plaintiff's injury."); *cf. Flores v. City of Palacios*, 381 F.3d 391, 396 (5th Cir. 2004) (describing elements of excessive force claim when the defendant directly participated in deploying the excessive force).

B. Sufficiency of the Allegations

¶ 28 Woodall's complaint includes the following factual allegations:

- A police dispatch call was made for Woodall's home when Woodall became depressed and suicidal.

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[5] To trigger the constitutional protections against unreasonable search and seizure, a plaintiff must be "seized" as that term is used in article II, section 7 of the Colorado Constitution. *Cf. Sebastian v. Douglas County*, 2016 CO 13, ¶ 23 (noting that, under the Fourth Amendment, a plaintiff bringing a claim under § 1983 must show he was "seized" by the government). The district court found that Woodall's excessive force claim "arises in the context of an investigatory stop or arrest of him and thus implicates the seizure provisions" of the Colorado Constitution. Neither party disputes that portion of the district court's order. Accordingly, this opinion assumes that Woodall was "seized" and analyzes only whether he alleged sufficient facts to support his claim that excessive force was used during the seizure.

- Godfrey responded to the dispatch call about a "physical domestic" with no other information about the circumstances.
- When he arrived, Godfrey saw Woodall, who was positioned 110 feet away, standing in the middle of a street and holding a knife.
- Godfrey did not see any bystanders at the scene.
- Godfrey believed Woodall was suicidal and was trying to provoke the police into shooting him.
- Godfrey saw Dinges nearby pointing an AR-15 rifle at Woodall and mistakenly yelling for Woodall to drop a "gun."
- Godfrey had a SIM shotgun.
- "Upon information and belief, when fired, the SIM[] shotgun mimics the sound of live gunfire such that it would be difficult for a nearby officer, like Dinges, to immediately distinguish between the sound of a SIM[] shotgun and the sound of a handgun."
- "Upon information and belief, a reasonable officer's ability and opportunity to distinguish between the sound

of a SIM[] shotgun [and] the sound of a handgun is made far more difficult where the officer has already trained a firearm on a person whom they believe is carrying a handgun, especially where that person is approximately 110 [feet] away."

- "Upon information and belief, a reasonably trained officer in Defendant Godfrey's position would know he was standing beyond the effective range of the SIM[] shotgun."
- "Upon information and belief, a reasonably trained officer in Defendant Godfrey's position would also know to announce 'less lethal' before firing the SIM[] shotgun due to the risks associated with contagious, sympathetic, or mistaken fire."
- Godfrey fired the SIM shotgun without announcing "less lethal."
- Dinges then shot Woodall four times.
- Woodall suffered four penetrating gunshot wounds to the right triceps, left scapula, right flank, and right upper thigh-buttock region, resulting in numerous fractures and injuries to his bladder and bowels.

- Godfrey's decision to fire the SIM shotgun was inconsistent with his training because he fired from beyond the weapon's effective range.
- Godfrey's decision also violated the Town of Castle Rock's policies and practices because he did not announce the use of less than lethal force before firing.

¶ 29 Taking these allegations as true, viewing them (as we must) in the light most favorable to Woodall, and drawing every reasonable inference in Woodall's favor, the complaint plausibly suggests that (1) Godfrey knew that Woodall only had a knife; (2) Godfrey knew that Dinges mistakenly believed that Woodall had a gun; (3) Godfrey knew that Dinges was pointing a lethal weapon at Woodall; (4) Godfrey had a SIM shotgun; (5) the firing of a SIM shotgun sounds like a gunshot; (6) Godfrey was standing beyond the SIM shotgun's effective range; (7) Godfrey, as a reasonably trained officer, was or should have been aware that he was standing beyond the SIM shotgun's effective range; (8) Godfrey acted inconsistently with his training by shooting the SIM shotgun from beyond its effective range; (9) Godfrey, as a reasonably trained officer, was or should have been aware that Dinges might mistake the sound of the

SIM shotgun for a gunshot; (10) Godfrey, as a reasonably trained officer, was or should have been aware that Dinges would shoot at Woodall if Dinges heard a gunshot-like sound; (11) Godfrey, as a reasonably trained officer, did know or should have known to shout "less lethal" before shooting the SIM round to mitigate those risks; (12) Godfrey shot the SIM round without announcing "less lethal"; (13) Dinges then shot Woodall four times; and (14) Woodall suffered serious injuries.

¶ 30 These facts and the reasonable inferences drawn from them plausibly allege the elements of an excessive force claim, which in this case are that (1) the use of deadly force was objectively unreasonable because Godfrey knew that Woodall was suicidal, that he was holding only a knife, and that there were no bystanders nearby;[6] (2) the sound of the SIM round being fired caused Dinges, who believed Woodall had a gun, to shoot Woodall with a potentially

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[6] We agree with the district court that Woodall did not explicitly allege in his complaint that deadly force was unreasonable under the circumstances. However, as the district court noted, that conclusion is "at best inferred in" Woodall's complaint. But the district court erred by failing to draw that inference in Woodall's favor, as it was required to do. *See Norton v. Rocky Mountain Planned Parenthood, Inc.*, 2018 CO 3, ¶ 7.

lethal round; (3) it was unreasonable for Godfrey to fire the SIM shotgun because he knew or should have known that he was beyond the SIM shotgun's effective range; (4) Godfrey knew or should have known that firing the SIM shotgun without first shouting "less lethal" would cause Dinges to use unreasonable, deadly force against Woodall and thereby violate Woodall's constitutional rights; and (5) the application of deadly force caused Woodall's injuries.

¶ 31 We next consider, and reject, Godfrey's arguments to the contrary.

C. The District Court Erred by Failing to Accept Factual Allegations as True and Failing to Draw Supported Inferences in Woodall's Favor

¶ 32 Godfrey contends that the district court correctly rejected large portions of the allegations in Woodall's complaint because, according to the district court, they were "legal conclusions regarding the reasonableness of [Godfrey's] actions that are couched in factual allegations." We disagree.

¶ 33 As an initial matter, we note that a "legal conclusion" is a "statement that expresses a legal duty or result but omits the facts creating or supporting the duty or result." Black's Law Dictionary

1072 (11th ed. 2019). A "conclusory" allegation is one "[e]xpressing a factual inference without stating the underlying facts on which the inference is based." *Id.* at 363.

¶ 34 While we agree with the district court that we need not accept as true legal conclusions or conclusory allegations couched as facts, *Fry*, ¶ 17, we don't agree with the district court's characterization of many of the rejected allegations. We confine our analysis to only those rejected allegations on which we have relied above to conclude that Woodall's complaint was sufficient to state a claim for relief.

¶ 35 First, the district court incorrectly disregarded the following allegations relating to the SIM shotgun:

- The firing of a SIM shotgun mimics the sound of live gunfire, so a nearby officer would have had difficulty immediately distinguishing the two sounds.
- The difficulty for a nearby officer to distinguish the SIM shotgun's sound from that of a handgun is made worse

when the nearby officer is already aiming a rifle at a person who the officer believes possesses a gun.[7]

¶ 36 Whether the firing of a SIM shotgun sounds like live gunfire to a nearby officer, whether an officer would have difficulty distinguishing between the sound of a gun firing and the sound of a SIM shotgun firing, and whether that difficulty is worsened by the officer's belief that the suspect has a gun are all evidentiary facts that could be proved (or disproved) by, for example, audio recordings comparing the sound of the two different types of guns, testimony from a witness who has heard both types of shots being fired, and testimony from a witness with training in how officers perceive sounds where they believe a suspect may have a gun. They do not require a fact finder to make any inferential steps. Accordingly, they are not conclusory, nor are they legal conclusions.

¶ 37 The district court did not treat these allegations as true, reasoning that "[t]he legal conclusion of [these paragraphs] is that

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[7] Woodall made both these allegations "upon information and belief," which, as the district court noted, is permissible. *See Warne v. Hall*, 2016 CO 50, ¶ 20 ("[W]hen a pleader is without direct knowledge, allegations may be made upon information and belief . . . .").

[Godfrey] should have known Officer Dinges would mistake the SIMs shotgun discharge for a handgun discharge and would have mistakenly fired, thus making [Godfrey] liable for Officer Dinges' actions." In other words, the district court used these two factual allegations to draw a reasonable inference that Godfrey was liable for Woodall being shot and then erroneously excluded the allegations based on the reasonable inference it drew.

¶ 38 The district court also rejected factual allegations regarding the effect of a reasonable officer's training:

- A reasonably trained officer in Godfrey's position would have known Woodall was outside the effective range of the SIM shotgun.
- A reasonably trained officer in Godfrey's position would have known to announce "less lethal" before firing the SIM round to avoid risking "sympathetic," "contagious," or mistaken shootings from nearby officers who heard the SIM shotgun fire.

¶ 39 As with the allegations relating to sound of a SIM shotgun firing, the allegations that an officer's training would make the officer aware (1) that he was standing outside the SIM shotgun's

effective range or (2) that he should announce "less lethal" before firing the SIM round are factual allegations provable by, for example, testimony about the training officers receive relating to the use of SIM rounds and the risks of sympathetic fire.

¶ 40 True, Woodall's complaint might be stronger if it had directly alleged that Godfrey himself had been specifically trained to announce "less lethal" before firing a SIM round under the conditions he faced. However, C.R.C.P. 12(b)(5) does not require a plaintiff to recite every conceivable fact that could support a claim. Rather, C.R.C.P. 12(b)(5) "simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence" that (in this case) Godfrey knew or should have known that failing to give advance notice of his use of less than lethal force was unreasonable and would result in Woodall being shot. *Twombly*, 550 U.S. at 556. Woodall's allegation that a reasonably trained officer in Godfrey's position would know to shout "less lethal" to avoid such a risk, in combination with the remaining factual allegations, meets that standard because it raises a reasonable expectation that discovery will reveal that Godfrey did, in fact, receive such training. And the training an officer receives is relevant to establishing whether the

officer's actions were reasonable under the circumstances. *See Weigel v. Broad*, 544 F.3d 1143, 1155 (10th Cir. 2008) ("[T]he reasonableness of an officer's actions must be assessed in light of the officer's training."), *overruled on other grounds by Pearson v. Callahan*, 555 U.S. 223, 235 (2009).

¶ 41 The district court also seems to have disregarded Woodall's allegation that reasonably trained officers are taught to announce the use of less than lethal force to avoid sympathetic, contagious, or mistaken fire because Woodall's complaint doesn't sufficiently explain sympathetic fire. But Woodall's complaint quotes a case from another jurisdiction that contextually explains that sympathetic fire is "fire from other officers should they hear [a] bean bag [non-lethal] shotgun be fired." *Norton v. City of South Portland*, 831 F. Supp. 2d 340, 353 (D. Me. 2011). We don't see why Woodall needs to provide additional detail to state a plausible claim for relief. *See Twombly*, 550 U.S. at 556.

D. Additional Allegations Were Not Required

¶ 42 Godfrey further contends that the district court was correct to conclude that additional specificity was required. We again disagree.

¶ 43 The district court faulted Woodall's complaint for failing to allege specific facts about (1) the direction from which Dinges heard the SIM shotgun fire; (2) the participants' exact positions in relation to each other; (3) what Dinges could see or perceive from the parties' positions; (4) the position Woodall's hands were in (and whether they were positioned such that Dinges would believe Woodall was pointing a gun at him); and (5) whether Dinges actually perceived that Woodall was firing at him. While we agree that such facts would be relevant to establishing causation (or the lack thereof) at a later stage of the case, such specificity isn't required to survive a motion to dismiss under C.R.C.P. 12(b)(5). *See Twombly*, 550 U.S. at 570. At this stage, it is plausible that Godfrey's actions caused Dinges to shoot Woodall based on the allegations that (1) the firing of a SIM shotgun sounds like gunfire; (2) Dinges believed Woodall had a gun; (3) an officer's training would alert the officer to the need to announce "less lethal" before shooting a SIM round "due to the risks associated with contagious, sympathetic, or mistaken fire"; and (4) Godfrey shot his SIM shotgun without announcing "less lethal." *See id.* at 556 (noting that there is no "probability requirement at the pleading stage" and

"a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable" or "that a recovery is very remote and unlikely" (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974))).

¶ 44 Godfrey also advances the district court's reasoning that Woodall should have alleged facts that, if proved, would show that Dinges's actions *by themselves* were an unreasonable seizure. But that isn't the case. Woodall's complaint must allege facts that, taken as true, allow a court to plausibly infer that the degree of force used against him was unreasonable under the circumstances, but it does not need to allege that Dinges acted unreasonably because Dinges is not the defendant. Rather, Woodall must allege that Godfrey knew or should have known that firing the SIM shotgun would cause Dinges to use excessive force against Woodall. *See Halley*, 902 F.3d at 1148. And, as explained above, Woodall's complaint meets this requirement.

E. Godfrey's Negligence Argument

¶ 45 Finally, Godfrey appears to assert that Woodall's complaint alleges only negligent action, and negligence alone is insufficient to state a cause of action for excessive force. As best we understand

this argument, Godfrey asserts that Woodall was required to, but did not, allege sufficient facts from which a court could plausibly infer that Godfrey acted with some unspecified degree of culpability greater than negligence. We disagree.

¶ 46 When examining whether the force used by an officer is excessive, the officer's intent is irrelevant. *Sebastian*, ¶ 22 n.2. The only question is whether the degree of force used is "objectively reasonable" under all the circumstances. *Id.* at ¶ 22. And for cases like this one involving "indirect" causation, an excessive force claim requires that Woodall allege sufficient facts for a court to plausibly infer that Godfrey "knew or reasonably should have known" that his actions would result in excessive force being applied against Woodall. *Halley*, 902 F.3d at 1148. As described above, Woodall's complaint plausibly alleged both of these components.

¶ 47 The cases on which Godfrey relies don't persuade us that anything more is required. First, *Williamson v. Connors*, Civ. A. No. 10-cv-02267-BNB, 2010 WL 5058448, at *2 (D. Colo. Dec. 3, 2010) (unpublished order), involved a pro se prisoner's complaint that did not allege that any search or seizure had occurred, and it is therefore inapplicable to this case.

¶ 48 Second, *Utah v. Strieff* involved application of the attenuation doctrine, an exception to the exclusionary rule under which evidence is admissible "when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that 'the interest protected by the constitutional guarantee . . . would not be served by suppression of the evidence obtained.'" 579 U.S. 232, 238 (2016) (quoting *Hudson v. Michigan*, 547 U.S. 586, 593 (2006)). One of the factors courts consider in applying the attenuation doctrine is "the purpose and flagrancy of the official misconduct." *Id.* at 239 (quoting *Brown v. Illinois,* 422 U.S. 590, 604 (1975)). The Supreme Court referred to a police stop as "an isolated instance of negligence" in connection with its analysis of this factor. *Id.* at 242. However, there is no such "purpose and flagrancy" factor in an excessive force analysis, so *Strieff* is also distinguishable from the present case. *See, e.g.*, *Graham*, 490 U.S. at 397-98.

¶ 49 *Hampton v. Hein*, No. CIV 10-1029, 2011 WL 13277770 (D.N.M. Dec. 30, 2011) (unpublished opinion), requires a bit more analysis. That case does say that "[t]he Tenth Circuit has clearly held that negligence alone cannot be the basis for a Fourth

Amendment claim." *Id.* at *4. But, respectfully, the Tenth Circuit cases cited by the *Hein* court do not stand for that broad of a proposition and are distinguishable from this case. *Hein* cites *Thomas v. Durastanti*, 607 F.3d 655, 667-68 (10th Cir. 2010), which in turn cites *Medina v. Cram*, 252 F.3d 1124, 1132 (10th Cir. 2001). Both *Thomas* and *Medina* involved the question of how to consider officers' actions leading up to the moment when the officers "reasonably believed they were in danger at the time they used force." *Medina*, 252 F.3d at 1132. The *Medina* court concluded that, when a plaintiff alleges that the officers' actions unreasonably contributed to the officers' perceived danger (such as when an officer's behavior provokes the plaintiff to threaten violence), the officers' conduct leading up to the need to use force must be reckless or intentional rather than just negligent. *Id.*; *see also Thomas*, 607 F.3d at 664.

¶ 50 While this case may look analogous at first blush, it isn't. This isn't a case in which Woodall alleges that Godfrey's conduct "precipitat[ed] a confrontation" between Woodall and Godfrey (or between Woodall and Dinges) or escalated Woodall's behavior such that the use of deadly force became "reasonable." *Medina*, 252 F.3d

at 1132 (quoting *Sevier v. City of Lawrence*, 60 F.3d 695, 699 n.7 (10th Cir. 1995)). Rather, as explained above, Woodall's theory of liability is one of indirect causation: all that is required is that Godfrey "set in motion a series of events" that he "knew or reasonably should have known would cause others" to use unreasonable force against Woodall. *Halley*, 902 F.3d at 1148. Accordingly, under these circumstances, we do not read *Medina*, *Thomas*, or *Hein* to require anything more than what Woodall has alleged.

V. Disposition

¶ 51 We reverse the judgment of the district court as to the excessive force claim and remand for further proceedings consistent with this opinion.[8]

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[8] In the conclusion of his opening brief, Woodall requests that we vacate the district court's order imposing attorney fees. Woodall filed his appeal on March 9, 2023, indicating that the only judgment on appeal is the district court's January 20, 2023, order granting Godfrey's motion to dismiss. That judgment contains no award of attorney fees. The district court issued a separate order on May 8, 2023, awarding Godfrey attorney fees and costs. We don't have jurisdiction over that order because Woodall didn't separately appeal it or amend his notice of appeal to include it. *See Kennedy v. Gillam Dev. Corp.*, 80 P.3d 927, 929 (Colo. App. 2003) ("[A]n award of attorney fees is distinct and separately appealable

JUDGE WELLING and JUDGE YUN concur.

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from the judgment on the merits."); *Dawes Agency, Inc. v. Am. Prop. Mortg., Inc.*, 804 P.2d 255, 257 (Colo. App. 1990) (holding that a notice of appeal of a merits judgment — filed before the district court entered an attorney fee award — does not confer jurisdiction on the court to decide an appeal of the attorney fee award). Nothing herein prohibits Woodall from seeking relief from the attorney fee order in the district court.