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10/03/2024	26 Appellants' Opening Brief **DOCUMENT COULD NOT BE RETRIEVED!**		[11126205] Appellant/Petitioner's brief filed by Ernestina Cruz and G.R.V.. Served on 10/03/2024 by email. Oral argument requested? Yes. Word/page count: 12964. This pleading complies with all required privacy and virus certifications: Yes. [24−2091] EOJ
11/01/2024	33 Defendants − Appellees' Response Brief	2	[11133372] Appellee/Respondent's brief filed by City Of Deming, Lee Cook Jordan, Sergio Quezada, Cristobal Paz, Adam Aragon, Mr. Robert Chavez, Benjamin Sanchez, David Acosta and Ashley Standridge. Served on: 11/01/2024. Manner of service: email. Oral argument requested? Yes. Word/page count: 10291. This pleading complies with all required privacy and virus certifications: Yes. [24−2091] AJD

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ERNESTINA CRUZ, as personal representative of the Estate of Gilbert Valencia, et al.,

Plaintiffs - Appellants,

v.

CITY OF DEMING, et al.,

Defendants - Appellees,

and

NEW MEXICO DEPARTMENT OF PUBLIC SAFETY, et al.,

Defendants.

No. 24-2091

On Appeal from the United States District Court for the District of New Mexico
Judge Margaret I. Strickland
Case No. 2:22-CV-00957

DEFENDANTS - APPELLEES' RESPONSE BRIEF

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ORAL ARGUMENT IS REQUESTED

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STATEMENT OF RELATED CASES

There are no prior or related appeals.

STATEMENT OF THE ISSUES

1. Whether the District Court erred in granting summary judgment where it relied upon undisputed video evidence, resolved all doubts against the movant, construed all admissible evidence in the light most favorable to the non-movant, and drew all reasonable inferences in the non-movant's favor.

2. Whether the District court erred in finding that officers were entitled to qualified immunity where they used lethal force against an alleged active shooter who repeatedly grabbed a weapon that appeared to be a rifle despite orders not to touch it and to keep his hands up.

3. Whether the District Court erred in granting summary judgment on claims brought under the New Mexico Tort Claims Act, where the force used by officers was objectively and subjectively reasonable.

STATEMENT OF THE CASE

On the morning of February 3, 2021, Luna County Dispatch informed law enforcement officers in and around Deming, New Mexico, that a man dressed in gray and standing on Interstate 10 was aiming at vehicles and had fired shots from an "AR-Type or Machine-Gun Type" weapon. [*See* App. Vol. II at 60]. Dispatch may later have disclosed that it was unknown if the individual was shooting at traffic when a vehicle would pass by. [*See* App. Vol. II at 60-61]. Officers from multiple agencies, including the Deming Police Department ("Deming Officers") responded to this report of an active shooter and began searching for the suspect. [*See* App. Vol. II at 61].

Lieutenant Arturo Baeza, of the Luna County Sheriff's Office, spotted Gilbert Valencia ("Valencia"), who matched the suspect's description, walking north of I-10. [*See* App. Vol. II at 61]. He radioed Valencia's location to fellow law enforcement and warned that the suspect had "an AR." [*See* App. Vol. II at 61]. A group of officers converged on the location, approaching Valencia in an empty mesquite field. [*See* App. Vol. II at 61]. Seeing his gray clothing and what appeared to be a rifle slung over his shoulder, the Deming Officers believed that this was the shooter described by Dispatch. [*See* App. Vol. II at 61].

Multiple officers shouted at Valencia to put his hands up, and he momentarily did, but then lowered them to cross his arms in front of his chest. [*See* App. Vol. II

at 62]. He was again ordered to raise his hands, and told to get on his knees, which he did. [*See* App. Vol. II at 62]. However, once on his knees he lowered his hands once again, this time touching the weapon hanging from his left side and pulling it in front of his stomach. [*See* App. Vol. II at 63]. Officers shouted, "don't reach for the gun!" and "let go!" at which point Valencia again raised his hands above his head. [*See* App. Vol. II at 63]. Valencia was told to keep his hands up and to get on his stomach. [*See* App. Vol. II at 63]. Instead of complying, he reached into his pocket and withdrew what appeared to be a wallet, flashing it at officers before putting it back. [*See* App. Vol. II at 62-63]. He was again told to get on his stomach. [*See* App. Vol. II at 63].

At this point, Valencia was in a kneeling position, with his hands free—though not raised—and his weapon on the ground in front of him, slightly off to the side. [*See* App. Vol. II at 63; App. Vol. I, 272 at 00:25:30-38]. Valencia looked down, leaned forward slightly, placed his left hand on the weapon, by the barrel, and lifted it up off the ground towards his body before placing it in his right hand, near the grip, and releasing his left hand from the barrel. [*See* App. Vol. II at 63; App. Vol. I, 272 at 00:25:36-38]. While picking up his weapon, the barrel also shifted in the Deming Officers' direction, though not directly at them. [*See* App. Vol. II at 63; App. Vol. I, 272 at 00:25:36-38]. Valencia's handling of his weapon led a number of the Deming Officers to fear for their safety and the safety of those around them.

[*See* App. Vol. II at 63]. Five Deming Officers (the "OIS Officers") opened fire, killing Valencia. [*See* App. Vol. II at 63-64]. Only later was it discovered that Valencia had been holding an airsoft gun with its orange tip painted black. [*See* App. Vol. II at 64].

On September 9, 2021, Valencia's Estate and the next friend of Valencia's minor son ("Plaintiffs") commenced this action in New Mexico's Sixth Judicial District Court alleging assault, battery, and negligent training and supervision against the City of Deming and its officers. [*See* App. Vol. I at 30]. On December 15, 2022, Plaintiffs amended their complaint to assert federal claims, including a § 1983 claim for violation of Valencia's Fourth and Fourteenth Amendment rights through excessive force, and Defendants removed the action to the United States District Court for the District of New Mexico. [*See* App. Vol. I at 29-30]. On August 21, 2023, the Deming Defendants moved for summary judgment on the Plaintiffs' state claims, found in Counts I, II and III of the Amended Complaint, and qualified immunity on Plaintiffs' §1983 claim for excessive force, found in Count VI (the "Motion"). [*See* App. Vol. I at 142-168]. The District Court issued an order granting the Motion on December 12, 2023 [the "Order"]. [*See* App. Vol. II at 58-82]. Once the Plaintiffs' remaining claims were disposed of, this appeal followed.

SUMMARY OF THE ARGUMENT

The District Court did not err when it granted summary judgment based on qualified immunity to the Deming Defendants on Plaintiffs' federal claim of excessive force. Nor did it err when it granted and summary judgment on the Plaintiffs' state tort claims. It based on its judgment on undisputed facts, including video evidence, showing that Deming Officers confronted a suspected active shooter who was carrying what appeared to be a rifle, that the suspect repeatedly disobeyed officer commands, and that OIS Officers only used lethal force after the suspect had grabbed his weapon for the second time, placing officers in fear for their safety. Under such circumstances, the use of force was both objectively and subjectively reasonable. The Deming Defendants were, therefore, entitled to qualified immunity as they had not violated the suspect, Valencia's, constitutional rights, much less clearly established law. Further, the Deming Defendants were entitled to summary judgment on Plaintiffs' state claims as their use of force was privileged under New Mexico law. Accordingly, this Court must affirm the District Court's Order.

STANDARD OF REVIEW

Appellate courts review a district court's qualified immunity determination on a motion for summary judgment *de novo*. *Becker v. Bateman*, 709 F.3d 1019, 1022 (10th Cir. 2013). Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A disputed fact is 'material' if it might affect the outcome of the suit under the governing law, and the dispute is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Estate of Beauford v. Mesa Cty.*, 35 F.4th 1248, 1261 (10th Cir. 2022). Courts review the evidence "and draw reasonable inferences therefrom in the light most favorable to the nonmoving party." *T.D. v. Patton*, 868 F.3d 1209, 1219 (10th Cir. 2017). However, they do not have to accept versions of the facts "contradicted by objective evidence," such as video footage. *Beauford*, 35 F.4th at 1261 (citing *Scott v. Harris*, 550 U.S. 372, 380 (2007)). There is no genuine issue of fact when one party's version of events "is blatantly contradicted by the record, so that no reasonable jury could believe it." *See Scott*, 550 U.S. at 380 (rejecting a party's version of events in light of contradictory videotape evidence). "To defeat a motion for summary judgment, evidence, including testimony, must be based on more than mere speculation, conjecture, or surmise." *Beauford*, 35 F.4th at 1261 (citing *Self v. Crum*, 439 F.3d 1227, 1230 (10th Cir. 2006)).

Courts "review summary judgment orders deciding qualified immunity questions differently from other summary judgment decisions." *See id*. When a defendant raises a qualified immunity defense at the summary judgment stage, the plaintiff bears the burden "to establish (1) a violation of a constitutional right (2) that was clearly established." *Estate of Redd v. Love*, 848 F.3d 899, 906 (10th Cir. 2017). Courts may address the two questions in any order. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

"For the law to be 'clearly established,' there ordinarily must be a Supreme Court or Tenth Circuit opinion on point, or the clearly established weight of authority from other circuits must point in one direction." *Pompeo v. Bd. of Regents*, 852 F.3d 973, 981 (10th Cir. 2017) (citing *Medina v. City & Cty. of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992)). It is not enough that a rule be suggested by then-existing precedent; the "rule's contours must be so well defined that it is clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018) (internal quotations omitted). "Such specificity is especially important in the Fourth Amendment context, where it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *City of Tahlequah v. Bond*, 142 S. Ct. 9, 11-12 (2021) (internal quotations omitted).

ARGUMENT

I. NO REASONABLE JURY COULD CONCLUDE THAT DEMING OFFICERS USED EXCESSIVE FORCE AND THIS COURT MUST AFFIRM THE DISTRICT COURT'S GRANT OF QUALIFIED IMMUNITY AND SUMMARY JUDGMENT ON COUNT VI OF THE PLAINTIFF'S AMENDED COMPLAINT.

a. The District Court Relied on Undisputed Facts and, Where Factual Disputes Existed, Resolved Them in Plaintiffs' Favor Before Concluding that Defendants Were Entitled to Summary Judgment.

The Plaintiffs' opening argument for reversal is that the District Court weighed conflicting evidence and resolved factual disputes in favor of the Defendants. [*See* Doc. 26 at 26-34]. This is a bold claim given that the Court explicitly stated that it was "resolv[ing] all doubts against the movant, constru[ing] all admissible evidence in the light most favorable to the nonmovant, and draw[ing] all reasonable inferences in favor of the nonmovant," [*see* App. Vol. II at 59 n.1] and reiterated that this is what it had done when asked to reconsider its ruling. [*See* App. Vol. II at 146]. In truth, the Court did not "weigh" any evidence; rather, it relied on undisputed video evidence capturing the entirety of the use of force, rejected characterizations of events that contradicted that video, and, where genuine factual disputes existed, resolved them in the Plaintiffs' favor. [*See* App. Vol. II at 59-64].

For example, viewing the facts in the light most favorable to Plaintiffs, the District Court found that Deming Officers "would have heard that it was unknown if the suspect was shooting at traffic if they had been listening to Luna County Dispatch." **[***See* App. Vol. II at 60-61**].** The Court also adopted Plaintiffs' expert's

observations that Valencia's "weapon had several features indicating that it was not an operable firearm, such as residual orange paint on the muzzle, a missing handguard on the forward section of the barrel, an empty magazine well, and no stock or buffer tube attached to the rear of the gun." [*See* App. Vol. II at 64].

Still, the Appellants suggest that the Court weighed evidence to find that Valencia pointed his gun at officers, which Plaintiffs declare is the "key material fact at issue." [*See* Doc. 26 at 30-31]. There are two problems with this argument. First, it misrepresents the District Court's findings. The Court explicitly stated that "[t]he parties . . . agree that Valencia never directly aimed his weapon at the officers." [*See* App. Vol. II at 63 n.4 (emphasis added)].

Second, the District Court did not weigh any competing evidence. Instead, relying on lapel camera footage, it observed that Valencia moved his weapon, so the barrel rotated "towards" officers but "it did not fully rotate so that it was pointing at the officers." [*See* App. Vol. II at 63]. Relying on this footage was not "weighing the evidence," as that would suggest giving credit to one version of events over another. Consistent with Supreme Court precedent in *Scott v. Harris*—an authority that is notably absent from the Appellants' briefing—the District Court simply "viewed the facts in the light depicted by the videotape"; videotape upon which both parties rely and which no one suggests is inaccurate. *See Scott*, 550 U.S. at 378, 380-81 (rejecting a litigant's version of events at odds with undisputed video tape).

Because there is no genuine dispute as to the accuracy of the video evidence, it was appropriate for the lower court to rely on it.[1] *See id*. at 380 ("At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party *only* if there is a 'genuine' dispute as to those facts" (emphasis added)).

Plaintiffs also suggest that the District Court credited "other individual Defendants' subjective testimony" and their imperfect recollection of events when describing Valencia's movement of his weapon. [*See* Doc. 26 at 31]. This, too, is a misrepresentation. The District Court relied upon individual officer statements in finding that, due to Valencia's movement, "several officers feared for their safety and for the safety of the officers around them, and they shot in response to the threat." [*See* App. Vol. II at 63]. The OIS Officers' subjective beliefs had to be considered because subjective reasonableness is an element of the Plaintiffs' state tort claims. [*See infra* at 36-37]. It is unclear what source Plaintiffs believe the Court should have relied on to ascertain the OIS Officers' *subjective* impressions, if not their own sworn statements. The District Court acknowledged that "Plaintiffs attempt to dispute the OIS Officers' subjective interpretation of Mr. Valencia's

[1] While Plaintiffs suggest the Court should have relied on their expert, Curtis Cope's, recitation of the events captured on video [*see* Doc. 26 at 30-31], an expert's retelling of undisputed video evidence is not helpful, and the Court was not required to defer to it. Fed. R. Evid. 702(a); *see also Thompson v. State Farm Fire & Cas. Co*., 34 F.3d 932, 941 (10th Cir. 1994) (expert testimony on a matter the fact finder can assess for itself, is not helpful).

handling of his weapon on the basis that '[t]he video evidence shows that Mr. Valencia's actions did not pose a threat to police officers,'" but the evidence they cited "fail[ed] to create a material dispute about the OIS Officers' subjective interpretations of Mr. Valencia's actions." [*See* App. Vol. II at 63 n.5].

Plaintiffs point to the account of Detective David Acosta, who did not feel directly threatened, as evidence that the District Court ignored other officers' impressions. [*See* Doc. 26 at 31]. The District Court's findings and Acosta's statement, however, are not contradictory. The observation that "several" officers felt threatened, necessarily acknowledges that some officers did not. The Defendants never claimed, and the Court never found, that *all* the officers present feared for their lives. Additionally, just because Acosta did not feel threatened cannot reasonably be inferred to mean that other officers should not have felt threatened, as Plaintiff seems to suggest. *See Taylor,* 16 F.4th at 769 (recognizing that whether a fellow officer was prepared to use force is simply one factor in the totality of the circumstances). By acknowledging that several officers were fearful, the Court was simply observing an undisputed fact relevant to Plaintiffs' state claims and was not weighing two contradictory pieces of evidence.

Next, Plaintiffs argue that the District Court's finding that "Mr. Valencia picked up his weapon from the ground immediately before he was shot" is contradicted by expert declaration that "the majority of Mr. Valencia's gunshot

wound paths are consistent with shots fired into his body immediately after his body had fallen." [*See* Doc. 26 at 32]. These are not contradictory observations. Valencia indisputably picked up his weapon while also leaning forward. [*See* App. Vol. II at 63-64]. To the extent the Plaintiffs suggest that Valencia did not, in fact, pick up his weapon immediately before being shot, such an account is blatantly contradicted by the undisputed video evidence. *See Scott*, 550 U.S. at 380.

The Plaintiffs liken this matter to the Supreme Court decision *Tolan v. Cotton*, a police shooting case where summary judgment was reversed for failure to apply the correct evidentiary standard. *See* 572 U.S. at 650, 657 (2014). There, the lower court had credited testimony that the victim had been in a dimly lit area when he was shot, that his mother had refused to be calm before the shooting, and that the victim had verbally threatened the officer, notwithstanding the existence of testimony to the contrary. *See id*. at 655, 657-59. Critically, the lower court found that the victim had abruptly attempted to approach the officer despite multiple testimonies that the victim was on his knees at the time of the shooting and "wasn't going anywhere." *Id*.

Unlike *Tolan*, this case does not involve contradictory sworn accounts of events and an absence of video footage. Here, the Court relied upon the undisputed video evidence to describe Valencia's actions in the lead-up to his shooting, and, where genuine disputes existed, it construed all reasonable inferences in the Plaintiffs' favor. Accordingly, it adhered to the proper standard of review for

summary judgment in developing its findings of fact and its judgment must be affirmed.

b. The Force Used by the OIS Officers was Objectively Reasonable Under the Totality of the Circumstances

A plaintiff who claims officers violated the Fourth Amendment through excessive force, must demonstrate that the force used was objectively unreasonable. *Graham v. Connor*, 490 U.S. 386, 388 (1989); *Estate of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1259 (10th Cir. 2008). Determining reasonableness requires looking at the totality of the circumstances "from the perspective a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.". *See Palacios v. Fortuna*, 61 F.4th 1248, 1256 (citing *Estate of Valverde v. Dodge*, 967 F.3d 1049, 1060 (10th Cir. 2020); quoting *Graham*, 490 U.S. at 396 (1989)); *Larsen*, 511 F.3d at 1259.

This analysis must embody the reality that "officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." *See Estate of Taylor v. Salt Lake City*, 16 F.4th 744, 761 (10th Cir. 2021). Consequently, "[t]he law does not require an officer to await the glint of steel before taking self-protective action; by then, it is often too late." *See Valverde*, 967 F.3d at 1063. No reason justifies waiting "to be shot at or even to see the suspect raise a gun and point it at [an officer] before it would be reasonable for [the officer], under the circumstances of a SWAT standoff, to shoot [a] suspect[]." *Id.*; *see also Mann v.*

Hyler, 918 F.3d 1109, 1113-1114 (10th Cir. 2019) (Officers need not use the least intrusive means in detaining an individual so long as the means are reasonable.). As long as an officer's perception that a suspect was about to use a firearm was reasonable, he "does not violate the Fourth Amendment even when in retrospect it is clear that the officer made a mistake in shooting someone who did not pose a threat at the precise moment of the shot." *Valverde*, 967 F.3d at 1064; *Estate of Smart v. City of Wichita*, 951 F.3d 1161, 1171 (10th Cir. 2020).

The Supreme Court case of *Graham v. Connor* provides three factors for assessing whether a use of force is objectively reasonable: (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. *See* 490 U.S. at 396. Each of these factors is considered in turn:

i. Valencia was suspected of a severe crime when confronted by officers.

When the Deming Officers confronted Valencia, they believed, based on what they had heard from Dispatch, that he either committed a heinous crime or threatened to commit a heinous crime and, therefore, the first *Graham* factor weighs in their favor. Plaintiffs disagree, arguing that "it is not determined whether Mr. Valencia even committed a crime." [Doc. 26 at 36]. This erroneously assumes that a suspect must have actually committed the crime for which they are being investigated in

order for this factor to weigh in an officer's favor. It is enough that responding officers have an objective reason to believe they are responding to a severe crime, such as a felony. *See e.g. Palacios*, 61 F.4th at 1256-57 (analyzing the severity factor based upon the seriousness of the crime being investigated, rather than the seriousness of the crime *actually* committed).

As the District Court observed—and Plaintiffs concede—the morning of the incident, a motorist reported that a man in a gray sweatsuit was shooting at traffic on I-10. [*See* App. Vol. II at 60; Doc. 26 at 15]. Dispatch relayed this information to the Deming Officers, describing the shooter's gun as an "AR-Type or Machine-Gun type weapon." [App. Vol. II at 60]. The Court acknowledged that Deming Officers could have heard Dispatch mention that it was "unknown if the suspect was shooting at traffic." [*See* App. Vol. II at 60]. Based upon this information, it was objectively reasonable for officers to believe that the suspect had committed a felony offense ranging anywhere from aggravated assault to attempted murder. *See* NMSA 1978, § 30-3-2 (defining the felony offense of aggravated assault as "unlawfully assaulting or striking at another with a deadly weapon"). As this Circuit has observed, where the crime being investigated is a potential felony "the crime is considered to have a high degree of severity which weighs against the plaintiff." *Palacios*, 61 F.4th at 1256 (citing *Vette v. K-9 Unit Deputy Sanders*, 989 F.3d 1154 (10th Cir. 2021)).

Not only were officers justified in believing a serious offense had been committed, they had every reason to believe Valencia was the perpetrator. When officers located Valencia, he perfectly matched the suspect described by Dispatch: he was wearing gray clothing and a hat and carrying what appeared to be a rifle. [*See* App. Vol. II at 61; Doc. 26 at 15]. Given that Valencia matched the suspect who had been aiming and potentially firing at traffic, the District Court correctly concluded that officers reasonably "believed they were responding to a reported crime of significant severity." [*See* App. Vol. II at 70].

Plaintiffs maintain that it was unreasonable for officers to believe they were investigating a severe crime because Valencia's weapon had features, acknowledged by the Court, indicating it was not an operable firearm. [*See* Doc. 26 at 37; App. Vol. II at 64]. While it is true that Plaintiffs' firearms expert, relying on close-up photographs of the weapon [*see* App. Vol. I at 280 ¶ 10], was able to reach this conclusion, his perspective is immaterial as the only relevant perspective is that of a reasonable officer on the scene. *See Palacios*, 61 F.4th at 1262 ("to the extent [an expert] opined about what an officer could have concluded or otherwise done under these circumstances based on his years of experience, this is exactly the type of hindsight analysis that we are reluctant to conduct."); *Valverde*, 967 F.3d at 1065 (rejecting an expert's opinion not taken from the perspective of the officer on scene). The officers on scene that day reasonably believed that Valencia was carrying a real

firearm based on both its appearance and the communications from Dispatch. [*See* App. Vol. II at 62]. Even Plaintiffs have admitted that Valencia's weapon "resembled an AR-15." [*See* Doc. 26 at 15]. Any suggestion that the weapon held by Valencia did not look like a firearm is contradicted by the video evidence and the statements of the officers present. *See Scott*, 550 U.S. at 380.

There is no dispute that one officer, Acosta, noticed that "the rifle did not look like it had a magazine in it." [*See* App. Vol. II at 13]. This observation, however, cannot be extrapolated to imply that a reasonable officer would have believed it was harmless. Acosta, himself, did not believe it was harmless. [*See* App. Vol. II at 13 ("The self-talk that was going through [Acosta's] head was that if Gilbert grabbed the rifle and moved it up, he was going to shoot him.)]. After all, common sense dictates that a firearm without a magazine could still contain a chambered round. An objectively reasonable officer would believe that the black weapon resembling a rifle that was reportedly used to fire at traffic could be both functional and lethal and officers were under no obligation to assume otherwise. *See e.g. Estrada v. Cook*, 166 F. Supp. 3d at 1230, 1241 (D.N.M. March 16, 2015) (citing *Larsen*, 511 F.3d at 1260) (relying on 10th Circuit precedent to find that officers facing a "black weapon similar to an AR-15 rifle" were not required to ponder whether it was a real AR-15 or pellet gun before taking defensive action).

It was objectively reasonable for the Deming Officers to believe that Valencia was the suspect who had reportedly aimed at—and even fired on—freeway traffic with an "AR-type" weapon. Accordingly, this factor weighs in the Defendants' favor.

ii. Valencia posed an objective and immediate threat to the safety of officers.

The second *Graham* factor, which asks whether a suspect posed an immediate threat, "is undoubtedly the 'most important' and fact intensive." *Arnold v. City of Olathe*, 35 F.4th 778 (10th Cir. 2022) (quoting *Pauly v. White*, 874 F.3d 1197, 1216 (10th Cir. 2017)). The Tenth Circuit utilizes the following, non-exhaustive subfactors from *Estate of Larsen v. Murr* as aids to determine whether a suspect posed an immediate threat: (1) whether the officers ordered the suspect to drop his weapon, and the suspect's compliance with police commands; (2) whether any hostile motions were made with the weapon towards the officers; (3) the distance separating the officers and the suspect; and (4) the manifest intentions of the suspect. *See Valverde*, 967 F.3d at 1061.

1. Valencia repeatedly failed to comply with commands, culminating in grabbing his weapon.

Under the first *Larsen* subfactor, "[i]f a suspect was given orders and did not comply, this weighs in the officers' favor." *Palacios*, 61 F.4th at 1259. Here, the video evidence clearly shows that, while Valencia obeyed some of the officers'

commands, he repeatedly disobeyed others, which would have placed any reasonable officer in fear for his safety. *See Hosea v. City of St. Paul*, 867 F.3d 949 (8th Cir. 2017) (finding that a reasonable officer could view partial compliance as passive resistance, justifying force).

For instance, during the course of the confrontation, officers commanded Valencia to show his hands, keep his hands up, or a variation of that command at least fifteen times. [*See* App. Vol. I, 272 at 00:24:10—00:25:37]. He was also commanded not to touch his weapon at least five times. [*See id*]. Despite this, Valencia disobeyed these commands on at least five separate occasions over forty-four seconds: first, by crossing his arms in front of his chest; then, by actually reaching down and moving his weapon around to his front; then, by withdrawing his wallet; then, by putting his wallet back; and finally, by grabbing his weapon off the ground. [*See id.*]. Importantly, officers never commanded Valencia to lower his hands, touch his weapon, or produce identification. [*See id.*].

Despite this abundant evidence of non-compliance with officer commands, Plaintiffs assert that "Mr. Valencia complied with each unequivocal[2] command

[2] Plaintiffs cite to the Ninth Circuit for the proposition that a suspect is only non-compliant if they disobey an "unequivocal command" but fail to explain what constitutes an unequivocal command or why they believe some commands here were unequivocal while others were not. To the extent this sister-circuit standard has a bearing on the case, Deming Officers did not equivocate when ordering Valencia to show his hands, to keep them up and to not touch his weapon.

given to him by officers." [*See* Doc. 26 at 30]. They even go so far as to claim that Valencia was not holding the weapon when officers deployed deadly force, despite clear visual evidence to the contrary. [*Compare* Doc. 26 at 30 with App. Vol. I, 272 at 00:25:30-41]. Plaintiffs' statements are "so utterly discredited by the record that no reasonable jury could [] believe [them]." *See Scott*, 550 U.S. at 380; [*see* App. Vol. I, 272 at 00:24:10-00:25:37]. This factor, therefore, weighs in the Defendants' favor.

2. *Valencia's non-compliance and handling of his weapon were objectively hostile motions*.

The second *Larsen* subfactor asks courts to consider whether a suspect made hostile motions toward officers. *See Larsen*, 511 F.3d at 1260. Here, Valencia's non-compliance with officer commands and, critically, the grabbing of his weapon off the ground, would appear objectively hostile to a reasonable officer. *See Taylor*, 16 F.4th at 766 (indicating that whether a motion is hostile is based upon a reasonable officer's perspective). This is especially true given the tense context in which these motions took place. *See id*. (observing that "context is key" in the hostile motion analysis). The Deming Officers only confronted Valencia because he matched the description of the suspect reported to have been shooting at traffic with an "AR-type" weapon. Additionally, while Valencia had never attacked police, many of the officers present knew that he could be unpredictable and even violent. [App. Vol. I

at 146, ¶ 11]. It was not unreasonable then to believe that that Valencia was armed and dangerous.

It was in this context that Valencia, who had been ordered to keep his hands up, repeatedly lowered them, reached into his pocket, and twice touched his weapon. [*See* App. Vol. I, 272 at 00:24:10—00:25:37]. Most importantly, though Valencia–who had been told only moments before not to touch his weapon–looked down, and picked up the weapon near the barrel, switching it to his right hand, and raising it towards his body. [*See* App. Vol. I, 272 at 00:25:08-37]. It was only after this last action that officers used lethal force. [*See* Doc. 15-1, 272 at 00:25:37-41]. As this Circuit has recognized, a reasonable officer would perceive a suspect's act of picking up a firearm after being told not to touch it as a hostile act. *See Palacios*, 61 F.4th at 1260 ("a reasonable officer would see a suspect who just picked up his gun and brought it in front of him, ignoring officer commands, as making a hostile motion."); *see Valverde*, 967 F.3d at 1063-64 (observing that case law in the Tenth Circuit and other circuits permits officers to employ lethal force when a suspect picks up a gun, even where the suspect's intentions are ambiguous). Indeed, it is difficult to imagine how a suspect who has no weapon in his hands and proceeds, *contrary to orders*, to pick up what appears to be a firearm could be perceived as anything other than hostile.

Despite all the above evidence, Plaintiffs contend Valencia made "no threatening gestures" and that a reasonable officer would have understood the "commonsense ramification of his orders was that Valencia had to move the rifle slightly to the side to get on his stomach." [*See* Doc. 26 at 42-43, 45]. In support of this argument, they cite to the Fourth Circuit case of *Franklin v. City of Charlotte*, in which a suspect who did not have a weapon in his hands, was told to drop his weapon, and, when he retrieved the weapon and was holding it backwards toward officers, was shot. [*See* Doc. 26 at 41-42 (citing *Franklin v. City of Charlotte*, 64 F.4th 519 (4th Cir. 2023)].

First, the suggestion that it is "commonsense" that Valencia, who was repeatedly non-compliant up to that point, was picking up his weapon in order to comply with commands is both paradoxical and absurd. As this Circuit has pointed out, where a suspect has previously been non-compliant, it is not reasonable to ask officers to assume that he has abruptly decided to become compliant. *See Palacios*, 61 F.4th at 1260 (citing *Taylor*, 16 F.4th at 770 & n.10). What is more, there is nothing in the record to suggest Valencia "had to move the rifle" in order to lie on the ground.

Next, Plaintiffs' reliance on *Franklin* is misplaced as "not only can [it] not override precedent from this circuit, [it is] also readily distinguishable." *See Valverde*, 967 F.3d at 1065-66 (rejecting plaintiff's attempt to use out-of-circuit

authority to drive the outcome of the use-of-force analysis). Crucially, in *Franklin*, the suspect did not do anything inconsistent with officer commands. *See Franklin*, 64 F.4th at 525-527. By contrast, here, Valencia disobeyed two commands: to keep his hands up and not to touch his weapon. [*See* App. Vol. I, 272 at 00:24:10-00:25:37]. As the Fourth Circuit observed in *Franklin*, "When an officer issues a clear command to an armed suspect to do one thing and that person does another, we seldom question the officer's use of force." *See Franklin* 64 F.4th at 525. Consequently, even relying on this out-of-circuit authority, the OIS Officers' force was an objectively reasonable response to hostile motions, and this factor weighs in the Defendants' favor.

3. *Valencia was a short distance from Deming Officers who had no source of cover*.

The third *Larsen* subfactor assesses the imminence of a threat by assessing both the distance between officers and a suspect as well as the presence of cover for officers. *See Palacios*, 61 F.4th at 1260. Here, while the exact distance between Valencia and the Deming Officers is uncertain, video shows that they were mere yards apart: close enough for officers to affirmatively identify Valencia, and certainly close enough to be within range of a firearm. [*See* App. Vol. I, 272 at 00:25:34-37]. What is more, the entire confrontation took place in a mesquite field, void of any cover from gunfire. [*See* App. Vol. I, 272 at 00:24:00-00:25:37; App. Vol. I, 278 at 0:00-0:55]. Consequently, this factor weighs in the Defendants' favor.

4. *Valencia's disobedience reflected hostile intent*.

Under the fourth *Larsen* subfactor, courts consider "how a reasonable officer on the scene would have assessed the manifest indicators of [a suspect's] intentions." *Palacios*, 61 F.4th at 1260 (citing *Taylor*, 16 F.4th at 770). To be clear, the suspect's subjective intentions are irrelevant to this analysis. *See id*. (rejecting plaintiff's speculation that the suspect intended to avoid confrontation). Plaintiffs repeat their allegation that Valencia never showed harmful intent because he "was compliant with officers." [Doc. 26 at 48]. As discussed in depth above, this allegation is, at best, a half-truth, given Valencia's repeated non-compliance with orders to keep his hands up and not to touch his weapon. Such blatant disobedience is not negated merely because Valencia may have complied with some other orders. *See Hosea*, 867 F.3d at 958-959. Indeed, Valencia's apparent ability to comprehend orders and comply makes his non-compliance appear that much more intentional.

Plaintiffs speculate that Valencia's act of grabbing his weapon was part of an attempt to comply with the order to get on his stomach. Such speculation on Valenica's subjective intent, however, is insufficient to overcome a motion for summary judgment. *See Beauford*, 35 F.4th at 1261. Moreover, even if Valencia intended to comply, "[o]fficers cannot be mind readers and must resolve ambiguities immediately." *Valverde*, 967 F.3d at 1062. Valencia was disobeying commands and was grabbing his weapon at the moment he was shot. It was reasonable for officers

to view Valencia's decision to pick up a weapon that was previously resting at his knees as a manifestly hostile act and to defend themselves accordingly. *See id.* ("Perhaps a suspect is just pulling out a weapon to discard it rather than to fire it. But waiting to find out what the suspect planned to do with the weapon could be suicidal."); *see also Palacios*, 61 F.4th at 1260 (finding that a suspect's act of picking up a gun despite being ordered to show his hands and having the option to leave the gun where it was constituted "hostile gestures and manifested hostile intent").

Taken together, the four *Larsen* subfactors show that it was reasonable for officers to believe that Valencia posed an immediate threat of danger. Thus, the District Court was more than justified in finding that the all-important second *Graham* factor "weighs strongly in favor of the OIS Officers." [*See* App. Vol. II at 75]; s*ee Valverde*, 967 F.3d at 1061 (noting that consideration of the second *Graham* factor is particularly important where "the issue is whether [] officer[s] reasonably believed that [they] faced a threat of serious physical harm.").

iii. Valencia's non-compliance constituted active resistance.

The third *Graham* factor, which considers whether the suspect was actively resisting or attempting to evade arrest by flight, was found by the District Court to weigh in the Plaintiffs' favor. [App. Vol. II at 71]. Arguably, however, this factor too should have benefited the Defendants. While it is undisputed that Valencia was not evading officers, his non-compliance with commands and, more importantly, the

touching of his weapon immediately prior to being shot, can reasonably be viewed as resistance. As this Circuit stated in *Valverde*, "anyone who appears to be ready to shoot an officer certainly appears to be ready to resist arrest." *Valverde*, 967 F.3d at 1061.

iv. Additional circumstances presented by the Plaintiffs, such as Valencia's mental illness, did not render officer action any less reasonable.

The *Graham* and *Larsen* factors are not exhaustive, and the Court may consider additional arguments relating to whether, under the totality of the circumstances, the force used was reasonable. *See Palacios*, 61 F.4th 1248, 1260 (citing *Graham*, 490 U.S. at 396). The Plaintiffs have raised additional circumstances that they believe made the use of force unreasonable, including Valencia's known mental illness [*see* Doc. 26 at 47] and the downward trajectory of some of the bullet wound paths [*see* Doc. 26 at 48-51]. While the Court should take the totality of the circumstances into account, these additional considerations do not change the objective reasonableness of the OIS Officers' use of force.

With respect to Valencia's mental state, the District Court acknowledged that OIS Officers were aware Valencia was mentally ill or unstable. [*See* App. Vol. II at 61]. This alone did not require officers to resort to a lesser form of force. *See Giannetti v. City of Stillwater*, 216 F. App'x 756, 765 (10th Cir. 2007) (Despite a suspects' irrational behavior and officers' familiarity with her mental history,

officers did not use excessive force "given the tense, uncertain, and rapidly evolving situation presented by [the suspect's] behavior."). This Court has previously acknowledged that armed suspects with diminished capacity may actually present a greater threat of harm to officers. *See Tenorio v. City of Hobbs*, 113 F. App'x 879, 882 (10th Cir. 2004) ("common sense dictates that a suspect who appears to have a mental handicap, is reportedly armed, and is not following verbal commands should be treated with a heightened degree of caution."). Ultimately, "officers are not required to use alternative, less intrusive means if their conduct is objectively reasonable," which the OIS Officers actions were. *See Ceballos v. Husk*, 919 F.3d 1204, 1214 (10th Cir. 2019) (quoting *Jiron v. City of Lakewood*, 392 F.3d 410, 414 (10th Cir. 2004)).

Plaintiffs suggest that shouting different commands at Valencia recklessly "created a volatile situation." [*See* Doc. 26 at 46-47]. As part of the excessive force analysis, courts will take into account whether officers, by their "own reckless or deliberate conduct during the seizure unreasonably create the need to use such force."[3] *Valverde*, 967 F.3d at 1067 (quoting *Pauly*, 874 F.3d at 1219). That being said, "it is important to underscore that '[m]ere negligent actions precipitating a confrontation would not, of course, be actionable under § 1983.'" *Taylor*, 16 F.4th

[3] A full analysis showing that officers did not engage in reckless conduct that led to the need for force is found within Defendants' discussion of clearly established law, *infra* at 32-35.

at 771 (quoting *Jiron*, 392 F.3d at 415). As the District Court reasonably observed, the Deming Officers did not create the need for force because (1) one would expect officers confronting an armed suspect to shout the commands they did and (2) they had already instructed Valencia not to touch his weapon twice. [*See* App. Vol. II at 76]. There is "no basis for concluding that their failure to do so a third time was reckless." [*See id*.].

Moreover, while the Plaintiff implies this case is similar to *Hastings v. Barnes* and *Allen v. Muskogee*, where reckless conduct was found [*see* Doc. 26 at 46-47], the circumstances here are materially distinct. In both *Hastings* and *Allen*, officers needlessly escalated matters by rushing suicidal individuals, who presented no threat to the public, grabbing or pepper-spraying them in close quarters, then shooting them. *See Hastings v. Barnes*, 252 Fed. Appx. 197, 198-200 (10th Cir. 2007); *Allen v. Muskogee*, 119 F.3d 837, 839-40 (10th Cir. 1997). By contrast, the Deming Officers acted quickly to confront the quintessential public threat: an active shooter. Their timely response and the shouting of commands to keep his hands up and not to touch his weapon did not unreasonably create the need for force; Valencia's repeated disobedience to commands did.

Finally, Plaintiffs contend that the downward trajectory of Valencia's gunshot wound paths show that officers unreasonably continued to use force after he had been "effectively subdued." [*See* Doc. 26 at 48-51]. While it is unlawful to continue

to use force on a fully subdued suspect (*see Fancher v. Barrientos*, 723 F.3d 1191, 1201 (10th Cir. 2013)), officers must have time to appreciate that a suspect is no longer a threat before it becomes unlawful to use force. *See Valverde*, 967 F.3d at 1064-65 ("an officer does not violate the Fourth Amendment even when in retrospect it is clear that the officer made a mistake in shooting someone who did not pose a threat at the precise moment of the shot"; *Smart*, 951 F.3d at 1176-77 ("the mere fact that a suspect has fallen and been disarmed does not necessarily mean an officer acts unreasonably by firing additional shots" and "Courts are particularly deferential to the split-second decisions police must make in determining precisely when a deadly threat has passed.").

Even assuming Valencia was attempting to comply with orders and lay down when he was struck, "this is not a case where the officer[s] had sufficient time to appreciate that the suspect was no longer a danger before the officer[s] decided to fire." *Valverde*, 967 F.3d 106. The video shows that officers fired immediately after Valencia touched his weapon, the entire shooting lasted approximately three seconds, and the scene was immediately obscured by dust. [*See* App. Vol. I, 272 at 00:25:35-41]. As such, the District Court was correct that "a reasonable jury could not conclude that the officers had enough time to recognize and react to changed circumstances after the first shot was fired at Mr. Valencia." [App. Vol. II at 147]. *See Palacios*, 61 F.4th at 1261 (rejecting a plaintiff's argument that the "officers had

enough time (three seconds) to stop shooting when [the suspect] fell onto his side after the first shots were fired, before rolling onto his back" because "[a] reasonable officer would not perceive that the threat had ended and that [the suspect] was effectively subdued merely because he fell, given that he repeatedly maintained possession of a gun").

To be clear, this case is materially distinct from those relied upon by Plaintiffs, such as *Reavis v. Frost* [*see* Doc. 26 at 34-36] and *Fancher v. Barrientos* [*see* Doc. 26 at 50], where officers used lethal force *after* a reasonable officer would have understood the threat to have passed. *See Reavis v. Frost*, 967 F.3d 978, 991 (10th Cir. 2020) (denying qualified immunity where an officer shot at the side and rear of a vehicle that was passing him); *Fancher*, 723 F.3d at 1197, 1201 (10th Cir. 2013) (denying qualified immunity where an officer shot a suspect, the suspect slumped over, the officer took two-to-three steps back, felt safer and, five-to-seven seconds later, fired additional shots).

To paraphrase this Court's observation in *Estate of Valverde v. Dodge*, the OIS Officers' "decision to shoot [Valencia] once [they] observed him draw [up] a gun is exactly the type of split-second judgment, made in 'tense, uncertain, and rapidly evolving circumstances, 'that [courts] do not like to second-guess using the 20/20 hindsight found in the comfort of a judge's chambers.'" *See* 967 F.3d at 1064. The District Court recognized this and found that the Deming Officers' actions were

objectively reasonable under the totality of the circumstances. This Court, relying on its own precedent, should affirm the District Court in finding that the Deming Officers did not violate Valencia's constitutional rights and are therefore entitled to qualified immunity.

c. The Force Used by Deming Officers Did Not Violate Clearly Established Law.[4]

The Parties agree that, on the date of this incident, it was clearly established that force is unreasonable if an officer's reckless and deliberate conduct is the immediate cause of the need to use force on a suspect. *See Estate of Ceballos v. Husk*, 919 F.3d 1204, 1214 (10th Cir. 2019); [*see also* Doc. 26 at 53]. The Defendants, however, vehemently disagree with Plaintiffs' suggestion that the Tenth Circuit cases of *Estate of Ceballos v. Husk*, *Allen v. Muskogee*, or *King v. Hill* would have placed the OIS officers on notice that their conduct violated Valencia's rights. [*See* Doc. 26 at 53]. This is because these cases bear little factual similarity to the situation faced by the Deming Officers.

In *Allen*, an officer ran screaming toward an armed, suicidal suspect who was sitting in his car, and attempted to grab a gun from the suspect's hand. *See Allen*, 119 F.3d at 839-41. In the ensuing struggle, the suspect pointed his gun at officers

[4] Because the District Court determined there was no constitutional violation, it did not address the 'clearly established' prong of the qualified immunity analysis. [*See* App. Vol. II at 69].

who then shot and killed him. *Id*. at 839. The Circuit found that a reasonable jury could conclude such actions were "reckless and precipitated the need to use deadly force." *Id*. at 841. The Deming Officers, by contrast, maintained distance from Valencia while ordering him to keep his hands up, not to touch his weapon, and to get to the ground.

In *Ceballos*, a woman reported that her husband was in front of the house with a bat "acting crazy" and was likely drunk and on drugs. *Estate of Ceballos v. Husk*, 919 F.3d 1204, 1209 (10th Cir. 2019). When officers arrived, they told the suspect's friends, who tried to provide helpful information, to "shut the f*** up and get back," before approaching the suspect and telling him to drop the bat. *Id*. at 1210. When the suspect, who was not accused of a violent crime and was only armed with a short-range weapon, began walking toward the officers, they refused to give ground and instead shot him to death. *Id*. at 1210, 1216. This Court found a clearly established violation of the Fourth Amendment. *Id*. at 1216. Unlike the suspect in *Ceballos*, here, Valencia was accused of a violent crime and appeared to be holding a lethal, long-range weapon. Unlike the officers in *Ceballos*, the Deming Officers did not cavalierly reject potentially valuable information. Further, unlike the *Ceballos* officers who could have retreated but chose not to, the Deming Officers were confronting an alleged gunman in an open mesquite field—retreat was simply not an option.

In *King*[5], officers responded to a domestic disturbance and were informed that the male suspect, who was accused of verbal threats and breaking a water line, had no known weapons. *See King v. Hill*, 615 Fed. Appx. 470, 471-472 (10th Cir. 2015). Officers shot the suspect from 25-75 yards away despite the fact that his hands were raised and empty, and he was not making any threatening motions. *See id*. at 471-472, 476. While the suspect made verbal threats, this Court emphasized that he was objectively unable to harm officers due to distance and deemed the use of force unreasonable. *See id*. at 476. Here, Valencia was alleged to have an AR-Type weapon, was reported to have potentially used that weapon, was holding what appeared to be an AR-15 and was shot only after touching that weapon for the second time, while under orders not to do so.

The scenarios presented by the above cases are dramatically different from this case and could not have alerted officers to a clearly established violation of law. *See City of Tahlequah*, 142 S. Ct. at 11-12 (emphasizing the importance of factual similarity in use-of-force cases to create clearly established law). Importantly, none of these cases involved an alleged active shooter. "The [reasonable force] calculus is very different when seeking to apprehend someone believed to be involved in

[5] *King v. Hill* is unpublished and therefore could not have placed officers on notice that their conduct violated law. *See Quinn v. Young*, 780 F.3d 998, 1005 (10th Cir. 2015) (noting that clearly established law includes an "on point Supreme Court or *published* Tenth Circuit decision." (emphasis added)). To the degree this Court is willing to consider it in its clearly established analysis, the Defendants address it.

high-violence crimes." *Valverde*, 967 F.3d at 1068. Accordingly, the Deming Officers are also entitled to summary judgment under the second prong of the qualified immunity analysis.

II. THE DISTRICT COURT CORRECTLY DETERMINED THAT THE PLAINTIFFS' STATE TORT CLAIMS FAILED AS A MATTER OF LAW

Plaintiffs contend that the District Court erred in granting summary judgment on their three tort claims brought under the New Mexico Tort Claims Act. These included: Count I for assault and battery resulting in wrongful death, brought against the City of Deming and OIS Officers; Count II for negligence resulting in assault and battery brought against all the Deming Defendants; and Count III for negligent training and supervision, brought against the City of Deming. [*See* App. Vol. I at 52-61]. Plaintiffs' overarching argument is that officer reasonableness should be left to a jury to decide. [*See* Doc. 26 at 47-48].

While reasonableness of an officer's use of force is often a jury question, even New Mexico courts agree that this is not the case where the undisputed facts demonstrate that officer actions were reasonable. *See Cordova v. City of Albuquerque*, 2024 N.M. App. Unpub. LEXIS 277 (Ct. App. Aug. 20, 2024) (affirming summary judgment in favor of defendant officers who used lethal force on a suspect). Here, the undisputed facts establish that the OIS Officers' use-of-force was objectively and subjectively reasonable, therefore, summary judgment was proper.

a. The OIS Officers' Use of Force Was Privileged Under New Mexico Law and the Defendants Were Entitled to Summary Judgment on Count I of Plaintiffs' Amended Complaint.

Section 41-4-12 of the NMTCA identifies specific torts "for which a law enforcement officer's immunity may be waived." *Thompson v. City of Albuquerque*, 397 P.3d 1279, 1281 (N.M. 2017) (citing NMSA 1978, § 41-4-12). These include assault, battery and wrongful death. *See* NMSA 1978, § 41-4-12 (2020). An officer, however, "is not civilly liable for using such force as may be reasonably necessary in the enforcement of law and the preservation of order." *Hernandez v. Parker*, 508 P.3d 947, 958 (N.M. Ct. App. 2022). In other words, an officers' reasonable use of force is privileged under New Mexico law. *See Hernandez v. Parker*, 508 P.3d 947, 958 (N.M. Ct. App. 2022).

To determine whether an officer's use of force is privileged, New Mexico courts appear to favor the "general rule," laid out in 6 Am. Jur. 2d, *Assault & Battery* § 104, which contemplates a two-pronged approach assessing both the objective and subjective reasonableness of the officer's actions. *See id*. (citing 6 Am. Jur. 2d, *Assault & Battery* § 104 (2021). Under the objective prong, "the officer's judgment is compared to that of a hypothetical reasonable police officer placed in the same situation." As Plaintiffs acknowledge, this objective analysis follows the federal Fourth Amendment criteria from *Graham*. *See State v. Ellis*, 2008-NMSC-032, ¶ 15, 25, 144 N.M. 253 (acknowledging that New Mexico courts are "informed

by federal jurisprudence regarding the Fourth Amendment's protections" when analyzing reasonable force). The subjective prong requires that an officer "subjectively believe[d] that he or she used no more force than necessary." *See Hernandez*, 508 P.3d at 958.

Here, Plaintiffs claim that the District Court "completely disregarded" the objective and subjective prongs in its analysis. [*See* Doc. 26 at 58]. This is demonstrably untrue. As the Court observed, "Here, the Court finds that the OIS Officers' use of lethal force to arrest Mr. Valencia was reasonably necessary from an objective and subjective standpoint." [App. Vol. II at 79]. It acknowledged that the use of force was objectively reasonable for all the reasons discussed in its § 1983 analysis. [*See* App. Vol. II at 79-80]. Then, it concluded that the "OIS Officers reasonably viewed the way Mr. Valencia handled his weapon immediately before he was shot as a threat to their lives or the lives of other responding officers." [*See id*. at 80]. The Court's conclusion as to the subjective element appears based upon its earlier factual finding, that, in response to the rotation of Valencia's weapon's barrel, "several officers feared for their safety and for the safety of the officers around them" and shot. [*See* App. Vol. II at 63].

Plaintiffs are adamant that the District Court should not have relied on the OIS Officer's statements to determine their subjective reasonableness, arguing that because their expert viewed the lapel footage and found inconsistencies between the

officers' recollections and what actually happened, there must be a dispute of fact. [*See* Doc. 26 at 60-61]. This argument confuses both (1) how the District Court used the officers' affidavits and (2) what the subjective inquiry considers.

First, the Court did not use OIS Officers' sworn statements in making its factual findings concerning Valencia's conduct. For that, it relied on the undisputed video evidence. [*See* App. Vol. II at 63, 146]. The Court then cited to the sworn statements in concluding that the OIS Officers subjectively feared for their safety and that is why they fired their weapons. [*See* App. Vol. II at 63]. Because the Court did not rely on the Deming Officers' recollections to determine the objective acts of Valencia, there is no dispute of facts.

Second, to the extent Plaintiffs suggest that the Officers' imperfect recollection of events means they were subjectively unreasonable, this misconstrues the subjective inquiry altogether. The subjective inquiry is not a closed book examination of whether an officer's recollection lines up precisely with the actual events preceding a use of force. It is an assessment of whether the individual officers who used force believed that they were using no more force than necessary. *See Hernandez*, 508 P.3d at 958. The OIS Officers have sworn that they used force because they viewed Valencia's actions as "a threat to their lives and the lives of the other officers around them." [App. Vol. I at 148, ¶ 26]. As the District Court pointed

out, Plaintiffs have produced no evidence to contradict these statements. [*See* App. Vol. II at 63 n.5].

Plaintiffs contend that Acosta's statement that he did not feel threatened creates an issue of fact concerning the other officers' subjective beliefs. [*See* Doc 26 at 51]. To be clear, it does not. If a third person's point of view were taken into account, then the subjective inquiry would cease to be subjective. As the term 'subjective' implies, this inquiry only considers the perspective of the officer who used the force. *See Hernandez*, 508 P.3d 958; *Subjective*, BLACK'S LAW DICTIONARY (5th Pocket ed.) (defining 'subjective' as, "Based on an *individual's* perceptions, feelings, or intentions, as opposed to externally verifiable phenomenon." (emphasis added)).

In summary, the undisputed evidence shows that the OIS Officers' use of force was both objectively and subjectively reasonable and, therefore, privileged. Consequently, the District Court was justified in granting summary judgment to the Defendants on Plaintiffs' NMTCA claim of assault and battery resulting in wrongful death.

b. The Defendants Were Entitled to Summary Judgment on Counts II and III of Plaintiffs' Amended Complaint as These Counts Are Derivative of Count I.

Once the District Court found that the OIS Officers' use of force was privileged, it was obligated to grant summary judgment on Counts II and III of the

Plaintiffs' Amended Complaint because those counts are entirely premised on Count I. Plaintiff has conceded as much with respect to Count II. [*See* Doc. 26 at 55 (admitting Count II is derivative of Count I)]. Plaintiff did not, however, acknowledge this with respect to Count III, so Defendants clarify the matter now.

Like Count II, Count III is a negligence claim which is brought under Section 41-4-12 of the NMTCA. [*See* Doc. 26 at 53-55]. While Section 41-4-12 waives immunity for law enforcement officers who commit certain torts like assault and battery, it does not waive immunity for negligence standing alone. *See* NMSA 1978, § 41-4-12 (2020); *Caillouette v. Hercules*, 1992-NMCA-008, ¶ 17, 113 N.M. 492, 827 P.2d 1306. As such, under Section 41-4-12, a law enforcement officer will not be held liable for a negligent act *unless* his negligence causes an underlying tort for which immunity is waived. *See Caillouette*, 1992-NMCA-008, ¶ 17.

Here, the OIS Officers' use of force was privileged under New Mexico law, therefore, it did not constitute an assault or battery. *See id.* (noting that intentional torts require intent to engage in *unlawful* conduct). Consequently, there is no underlying tort upon which Plaintiffs can premise their claims of negligence and summary judgment was proper.

The District Court was further justified in disposing of Count III because it was brought against the City of Deming, which is not a valid party under Section 41-4-12. The waiver of immunity in Section 41-4-12 only applies to law

enforcement officers and not public entities. *See Ford v. N.M. Dep't of Pub. Safety,* 1994-NMCA-154, ¶ 22, 119 N.M. 405, 891 P.2d 546. Therefore, while the City of Deming may be responsible for the judgments taken against its employees, it is immune from claims brought *directly* against it under Section 41-4-12. *See id*.; *see also* NMSA 1978, § 41-4-4(D) (2020) (imposing a duty on public entities to cover judgments taken against employees).

CONCLUSION

The undisputed evidence shows that, while searching for an active shooter, the Deming Officers encountered Valencia, who perfectly matched the suspect's description. During their interaction, Valencia repeatedly failed to comply with officer commands. His non-compliance, and specifically his grabbing and moving of his weapon, put several officers in fear for their lives and the lives of others and they fired their weapons. The District Court, taking the facts in the light most favorable to the Plaintiffs, had no choice but to find that these officers' actions were both objectively and subjectively reasonable. Accordingly, the District Court's grant of summary judgment on the Plaintiffs' state claims (Counts I, II, III) and § 1983 Fourth Amendment claim (Count VI) must be affirmed.

Respectfully submitted,

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BASIS FOR ORAL ARGUMENT

Defendants agree with Plaintiffs that oral argument would aid in the disposition of this case. Specifically, it would allow the Defendants to more thoroughly address the lack of factual disputes, to highlight the reasonableness of officer actions when compared with controlling federal case law on excessive force and to discuss New Mexico's developing standard of privilege for officers.

CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit and type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) it contains 10,291 words and 892 lines of text.

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Date: November 1, 2024

/s/ Alan J. Dahl
BLAINE T. MYNATT
ALAN J. DAHL

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing **DEFENDANTS - APPELLEES' RESPONSE BRIEF**, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned with the most recent version of a commercial virus scanning program, and is free of viruses. In addition, I certify all required privacy redactions have been made.

/s/ Alan J. Dahl
BLAINE T. MYNATT
ALAN J. DAHL

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **DEFENDANTS - APPELLEES' RESPONSE BRIEF** was furnished through (ECF) electronic service to the following on this the 1st day of November 2024:

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