

Case No. 25-1118

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

Kenda James, Personal Representative
for Estate of Mr. Dizmang Dizmang,
Plaintiff -Appellant.

v.

Sean Reed and Nick Fischer,
Defendants -Appellees.

On Appeal from
The United States District Court
For The District of Colorado Case
No. 1:24-cv-00423-SNC-MDB

OPENING BRIEF OF APPELLANT

Oral Argument Requested

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STATEMENT OF PRIOR OR RELATED APPEALS

None.

JURISDICTIONAL STATEMENT

Appellant Kenda James, Personal Representative brought an action against Appellee Nick Fischer, in his individual capacities, alleging wrongful death, pursuant to C.R.S. § 13-21-201, et seq; excessive force, pursuant to 42 U.S.C. § 1983, Article II Section 7 of the Colorado Constitution, and the Enhance Law Enforcement Integrity Act (ELEIA), C.R.S. § 13-21-131; deliberate indifference to medical needs, pursuant to the Fourteenth Amendment via § 1983, Article II Section 3 of the Colorado Constitution, and ELEIA; negligence and professional/medical malpractice. Appellant James also brought an action against Appellee Sean Reed, in his individual capacities, alleging wrongful death pursuant to C.R.S. § 13- 21-201, et seq.); breach of duty to intervene in unlawful and excessive force, in violation of the Fourth Amendment via § 1983, Article II Section 7 of the Colorado Constitution, C.R.S. § 18-8-802, and C.R.S. § 13-21-131. All Appellees moved for dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) on all claims on July 3, 2024. On February 28, 2025, the district court issued an order finding that Appellees Fischer and Reed was entitled to qualified immunity on excessive use of force under 42 U.S.C. § 1983. The district court chose not to adjudicate the Appellant's state law claims for lack of jurisdiction after dismissing the Appellant's federal claims. The Appellant filed his timely notice of appeal on March 26, 2025. This Court has jurisdiction pursuant to 28 U.S. Code § 1291.

STATEMENT OF THE ISSUES

- A. Did the district court commit a reversible legal error by interpreting the facts in a way that favored the moving party, the Appellees, during the motion to dismiss phase?
- B. Did the district court erroneously determine that a medical professional's restraint of an individual in an emergency medical situation could not be considered a seizure under the Fourth Amendment?
- C. Did the district court err by requiring the Appellant to undertake a "scavenger hunt" for previous cases with identical facts, when obvious egregious constitutional violation t exist.
- D. Did the district court err in its conclusion that the Appellant abandoned her claim of deliberate indifference regarding the Fourth Amendment violation?

STATEMENT OF THE CASE

A. Parties

At all times pertinent to the subject matter of this litigation, Appellant Kenda James (hereinafter Appellant or Ms. James) was a citizen of the United States of America and a resident of, and domiciled in, the State of Colorado. At all relevant times, Appellee Sean Reed (hereinafter Appellee Reed) was a citizen of the United States and a resident of, and domiciled in, the State of Colorado. At all times pertinent, Appellee Reed was acting within the scope of his official duties and

employment and under color of state law in his capacity as a law enforcement officer, and Appellee Reed was employed by the Colorado Springs Police Department.

At all relevant times, Appellee Fischer (hereinafter Appellee Fischer was a citizen of the United States and a resident of, and domiciled in, the State of Colorado. At all times pertinent, Appellee Fischer was acting within the scope of his official duties and employment and under color of state law in his capacity as a paramedic, and Appellee Fischer was employed by the Colorado Springs Fire Department.

B. Statement of Facts

On November 15th, 2022, members of the Colorado Springs Police Department Crisis Response Unit responded to a call regarding Mr. Dizmang, who was reported to be having psychotic breakdown. **App. VOL I, at 11.** Mr. Dizmang's family reported that he is suffering from significant symptoms associated with his established history of PTSD and schizophrenia. **Id.** Family members expressed concern regarding the possibility that Mr. Dizmang was under the influence, although they could not substantiate this assertion. **Id.** Consequently, following the reported psychotic episode, Mr. Dizmang's family indicated that he was causing damage to some of his personal belongings, particularly an RV trailer where he resided alone, situated at 220 Mount View Lane, Colorado Springs. It is crucial to note that the individual making the report, Mr. Dizmang's ex-wife, did not allege that Mr. Dizmang was threatening anyone, damaging the property of others, or

engaging in any criminal activities. **Id.** Mr. Dizmang's ex-wife reported believing that Mr. Dizmang was possibly attempting suicide by walking out into traffic near his home. **Id.** In response to the call, the entity known as "CRT3" arrived at the location of Mr. Dizmang. CRT3 is defined as a "Crisis Response Team," which is composed of a police officer, a medic from the fire department, and a case worker. **Id.** More specifically, Crisis Response Teams are tasked with conducting welfare checks, assisting individuals who are suicidal, addressing the needs of emotionally disturbed individuals, and providing support to those in crisis. Although a police officer is included in the CRT, the primary objective of their involvement is to safeguard lives and to prevent individuals who may be at risk of self-harm from doing so. **Id.** The members of CRT3 included Officer Sean Reed from the Colorado Springs Police Department, Paramedic Nick Fischer from the Colorado Springs Fire Department, and licensed clinician Andrea Alban. **Id.** Upon reaching Mr. Dizmang's location, Reed and Fischer noted Mr. Dizmang on the sidewalk of Mount View Lane, hunched over with his hands resting on his knees. Mr. Dizmang exhibited clear signs of respiratory distress. **Id. at 12.** A number of concerned citizens gathered around Mr. Dizmang, attempting to prevent him from stepping back into the traffic on Mount View Lane. Nevertheless, as CRT3 arrived and Reed approached, Mr. Dizmang returned to the roadway, where he once more bent over with his hands on his knees, again showing evident respiratory distress. **Id.** As Reed neared Mr.

Dizmang, Mr. Dizmang promptly exclaimed, "HELP me," and then proceeded, in a visibly disoriented fashion, further into the roadway. Mr. Dizmang continuously implored, "please," to Officer Reed while he wandered in a distinctly bewildered and frantic condition, moving in circles within the westbound traffic lane. **Id.** Reed then told Mr. Dizmang "sit down or put your hands behind your back," indicating to Mr. Dizmang that he intended to handcuff and arrest Mr. Dizmang. Reed then proceeded to grab Mr. Dizmang's left arm as he told him to put his hands behind his back. **Id.** Mr. Dizmang responded with "I will" as Reed continued to grab his arms and without giving him an opportunity to calm down and comply. **Id.** As Reed attempted to apprehend Mr. Dizmang and secure him with handcuffs, Mr. Dizmang repeatedly distanced himself, taking several steps away, subsequently bending at the waist and resting his hands on his knees, exhibiting labored breathing, before reverting to the identical physical stance he maintained upon Reed's arrival at Mr. Dizmang's location. **Id.** As Reed's tone escalated for Mr. Dizmang to put his hands behind his back, Mr. Dizmang walked further away from the road and into a small line of trees, repeatedly stating "no!" and "please don't" all while breathing heavily and in an obviously stressed and panicked state. **Id. at 13.** At no point did Mr. Dizmang attempt to take any violent actions against any of the CRT3 personnel. **Id.**

As Mr. Dizmang stood in the thin tree line, approximately 20 feet from the road, Fischer unexpectedly and forcefully tackled Mr. Dizmang, driving him face-

first into the ground, ultimately positioning Mr. Dizmang on his right side. **Id.** Once on the ground, Fischer put Mr. Dizmang into a chokehold while Reed took Mr. Dizmang 's hands and placed them in handcuffs behind his back. Fischer maintained this chokehold, by wrapping his arms around Mr. Dizmang's neck, severely impacting Mr. Dizmang 's ability to breathe, for approximately 30 seconds, at which point Mr. Dizmang quit moving at all. **Id.** The autopsy described Fischer's actions as a "bear hug." Fischer then rolled Mr. Dizmang face down onto the ground and placed his hands on the back of Mr. Dizmang 's neck and driving his body weight downward, pushing Mr. Dizmang 's neck and face into the ground. **Id.** At this point, Mr. Dizmang remained completely motionless. *Fischer stayed in this position, with his body weight on Mr. Dizmang 's neck and back for approximately forty-five (45) seconds, and Mr. Dizmang remained completely unresponsive.* **Id.** After approximately forty-five (45) seconds on laying on top of Mr. Dizmang while he was unresponsive, Fischer and Reed rolled Mr. Dizmang into a seated position. **Id.** At this point Mr. Dizmang still had a faint pulse but was clearly struggling to breathe and was totally unresponsive to any questions or commands. A concerned citizen from the mobile home park where Mr. Dizmang lived, repeatedly asked Mr. Dizmang to "talk to me," however Mr. Dizmang never responded. Officer Reed called for AMR to respond, as Mr. Dizmang was clearly unresponsive and unconscious, yet he and Fischer left him in handcuffs. **Id. at 14.** Despite being

unresponsive and unconscious, Mr. Dizmang remained handcuffed behind his back for nearly seven (7) minutes before he was loaded onto a stretcher and moved into an ambulance. *Id.* Despite Mr. Dizmang being unresponsive, Fischer took no actions to provide medical care or resuscitate Mr. Dizmang until over nine (9) minutes had passed and he had been loaded into the back of the ambulance. ***Id.*** *Comments made by Fischer, such as “He’s not aspirating” and “I want to attempt a nasal airway,” indicate his awareness of Mr. Dizmang’s condition, however he took no steps to provide any care to him until he was loaded into the ambulance and AMR staff began resuscitative measures. Id.* Fischer’s failure to provide any medical care to Mr. Dizmang during this period of time was unreasonable and fell below the standard of care imposed upon paramedic professionals, and ultimately caused or directly contributed to Mr. Dizmang’s death. **(Affidavit of Merit from Geo Henderson. Id. at 76-80.)**

Mr. Dizmang was transported to the emergency room at Penrose hospital, where emergency room staff continued to attempt life-saving measures, however they were unsuccessful, and Mr. Dizmang was pronounced dead at 6:16 PM by Dr. Michael Loew. **Id. at 15.** Subsequently, an autopsy was conducted by the El Paso County Coroner’s office. Mr. Dizmang’s death was ruled to be a homicide, specifically that Mr. Dizmang died as a result of cardiopulmonary arrest as a result of “physical restraint.” *Id.* Mr. Dizmang’s autopsy was reviewed and signed off on

by five (5) different doctors: Dr. Allison Cooper, Dr. Megan Kliesner, Dr. Jarod Murdoch, Dr. Emily Russell-Knisley, and Dr. Leon Kelly. **Id. at 16.**

As if engaging in an unlawful chokehold against a man clearly in crisis was not enough, Fischer had the bravado to brag and laugh about his take down of Mr. Dizmang with another police officer and a charge nurse at the Penrose Hospital ER, just outside the hospital room Mr. Dizmang was in, while ER staff was conducting chest compressions in an attempt to save Mr. Dizmang 's life the following is an exchange that took place between a currently unknown charge nurse, Fischer, and CSPD Officer Cochrane:

a. Nurse: "He was that big BIG fucker?"

b. Cochrane laughs.

c. Nurse, to Cochrane and FISCHER: "well you brought him DOWN, you took him DOWN."

d. Cochrane and FISCHER laugh.

e. Nurse: "You ARRESTED that boy"

f. FISCHER: "No the cop did. He was chasing him, but then we lost him between this little grove of trees, and so I was like [puts his hands up and shrugs]. So my first time taking someone down with this job [laughs, smirks] I don't know what I'm supposed to do."

g. Nurse: acts out a football tackle, Cochrane and FISCHER laugh.

h. FISCHER: "So another clinician told me, she was like 'go help restrain him,' so I go to pull drugs out and she was like "no, go help him," well then I was like "high school football!"

i. Nurse: "Well good form homie!"

j. Cochrane: “yeah good form!”

k. Nurse: “DAMNNNN” as he turns around and looks into Kevin’s room to see that ER staff is actively doing chest compressions on Kevin in an attempt to save his life.

Id. at 16-17.

The above conversation with the charge nurse removes all doubt that Fischer’s actions here were willful and wanton- he executed a football style tackle and “bear hug” on Mr. Dizmang, a man in clear respiratory and medical distress, and then failed to provide any medical care, ultimately resulting in Mr. Dizmang’s death. Fischer’s tackle and subsequent “bear hug” of Mr. Dizmang were intentional actions that were done without any regard to the safety of Mr. Dizmang. **Id. at 18.**

SUMMARY OF THE ARGUMENT

The district court committed a reversible error by interpreting the facts in a way that favored the moving party, the Appellees, during the motion to dismiss stage. Rather than accepting the allegations presented in the Appellant's Amended Complaint as true, the district court has constructed its own narrative indicating that Appellee Fischer was not engaged in the act of arresting Mr. Dizmang or enforcing the law in any capacity; rather, he was endeavoring to restrain him for the purpose of ensuring he received appropriate treatment. This methodology is in direct contradiction to the established standard of review for motions to dismiss as

delineated in *Twombly*. The district court incorrectly concluded that a medical professional's restraint of a person in an emergency medical context could not be classified as a seizure under the Fourth Amendment. Additionally, the district court err by requiring the Appellant to undertake a "scavenger hunt" for previous cases with identical facts, when obvious egregious constitutional violation exist. Finally, the district court erred in its determination that the Appellant had abandoned her claim of deliberate indifference concerning the Fourth Amendment violation against Appellee Fischer.

STANDARD OF REVIEW

At the motion to dismiss stage, we consider all well-pleaded allegations to be true and view them in the light most favorable to the non-moving party. *See, Truman v. Orem City, 1 F.4th 1227, 1235 (10th Cir. 2021)*. To survive a Rule 12(b)(6) motion, the complaint must contain factual allegations that plausibly give rise to an entitlement to relief. *Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)*. This standard "does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* (quoting *Twombly* at 555.).

ARGUMENT

I. The district court commit a reversible legal error by interpreting the facts in a way that favored the moving party, the Appellees, during the motion to dismiss stage.

In reviewing a motion to dismiss, “all well-pleaded factual allegations in the ... complaint are accepted as true and viewed in the light most favorable to the nonmoving party.” *Moore v. Guthrie*, 438 F.3d 1036, 1039 (10th Cir.2006) (quotation omitted). Because the Court is reviewing the qualified immunity issue in the context of a motion to dismiss, the Court must bear in mind the standard governing motions to dismiss, which the Supreme Court addressed in *Twombly* and *Iqbal*. See *Brown v. Montoya*, 662 F.3d 1152, 1162-63 (10th Cir. 2011). In *Twombly*, the Court held that, to survive a motion to dismiss, plaintiffs' pleadings must “nudge[] their claims across the line from conceivable to plausible.” 550 U.S. at 570. In *Iqbal*, the Court applied *Twombly* to a motion to dismiss based on qualified immunity in a *Bivens* action. *Iqbal* formulated the test in this way:

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief. *Iqbal* at 678.

In this instance, the district court has constructed its own narrative indicating that Appellee Fischer was not engaged in the act of arresting Mr. Dizmang or enforcing the law in any capacity; rather, he was endeavoring to restrain him for the purpose of ensuring he received appropriate treatment. Moreover, the district court contends that "it is evident that Mr. Dizmang required treatment, and that Appellee Fischer was striving to perform his duties as a treatment provider." **See App. VOL I, at 116-17.** Based on the above facts, the district court not only embraced and supported the story outlined in the Appellees' motion to dismiss, but it also deviated from the established standard of review by rewriting the Appellant's Amended Complaint and imposing its own interpretation of the events. During the motion to dismiss phase, the district court is required to treat all well-pleaded allegations as true and to interpret them in the most favorable light for the non-moving party. *See Truman* at 1235. This standard was not adhered to by the district court. A brief examination of the Appellant's Amended Complaint reveals that the Amended Complaint alleged that:

As Mr. Dizmang stood in the thin tree line, approximately 20 feet from the road, Fischer unexpectedly and forcefully tackled Mr. Dizmang, driving him face-first into the ground, ultimately positioning Mr. Dizmang on his right side. **Id. at 15.**

Once on the ground, Fischer put Mr. Dizmang into a chokehold while Reed took Mr. Dizmang's hands and placed them in handcuffs behind his back. Fischer maintained this chokehold, by wrapping his arms around Mr. Dizmang's neck, severely impacting Mr. Dizmang's ability

to breathe, for approximately 30 seconds, at which point Mr. Dizmang quit moving at all. **Id.**

The autopsy described Fischer's actions as a "bear hug." Fischer then rolled Mr. Dizmang face down onto the ground and placed his hands on the back of Mr. Dizmang's neck and driving his body weight downward, pushing Mr. Dizmang's neck and face into the ground. **Id.**

At this point, Mr. Dizmang remained completely motionless. *Fischer stayed in this position, with his body weight on Mr. Dizmang's neck and back for approximately forty-five (45) seconds, and Mr. Dizmang remained completely unresponsive.* **Id.** After approximately forty-five (45) seconds on laying on top of Mr. Dizmang while he was unresponsive, Fischer and Reed rolled Mr. Dizmang into a seated position. **Id.**

At this point Mr. Dizmang still had a faint pulse but was clearly struggling to breathe and was totally unresponsive to any questions or commands. A concerned citizen from the mobile home park where Mr. Dizmang lived, repeatedly asked Mr. Dizmang to "talk to me," however Mr. Dizmang never responded. Officer Reed called for AMR to respond, as Mr. Dizmang was clearly unresponsive and unconscious, yet he and Fischer left him in handcuffs. **Id. at 14.**

Despite being unresponsive and unconscious, Mr. Dizmang remained handcuffed behind his back for nearly seven (7) minutes before he was loaded onto a stretcher and moved into an ambulance. **Id.** Despite Mr. Dizmang being unresponsive, Fischer took no actions to provide medical care or resuscitate Mr. Dizmang until over nine (9) minutes had passed and he had been loaded into the back of the ambulance. **Id.** *Comments made by Fischer, such as "He's not aspirating" and "I want to attempt a nasal airway," indicate his awareness of Mr. Dizmang's condition, however he took no steps to provide any care to him until he was loaded into the ambulance and AMR staff began resuscitative measures.* **Id.**

The above allegations significantly undermine the narrative presented by the district court, which suggests that Appellee Fischer was not involved in the act of arresting Mr. Dizmang or enforcing the law in any manner; instead, he was attempting to restrain him to ensure that he received the necessary treatment. Initially, the claim that Appellee Fischer forcefully tackled Mr. Dizmang, propelling him face-first into the ground, raises the plausibility that Appellee Fischer's actions were beyond the scope of his role as a medical provider, thereby allowing for a reasonable inference of liability for the alleged misconduct. Initially, it can be reasonably inferred from the allegations that Appellee Fischer was not actively "striving" to render medical treatment to Mr. Dizmang. Importantly, Appellee Fischer failed to administer any medical care to Mr. Dizmang after he had been handcuffed behind his back for nearly seven (7) minutes prior to being placed onto a stretcher and transported into an ambulance. Nevertheless, Appellee Fischer informed AMR personnel that Mr. Dizmang was not aspirating and expressed a desire to attempt a nasal airway. This suggests that Appellee Fischer was cognizant of Mr. Dizmang's condition; however, he did not take any measures to provide any medical treatment until Mr. Dizmang was loaded into the ambulance and AMR staff commenced resuscitative efforts. *Id.* The district court made a remarkable assumption in determining that Appellee Fischer was "striving" to deliver medical care to Mr. Dizmang. This conclusion was probably based on Appellee Fischer's designation as a paramedic and the potential

intent behind his response to a mental health emergency, rather than an assessment of his actual conduct on that unfortunate day. Moreover, upon reviewing the dialogue that Appellee Fischer engaged in at the hospital with an unidentified nurse and Officer Cochrane, the district court required no speculation regarding the capacity in which Appellee Fischer was operating when he forcefully tackled Mr. Dizmang, driving him face-first into the ground. Appellee Fischer acknowledges that Appellee Reed was in the process of arresting Mr. Dizmang, and he assisted in that endeavor. Appellee Fischer also indicated that this was his initial experience in subduing an individual in the course of his employment, and he was uncertain about the appropriate procedures to follow, which led him to simply tackle Mr. Dizmang in a manner akin to a football tackle. **See App. VOL I, at 17.** The district court, in its actions, overlooked the appropriate standard of review and took it upon itself to engage in the case as it deemed fit. Although a case may be captivating, this is not the function of the court. At the trial level, district courts have the responsibility to guarantee that trials are conducted fairly. This includes leaving factual disagreements for a jury to decide, as mandated by the Seventh Amendment.

II. The district court erroneously determine that a medical professional's restraint of an individual in an emergency medical situation could not be considered a seizure under the Fourth Amendment.

The district court determination that a medical professional's restraint of an individual in an emergency medical situation could not be considered a seizure under the Fourth Amendment, is fundamentally incorrect, and unequivocally so, in light of the definition of seizure articulated by the Supreme Court in *Torres v. Madrid*, 592 U.S. 306 (2021), which determined that the use of physical force against an individual with the intent to restrain constitutes a seizure. In accordance with this well-established and authoritative legal principle, Appellee Fisher's restraint of Mr. Dizmang undoubtedly constituted a seizure. The fact that Appellee Fisher was a paramedic is of no consequence, nor does it matter what Appellee Fisher's personal intentions were. It was a seizure, plain and clear. The entire analytical framework employed by the district court to assess this matter—whether the individual was a paramedic or whether he was attempting to fulfill 'law enforcement' objectives. At least one district court within the Tenth Circuit has held that conduct in “a law-enforcement capacity rather than an emergency-medical-response capacity” is required to implicate the Fourth Amendment. *See Vanlandingham v. City of Oklahoma City*, CIV-22-209-D at *8 (W.D. Okla. Oct 28, 2022). Further, other circuits have held that the Fourth Amendment applies where the state actor is acting in a law enforcement capacity. *See McKenna v. Edgell*, 617 F.3d 432, 438-39 (6th

Cir. 2010); *Peete v. Metro. Gov't of Nashville Cnty.*, 486 F.3d 217, 221-22 (6th Cir. 2008); *Judd v. City of Baxter*, 780 Fed.Appx. 345, 349 (6th Cir. 2019) (unpublished); *Pena v. Givens*, 637 Fed.Appx. 775, 781 (5th Cir. 2015)(unpublished). As stated in the Amended Complaint, following Appellee Reed's attempt to arrest Mr. Dizmang and secure him with handcuffs, Appellee Fisher tackled Mr. Dizmang, forcefully bringing him to the ground. Once on the ground, Fischer applied a chokehold on Mr. Dizmang, which severely hindered his ability to breathe for approximately thirty seconds, at which point Mr. Dizmang ceased all movement. At this juncture, Mr. Dizmang lay completely still. Appellee Fischer maintained this position, exerting his body weight on Mr. Dizmang's neck and back for about forty-five (45) seconds, during which Mr. Dizmang remained entirely unresponsive. After approximately forty-five (45) seconds of lying atop Mr. Dizmang while he was unresponsive, Appellees Fischer and Reed maneuvered Mr. Dizmang into a seated position. At this moment, Mr. Dizmang still exhibited a faint pulse but was evidently struggling to breathe and was wholly unresponsive to any inquiries or commands. A concerned citizen from the mobile home park where Mr. Dizmang resided repeatedly urged him to "talk to me," yet Mr. Dizmang did not reply. At that time, Appellee Reed summoned AMR to respond, as Mr. Dizmang was clearly unresponsive and unconscious; nevertheless, Appellees Fischer and Reed left him restrained in handcuffs. Despite his unresponsive and unconscious state, Mr. Dizmang remained

handcuffed behind his back for nearly seven (7) minutes before being placed onto a stretcher and transported into an ambulance. Even though Mr. Dizmang was unresponsive and unconscious, Appellee Fischer failed to take any measures to provide medical assistance or attempt resuscitation until more than nine (9) minutes had elapsed and Mr. Dizmang had been loaded into the ambulance. As stated above, in reviewing a motion to dismiss, “all well-pleaded factual allegations in the ... complaint are accepted as true and viewed in the light most favorable to the nonmoving party.” *Moore v. Guthrie*, 438 F.3d 1036, 1039 (10th Cir.2006) (quotation omitted). It is more than plausible that Appellee Fischer, who arrived at the scene in his capacity as a paramedic, removed his paramedic hat when he assisted Appellee Reed in the arrest of Mr. Dizmang. Notably, the CRT are tasked with conducting welfare checks, assisting individuals who are suicidal, addressing the needs of emotionally disturbed individuals, and providing support to those in crisis. Consequently, should the district court's ruling be upheld in accordance with the analytical framework established by the district court regarding the provision of medical care to individuals in relation to a seizure under the Fourth Amendment, no member of a CRT could be held liable for infringing upon an individual's Fourth Amendment rights, including any police officer who is part of that team. Such a proportion would be absurd and could lead to an unrestricted violation of citizens' Fourth Amendment rights by members of a CRT.

III. The district court err by requiring the Appellant to undertake a "scavenger hunt" for previous cases with identical facts, when obvious egregious constitutional violation exist.

However, because excessive force jurisprudence requires an all-things-considered inquiry with 'careful attention to the facts and circumstances of each particular case,' there will almost never be a previously published opinion involving exactly the same circumstances. *Casey v. City of Federal Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007) (quoting *Graham v. Connor*, 490 U.S. 386, 396(1989).; *see also Estate of Melvin*, No. 23-1070, at *13. Thus, the Court's analysis is not "a scavenger hunt for prior cases with precisely the same facts" and is instead an "inquiry of whether the law put officials on fair notice that the described conduct was unconstitutional." *Id.*; *see also Truman v. Orem City*, 1 F.4th 1227, 1235 (10th Cir. 2021); *Estate of Melvin*, No. 23-1070, at *13.

Notably, "binding" precedent holding the specific conduct unconstitutional is not the standard for qualified immunity. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987). That clarity can come from either "controlling authority or a robust consensus of cases of persuasive authority," *District of Columbia v. Wesby*, 583 U.S. 48, 63 (2018) (citing *Wilson v. Layne*, 526 U. S. 603, 617 (1999) (internal quotations omitted). In an obvious case," even general standards "without a body of relevant case law" suffice. *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004). Qualified immunity demands no such thing. A prior case need not be exactly parallel to the

conduct here for the officials to have been on notice of clearly established law. All the same, the Supreme Court has cautioned circuit courts 'not to define clearly established law at a high level of generality, but to focus on whether the violative nature of particular conduct is clearly established. *Perea*, 817 F.3d at 1204 (quoting *Mullenix v. Luna*, 577 U.S. 7, 12 (2015).; see also *Estate of Melvin*, No. 23-1070, at *13. In *Casey* the Court held, "We cannot find qualified immunity wherever we have a new fact pattern." 509 F.3d at 1284. Further, the Supreme Court has "shifted the qualified immunity analysis from a scavenger hunt for prior cases with precisely the same facts toward the more relevant inquiry of whether the law put officials on fair notice that the described conduct was unconstitutional." *Gomes v. Wood*, 451 F.3d 1122, 1134 (10th Cir. 2006). A general constitutional rule that has already been established can apply with obvious clarity to the specific conduct in question, even though [such conduct] has not previously been held unlawful. *Anderson v. Blake*, 469 F.3d 910, 914 (10th Cir. 2006). The more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation. *Pierce v. Gilchrist*, 359 F.3d 1279, 1298 (10th Cir. 2004); *Waters v. Coleman*, 632 F. App'x 431, 7 (10th Cir. 2015). The details outlined in the Amended Complaint exemplify the pinnacle of the Appellees' obviously egregious conduct. It is alleged, that a paramedic (Appellee Fischer) resulted in the death of an individual by asphyxiating him and exerting pressure on

the upper back of a vulnerable person's torso while he was positioned face down, during which a police officer (Appellee Reed), who was also engaged in restraining the individual, neglected to intervene and prevent the paramedic from choking the man. This Court is obligated to accept the Appellant's assertion that the actions of Appellees Fischer and Reed led to the death of Mr. Dizmang; Nevertheless, should this Court harbor any doubts, it may choose to review the autopsy report. The autopsy was performed by the El Paso County Coroner's office. The cause of Mr. Dizmang's death was determined to be homicide, specifically indicating that he died from cardiopulmonary arrest due to "physical restraint." The autopsy of Mr. Dizmang was evaluated and approved by five (5) distinct doctors: Dr. Allison Cooper, Dr. Megan Kliesner, Dr. Jarod Murdoch, Dr. Emily Russell-Knisley, and Dr. Leon Kelly. Refer to **App. VOL I, at 63-65**. Notably, the Tenth Circuit has long held, "continuing to use pressure on a vulnerable person's upper torso while he was lying on his stomach" would "present a substantial and totally unnecessary risk of death to the person") *Weigel v. Broad*, 544 F.3d 1143, 1153-55 (10th Cir. 2008). *Weigel* placed all on notice that continuing to use pressure on a vulnerable person's upper torso while he was lying on his stomach would present a substantial and totally unnecessary risk of death to the person, especially a trained paramedic. As a trained paramedic, Appellee Fisher more likely than not possessed superior medical training, skills and knowledge that continuing use of pressure on a vulnerable

person's upper torso while he was lying on his stomach would present a substantial and totally unnecessary risk of death opposed to a non-medical trained layman. Nevertheless, for the sake of argument, if Appellee Fisher was unaware that the Tenth Circuit has consistently ruled that "continuing to apply pressure to a vulnerable individual's upper torso while they are lying face down" poses a significant and entirely avoidable risk of death to that individual, Appellee Reed was certainly aware that such actions could present a considerable and completely unnecessary risk of death to the person and had a duty to protect Mr. Dizmang under the special-relationship doctrine.

A. Special-relationship doctrine.

The Fourteenth Amendment to the Constitution of the United States' Due Process Clause provides that "no State shall . . . deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV, § 1. In general, state actors may be held liable under § 1983 only for their own affirmative acts that violate a plaintiff's due-process rights and not for third parties' acts. See *Robbins v. Oklahoma*, 519 F.3d 1242, 1251 (10th Cir. 2008)(citing *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 197 (1989)). "[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty and property of its citizens against invasion by private actors." *Id.* at 195. The Due Process Clause is not a guarantee of a minimal level of safety and security. *See Id.*

There are, however, two exceptions to this general rule. The first exception -- the special-relationship doctrine -- arises when the state has a custodial relationship with the victim, which triggers an affirmative duty to provide protection to that individual. *See Christiansen v. City of Tulsa*, 332 F.3d 1270, 1280 (10th Cir. 2003); *Graham v. Indep. Sch. Dist. No. 1-89*, 22 F.3d 991, 994-95 (10th Cir. 1994). The second exception -- the danger-creation theory -- provides that a state may also be liable for an individual's safety "only when 'a state actor affirmatively acts to create, or increases a plaintiff's vulnerability to, or danger from private violence.'" *Robbins*, 519 F.3d at 1251 (quoting *Currier v. Doran*, 242 F.3d 905, 923 (10th Cir. 2001)). "If either the special-relationship or danger-creation exception applies, the conduct of the state actor must go beyond negligence to the point of 'shocking the conscience.'" *Glover v. Gartman*, 899 F. Supp. 2d 1115, 1135 (D.N.M. 2012)(Browning, J.)(citing *Johnson ex rel. Estate of Cano v. Holmes*, 455 F.3d 1133, 1142 (10th Cir. 2006)("The shocks the conscience standard applies to both types of suits.")). Special-Relationship Exception. The first exception to the general principle that a state's negligent failure to protect an individual cannot trigger liability under the due-process clause is the special-relationship doctrine. A plaintiff must show that they were involuntarily committed to state custody to establish a duty to protect under the special-relationship doctrine. See *Liebson v. N.M. Corr. Dep't*, 73 F.3d 274, 276 (10th Cir. 1996). "A special relationship exists when the state assumes

control over an individual sufficient to trigger an affirmative duty to provide protection to that individual (e.g. when the individual is a prisoner or involuntarily committed mental patient)." *Uhlrig v. Harder*, 64 F.3d 567, 572 (10th Cir. 1995).

B. What Shocks the Conscience?

A government actor's official conduct intended to injure in a way that cannot reasonably be justified by any government interest most likely shocks the conscience. See *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998)("[C]onduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level."). "[A] plaintiff must do more than show that the government actor intentionally or recklessly caused injury to the plaintiff by abusing or misusing government power." *Camuglia v. City of Albuquerque*, 448 F.3d 1214, 1222 (10th Cir. 2006)(internal quotation marks omitted)(quoting *Moore v. Guthrie*, 438 F.3d 1036, 1040 (10th Cir. 2006))."The plaintiff must demonstrate a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking." *Camuglia* at 1222-23 (internal quotation marks omitted)(quoting *Uhlrig*, 64 F.3d at 574). "Whether the conduct shocks the conscience is an objective test, based on the circumstances, rather than a subjective test based on the government actor's knowledge." conscious disregard of that risk. *Peña v. Greffet*, 922 F. Supp. 2d 1187, 1227 (D.N.M. 2013) (citing *James v. Chavez*, 830 F. Supp. 2d 1208,

1276 (D.N.M. 2011). Instead, he allowed Appellee Fischer to use a chokehold/neck restraint and apply pressure to Mr. Dizmang's upper body while he was lying face down, which posed a serious and completely unjustified risk of death for Mr. Dizmang. This negligence on the part of Appellee Reed, a police officer who was within arm's reach and had both the ability and the opportunity to protect Mr. Dizmang, was egregious and shocked the conscience.

IV. The district court err in its conclusion that the Appellant abandoned her claim of deliberate indifference regarding the Fourth Amendment violation.

The district maintained that the Appellant failed to address any of Appellee Fischer's arguments aimed at dismissing the Appellant's claim of deliberate indifference. Consequently, the Court deems this claim forfeited. Nevertheless, the Appellant's response to Appellee Fischer's Motion to dismiss clearly indicates that the Appellant did not forsake her claim of deliberate indifference and actively responded to Appellee Fischer's Motion regarding this claim. **See APP VOL I, 87-89.** It is true that the title of the section concerning the opposition to Appellee Fischer's argument in his motion to dismiss the Appellant's deliberate indifference claim did not explicitly label the Appellant's response in opposition to dismiss the Appellant's deliberate indifference claim as such. However, the core of the Appellant's argument directly addresses Appellee Fischer's motion to dismiss the deliberate indifference claim under the label "Plaintiff's Wrongful Death and

Medical Malpractice Allegation in Her Complaint Shatters the Pleading Standard in Alleging Defendant Fischer’s Conduct was Willful and Wanton.” See **App VOL I, 87-89**. The Tenth Circuit, similar to other federal courts, strives to resolve conflicts based on the merits of the case rather than on minor technicalities in pleading. While it is essential to follow procedural rules, courts generally should not penalize parties for slight errors in form or labeling if the substance of their argument is evident.

CONCLUSION

Given the reasons outlined above, the order from the district court that granted Appellees motion to dismiss the federal claims in the Appellant’s Amended Complaint should be overturned and remanded to the district court for further consideration.

This 18th day of June 2025.

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STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

Appellants respectfully request oral argument because this case involves the important issue of the application of the qualified immunity standard, and Appellants believe oral argument will assist this Court in its review of the issues raised herein.

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and the word limit of Fed. R. App. P. 32(a)(7)(c) because:

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/s/Harry M. Daniels, Jr.
Harry M. Daniels, Jr.
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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing Appellants' Opening Brief:

- (1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) The digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, {Avast Security, 1Version 1.15 (Revised July 11, 2023)}, and according to the program are free of viruses.

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NOTICE OF ATTACHMENT

There is a PDF attachment to this brief.

/s/Harry M. Daniels, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that on June 18th, 2025, I electronically filed the foregoing Appellants' Opening Brief using the court's CM/ECF system which will send notification of such filing to all registered counsel of record.

/s/Harry M. Daniels, Jr.
Harry M. Daniels, Jr.
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COPY OF DECISION UNDER REVIEW

A copy of the district court's decision granting Appellees qualified immunity on Appellant's federal claims, App. Vol. I, at 109 (Dkt. 63), is attached hereto and follows immediately after this page.

/s/Harry M. Daniels, Jr.

Harry M. Daniels, Jr.

Georgia Bar 234158