No. _____

In The
# Supreme Court of the United States

CITY OF ALAMOSA, COLORADO,

*Petitioner,*

v.

THE ESTATE OF STEVEN WAYNE BLECK,
by Joanna Churchill, Personal
Representative for Steven Bleck, deceased,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

In *Brower v. County of Inyo*, 489 U.S. 593 (1989), this Court held that "violation of the Fourth Amendment requires an intentional acquisition of physical control" and that a seizure occurs "only when there is a governmental termination of freedom of movement *through means intentionally applied*." *Id*. at 596-97 (emphasis in original). *Brower* involved the deployment of a roadblock with the intent to stop a fleeing suspect.

The question presented for review here is:

> WHETHER A SUSPECT, SHOT AS A RESULT OF AN UNDISPUTED ACCIDENTAL DISCHARGE OF A FIREARM BY A LAW ENFORCEMENT OFFICER, HAS BEEN SEIZED FOR PURPOSES OF THE FOURTH AMENDMENT.

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

1. The Estate of Steven Wayne Bleck, by Joanna Churchill, Personal Representative for Steven Bleck, deceased,[1] Plaintiff/Appellant below, and Respondent here.

2. City of Alamosa, Colorado, Defendant/Appellee below, and Petitioner here; and Jeff Martinez, individually, and in his official capacity as Law Enforcement Officer of the Alamosa Police Department. This Petition for Writ of Certiorari is sought on behalf of only the City of Alamosa, Colorado.[2]

No corporations are involved in this proceeding.

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[1] During the pendency of the appeal, Steven Bleck died. Consistent with Federal Rule of Appellate Procedure 43(a)(1), the personal representative for Mr. Bleck's estate was, on motion, substituted as the Appellant. *Estate of Bleck ex rel. Churchill v. City of Alamosa, Colorado*, 540 F. App'x 866 (10th Cir. 2013) (App. 1). In the interest of simplicity, reference in this brief to the proponent of Respondent's cause is to Bleck.

[2] Pursuant to Sup. Ct. R. 12.6, Petitioner notified the Clerk of this Court that Jeff Martinez, Defendant and Appellee below, has no interest in this appeal as his dismissal was affirmed, albeit on a different ground, by the Tenth Circuit. *See* Statement of the Case, *infra* pp. 4-5, on the background for the dismissal of Martinez.

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## PETITION FOR WRIT OF CERTIORARI

The City of Alamosa, Colorado, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is available at: *Estate of Bleck ex rel Churchill v. City of Alamosa, Colorado*, 540 F. App'x 866 (10th Cir. 2013). That opinion is included as App. 1-26. The opinion of the United States District Court for the District of Colorado is reported at: *Bleck v. City of Alamosa, Colorado*, 839 F. Supp. 2d 1149 (D. Colo. 2012). That opinion is included as App. 27-44.

## BASIS FOR JURISDICTION

The Tenth Circuit issued its opinion on November 4, 2013 (App. 1-26). Petitioner timely petitioned for rehearing and rehearing en banc, and on December 16, 2013, the Tenth Circuit denied the petition (App. 45-46). Petitioner's application to extend the deadline for filing a petition for writ of certiorari to April 16, 2014, was granted by Justice Sotomayor on March 10, 2014. This Court has jurisdiction to review the Tenth Circuit's November 4, 2013, decision on writ of certiorari under 28 U.S.C. § 1254(1). The U.S.

District Court for the District of Colorado had jurisdiction pursuant to 28 U.S.C. § 1331.

## CONSTITUTIONAL PROVISION AT ISSUE

Respondent brought the underlying action under 42 U.S.C. § 1983, which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Respondent alleges Petitioner violated the decedent's rights under the United States Constitution's Fourth Amendment, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## STATEMENT OF THE CASE

### A. The Initial Suicide Threat Call and Dispatch

On August 6, 2010, the Colorado State Patrol received a 911 call from a mental health counselor who indicated that he had received a distressing telephone call from Steven Wayne Bleck ("Bleck"). The counselor reported that Bleck, a Vietnam War veteran, was re-experiencing trauma and was intoxicated, suicidal, and possibly armed. *Estate of Bleck*, 540 F. App'x at 867 (App. 2-3); *Bleck*, 839 F. Supp. 2d at 1151 (App. 31).

Officers with the Alamosa Police Department, including Officer Jeff Martinez ("Martinez"), were dispatched to the local hotel where Bleck was reported to be staying to perform a welfare check. *Bleck*, 839 F. Supp. 2d at 1151 (App. 31). The officers re-contacted the mental health worker who reported that Bleck was threatening to "blow his head off." *Id.* In a subsequent call, the counselor advised that Bleck had cut off communications. *Id.* (App. 31-32).

### B. The Entry Into the Hotel Room

Believing Bleck was an imminent danger to himself and others, it was determined by the law enforcement officers to enter Bleck's hotel room. Martinez entered the room first with his duty weapon[3] drawn and in a ready position. *Estate of Bleck*, 540 F. App'x at 867 (App. 3); *Bleck*, 839 F. Supp. 2d at 1151-52 (App. 32). Bleck was sitting on the bed facing away from the door, and Officer Martinez could not see Bleck's hands. *Estate of Bleck*, 540 F. App'x at 867-68 (App. 3); *Bleck*, 839 F. Supp. 2d at 1152 (App. 32). The officers announced loudly that they were the police and commanded that Bleck show his hands and lie down on the floor. *Estate of Bleck*, 540 F. App'x at 868 (App. 3); *Bleck*, 839 F. Supp. 2d at 1152 (App. 32). Bleck failed to comply and may have attempted to stand instead. *Estate of Bleck*, 540 F. App'x at 868 (App. 3); *Bleck*, 839 F. Supp. 2d at 1152 (App. 32).

### C. The Accidental Discharge of the Weapon

In the face of Bleck's failure to comply with the officers' orders, Martinez made a decision to gain control of Bleck by pushing Bleck down onto the bed.

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[3] Martinez' duty weapon was, as established in the record below, a Glock .45 GAP model handgun. Defendants' Combined Response to Plaintiff's Motion for Summary Judgment and Reply to Plaintiff's Supplemental Response to Defendants' Motion for Judgment on the Pleadings and for Summary Judgment (Doc. 161) at Exhibit A-11 (161-7), Colorado Bureau of Investigation Report, p.4, February 21, 2012.

Still holding his duty weapon in his right hand, Martinez attempted to push Bleck down onto the bed by reaching around Bleck's right side with his free left hand, a procedure referred to by Martinez as going "hands-on." *Estate of Bleck*, 540 F. App'x at 868 (App. 3); *Bleck*, 839 F. Supp. 2d at 1152 (App. 32). In attempting to gain control of Bleck in this manner, Martinez' weapon accidentally discharged, shooting Bleck in the hip. *Estate of Bleck*, 540 F. App'x at 868 (App. 3); *Bleck*, 839 F. Supp. 2d at 1152 (App. 33).

It is undisputed that the discharge of the firearm was accidental. *Estate of Bleck*, 540 F. App'x at 872 (App. 14); *Bleck*, 839 F. Supp. 2d at 1154 (App. 38). Bleck's own experts admitted that there was no evidence suggesting that the shooting was attributable to anything other than the accidental discharge of Martinez' duty weapon. *Bleck*, 839 F. Supp. 2d at 1154 (App. 38).

### D. The Lawsuit, Summary Judgment, and Appeal

Bleck filed a lawsuit alleging three claims: (1) a Fourth Amendment claim for unreasonable seizure by use of excessive force against Martinez[4] pursuant to 42 U.S.C. § 1983; (2) a claim against the City of Alamosa for failure to train and supervise Martinez properly with regard to use of force in situations

[4] Bleck also sued for, but later abandoned, other claims for relief (App. 4).

involving mentally ill individuals pursuant to 42 U.S.C. § 1983; and (3) a state-law tort claim for battery against Martinez. *Estate of Bleck*, 540 F. App'x at 868 (App. 3-4); *Bleck*, 839 F. Supp. 2d at 1152 (App. 33). Federal question jurisdiction was conferred on the district court pursuant to 28 U.S.C. § 1331.

The district court granted summary judgment to Martinez and the City, holding that there was no constitutional violation as the accidental discharge of the firearm was not a seizure within the meaning of the Fourth Amendment. *Bleck*, 839 F. Supp. 2d 1149 (App. 27-44). Specifically, the district court, relying in large part on *Brower v. County of Inyo*, 489 U.S. 593 (1989), held that:

> There is no question but that, in the ordinary sense of the term, plaintiff was "seized," and that Officer Martinez intended to seize him. Nevertheless *Brower* teaches that this fact alone is insufficient to give rise to a seizure that implicates the Fourth Amendment. To determine whether the seizure has constitutional dimension, I must focus more precisely on what means or instrumentality Officer Martinez intended to effectuate the seizure. . . . [T]he question is whether plaintiff was "stopped by the very instrumentality set in motion or put in place in order to achieve that result."
>
> On that score there is no genuine issue of material fact to suggest other than that Officer Martinez's intention was to seize plaintiff by going hands on and pushing him to

> the bed or the floor. The instrumentality, therefore, was the hands on technique. . . . Although undoubtedly the gun was intended as a show of the officer's authority, *it was not the instrumentality by which Officer Martinez intended to effectuate the seizure itself.*
>
> * * *
>
> *In other words, Officer Martinez's use of the gun was incidental to the intentional use of the hands on technique. The means intentionally applied was the use of hands on, not the gun.* Proceeding with the technique while still holding a gun may well have been negligent, but the Constitution is concerned only with intentional conduct.

*Bleck*, 839 F. Supp. 2d at 1153 (App. 35-37) (citations omitted) (emphasis added). Bleck appealed.

On November 4, 2013, the Tenth Circuit affirmed in part and reversed in part the holding of the district court. *Estate of Bleck*, 540 F. App'x 866 (App. 1-26). Conceding that the discharge of the firearm was unintentional, the Tenth Circuit looked back to conduct that preceded the accidental discharge and held that Officer Martinez had intentionally introduced the firearm into the encounter as a display of force and that the decision to use the gun as a display of force and the "hands-on technique" was sufficient to constitute the intentional conduct required for a Fourth Amendment seizure. *Id.* at 876 (App. 22). Using an illustration from *Brower* regarding an accidental discharge of a firearm, the Tenth Circuit wrote:

> Turning to the district court's legal error, . . . the court concluded that "[a] Fourth Amendment seizure may be found only where there is evidence suggesting that the officer's decision to fire his weapon was volitional." Yet, the court's reasoning in this regard runs directly contrary to the gun hypothetical in *Brower*, in which the victim would have been seized if "stopped by the *accidental* discharge of a gun with which he was meant only to be bludgeoned," so long as the gun was "the very instrumentality set in motion or put in place" in order to effect a seizure. 489 U.S. at 599 (emphasis added). In other words, there is simply no requirement that Officer Martinez had to intend to *fire* the gun in order to effect a Fourth Amendment seizure under *Brower*. As such, the district court's reasoning is legally infirm.

*Id.* at 874 (App. 19) (internal citation to the record omitted) (emphasis in original). The Tenth Circuit, however, found that the law on this issue was not clearly established at the time of the incident and affirmed judgment for Martinez on the basis of qualified immunity. *Id.* at 873-74 (App. 17). The circuit court remanded the case to the district court for further proceedings as to the City on the issues of whether there was an unreasonable seizure and whether the existence of a municipal policy or custom was the moving force behind any constitutional deprivation. *Id.* at 877 (App. 25-26).

## REASONS TO GRANT THE PETITION

In holding that the accidental discharge of a firearm constituted a Fourth Amendment seizure, the Tenth Circuit focused not on whether the discharge of the firearm was intentional, but on whether the officer intentionally introduced the firearm into the encounter. Such holding conflicts with the precedents of this Court and crystalizes the deep and long-percolating conflict in the circuits on the role of intent in Fourth Amendment seizure analysis.[5] While *Brower v. County of Inyo*, and its holding that "violation of the Fourth Amendment requires an *intentional acquisition of physical control*," provides the

[5] This conflict of authority was observed 22 years ago in Kathryn R. Urbonya, *"Accidental" Shootings As Fourth Amendment Seizures*, 20 HASTINGS CONST. L.Q. 337 (1992). Therein, the author, advocating for the position taken by the Tenth Circuit, here, wrote:

> Courts have disagreed as to how to evaluate "accidental" shootings by police officers under the Fourth Amendment. Central to the disagreement is a court's interpretation of what constitutes a Fourth Amendment "seizure." In applying the Supreme Court's three "seizure" definitions in *Terry* [*v. Ohio*, 392 U.S. 1 (1968)], [*United States v.*] *Mendenhall*, [446 U.S. 544 (1980)], and *Brower*, some courts have concluded that an "accidental" shooting, even one that results in death, cannot be a Fourth Amendment "seizure." These courts have erroneously focused on the last act committed by the officer – the "accidental" shot. By looking at the actions that precede the shooting, courts can discern how the Fourth Amendment is implicated when police officers withdraw their guns.

*Id*. at 387.

analytical framework, there is a seven-circuit split as to its application – with the Tenth Circuit joining the Fifth, Sixth, and Eighth Circuits which look to the intentionality in introducing the firearm into the encounter, and the Second, Third, and Fourth Circuits which look to the intentionality in the discharge of the firearm.[6]

Allowed to stand, the Tenth Circuit decision threatens constitutional core concepts that shaped decisions such as *Brower* and would reduce the Fourth Amendment to a constitutional tort.[7]

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[6] This seven-circuit split is actually symptomatic of a more fundamental struggle within the circuits to find the proper role of intent in cases involving accidental discharge of a firearm, specifically, and Fourth Amendment seizures, generally. *See* footnotes 12 & 13, *infra*. *See also*, Ronald Bacigal, *A Unified Theory for Seizures of the Person*, 81 MISS. L.J. 915, 932 (2012) (observing that this Court has provided three different tests for determining a seizure, arguing for a unified test and criticizing the intentionality requirement of *Brower* as demonstrating a "lack of concern for any harm the government accidentally causes to citizens"); Urbonya, *supra* at 342 (arguing that different "seizure" definitions have led to an analytical "morass"); and Thomas K. Clancy, *The Supreme Court's Search for A Definition of A Seizure: What Is A "Seizure" of A Person Within the Meaning of the Fourth Amendment?*, 27 AM. CRIM. L. REV. 619, 650-55 (1990) (noting the struggle the courts have had with the definition of seizure and suggesting modifications in the working definition in *Brower*).

[7] There is a conceptual similarity here with this Court's analysis of constitutional due process in *Daniels v. Williams*, 474 U.S. 327 (1986), in which it was observed that permitting a negligence claim under the Fourteenth Amendment due process clause would "trivialize the centuries-old principle" that such

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## I. CERTIORARI IS WARRANTED AS THE TENTH CIRCUIT OPINION IS INCONSISTENT WITH SUPREME COURT PRECEDENT

In *Brower*, this Court considered whether the death of a fleeing driver who drove a stolen car into a police roadblock was a seizure for purposes of the Fourth Amendment. Observing that the Fourth Amendment addresses "misuse of power" and "not the accidental effects of otherwise lawful government conduct" (*id*. at 596), this Court held that a Fourth Amendment seizure required "governmental termination of freedom of movement *through means intentionally applied*."[8] *Id*. at 597 (emphasis in original).

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right was premised on preventing "abuse of power." *Id.* at 332. Like due process, the right to be free from unreasonable searches and seizures is premised on preventing "misuse of power" and "not the accidental effects of otherwise lawful government conduct." *Brower*, 489 U.S. at 596. Indeed, the exclusion of negligence from constitutional application is a core constitutional concept, and it is worth noting that prior to *Graham v. Connor*, 490 U.S. 386 (1989), it was not uncommon to review excessive force claims under due process standards. *See Dixon v. Richer*, 922 F.2d 1456, 1461 (10th Cir. 1991); *Gumz v. Morrissette*, 772 F.2d 1395, 1399 (7th Cir. 1985), *cert. denied,* 475 U.S. 1123 (1986) ("[t]he constitutional provision on which most courts . . . ground a § 1983 claim solely alleging excessive use of force by state officials is the Fourteenth Amendment").

[8] The role of unintentional or accidental acts on the issue of seizure was thought by four concurring justices in *Brower* to be dicta as they did not believe that consideration of "whether an unintentional act might also violate the Fourth Amendment" was necessary to the decision of the Court. *Brower*, 489 U.S. at 600-01 (Stevens, J., concurring). These justices observed that

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Applying that standard, this Court held that, because the roadblock was the means intentionally applied to stop the driver and did stop the driver, it was a Fourth Amendment seizure.

There have been few occasions in the twenty-five years since *Brower* in which this Court has commented on the interplay of unintentional or accidental conduct on Fourth Amendment seizure jurisprudence. In *Sacramento v. Lewis*, 523 U.S. 833 (1998), this Court, before considering the broader issue of whether substantive due process provided a constitutional basis for a claim, observed that a Fourth Amendment seizure was precluded under *Brower* where a police officer, who was engaged in a high-speed pursuit with lights and sirens as a show of force, accidentally collided with a suspected offender at the conclusion of the chase.

Here, in deciding that the unintentional and accidental discharge of the firearm by Martinez was a seizure, the Tenth Circuit departed from *Brower* and its holding that a seizure does not occur from "the accidental effects of otherwise lawful government conduct." *Brower*, 489 U.S. at 596. The Tenth Circuit rationalized its decision as consistent with *Brower* by looking to the intentional introduction of the firearm into the encounter as a show of force prior to its

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while "intentional acquisition of physical control" was a "characteristic of the typical seizure," they doubted whether it was "an essential element of every seizure." *Id.*

accidental discharge and, as such, played "a significant role in the intentional efforts" to seize Bleck. *Estate of Bleck*, 540 F. App'x at 875 (App. 19). This rationalization is directly inconsistent with and cannot be reconciled with the illustration in *Brower* and the decision in *Lewis* finding that no seizure occurs where a pursuing police vehicle, using lights and sirens as a show of force, accidentally collides with the suspected violator, causing termination of freedom. *Brower*, 489 U.S. at 597; *Lewis*, 523 U.S. 833. Using the Tenth Circuit's reasoning, *Lewis* would have been decided differently as, there, the vehicle was intentionally introduced into the encounter and was the instrumentality that, albeit accidentally, terminated the freedom of the suspect and played "a significant role in the intentional efforts" in the seizure.

The core concept of *Brower* is that the question of a Fourth Amendment seizure occurs "only when there is a governmental termination of freedom of movement *through means intentionally applied*." *Brower*, 489 U.S. at 597 (emphasis in original). This core concept is rooted in the language of the Fourth Amendment and the conduct it was intended to proscribe. The Tenth Circuit and other courts which have failed to adhere to this core concept veer off constitutional course. In the instant case, the Tenth Circuit ignored the *Brower* admonition that the termination of freedom of movement be "through means intentionally applied" and instead looked back to the decision by Martinez to introduce the firearm into the encounter

to attempt to control Bleck while still holding his firearm.

The Tenth Circuit justified looking back to the intentional introduction of the firearm into the encounter through a tortured reading of the gun hypothetical described by Justice Scalia in *Brower*.[9] The gun hypothetical was meant to illustrate the distinction between unintended nature of injury from intended conduct – a distinction with deep roots in mens rea calculus.[10] It was an illustration meant to fine-tune the broader core concept and directing that, while accidental discharge of a firearm leading to termination of freedom would ordinarily not be considered means intentionally applied, in limited fact patterns, an accidental discharge might meet

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[9] The gun hypothetical in *Brower* was as follows:

> In determining whether the means that terminates the freedom of movement is the very means that the government intended we cannot draw too fine a line, or we will be driven to saying that one is not seized who has been stopped by the accidental discharge of a gun with which he was meant only to be bludgeoned, or by a bullet in the heart that was meant only for the leg. We think it enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result.

*Brower*, 489 U.S. at 598-99.

[10] RESTATEMENT (SECOND) OF TORTS § 16(1) (1965) (a battery occurs with harmful or offensive touching even though "the act was not done with the intention of bringing about the resulting bodily harm").

Fourth Amendment seizure criteria.[11] Instead of reading the hypothetical as a fine-tuned distinction, the Tenth Circuit misread the hypothetical as a blunt holding that "there is simply no requirement" that an officer "intend to *fire* the gun in order to effect a Fourth Amendment seizure under *Brower*." *Estate of Bleck*, 540 F. App'x at 874 (App. 19) (emphasis in original).

The Tenth Circuit opinion is a troubling departure from Supreme Court precedent. It finds company, however, in a cadre of other circuits which have looked back to the intentional decision to introduce the firearm into an encounter that ultimately resulted in the unintentional discharge to provide the intent necessary for a Fourth Amendment seizure.

## II. CERTIORARI IS WARRANTED AS DECISIONS WITHIN THE CIRCUITS ARE IN CONFLICT

The Tenth Circuit decision in this case expands and exacerbates the conflict in the circuits on whether the accidental discharge of a firearm by a law

[11] This distinction may have analytical importance in cases where an officer mistakenly shoots a suspect with a lethal weapon rather than the intended non-lethal weapon. *See, e.g., Henry v. Purrell*, 501 F.3d 374, 381-82 (4th Cir. 2007) (holding that an officer who meant to shoot a suspect with his taser but mistakenly drew and shot him with his service pistol met the intentionality requirement of *Brower* as he intended, in either case, to shoot the suspect).

enforcement officer rises to the level of a Fourth Amendment seizure.

### A. Circuits Looking to the Intentional Discharge of the Firearm

The Second, Third, and Fourth Circuits have looked to whether the discharge of the firearm was intentional – finding that an unintentional discharge did not meet the intentionality requirements for a Fourth Amendment seizure.[12]

#### 1. Second Circuit

In *Dodd v. City of Norwich*, 827 F.2d 1 (2d Cir. 1987) (on re-argument), *cert. denied*, 484 U.S. 1007 (1988), the Second Circuit in a pre-*Brower* decision considered a claim in which a suspect was accidentally shot by a police officer while holding his gun in one hand while handcuffing the suspect. Finding no Fourth Amendment violation, the Second Circuit

[12] The Eleventh Circuit does not appear to have a controlling circuit case on the issue of accidental discharge. However, in the pre-*Brower* decision of *Matthews v. City of Atlanta*, 699 F. Supp. 1552 (N.D. Ga. 1988), a district court within the circuit granted summary judgment in an excessive force claim against a police officer whose firearm accidentally discharged while he was holding his gun in his hand and reaching into the suspect's vehicle to turn off the engine. *Id.* at 1553. The court, finding no Fourth Amendment seizure, held that there was no evidence to dispute that the gun discharged accidentally and that the shooting was, at most, negligent. *Id.* at 1555-56.

held that "[t]he fourth amendment . . . only protects individuals against 'unreasonable' seizures, not seizures conducted in a 'negligent' manner." *Id*. at 7-8.

Also decided within the Second Circuit is the district court case of *Loria v. Town of Irondequoit*, 775 F. Supp. 599 (W.D.N.Y. 1990), where the court observed that *Brower* required intentional acquisition of physical control but denied summary judgment on the factual question of whether the discharge of a firearm during a struggle between an officer and the father of a suspect was accidental. *Id*. at 603-05.

### 2. Third Circuit

The Third Circuit, in an unpublished table opinion, affirmed *Troublefield v. City of Harrisburg*, 789 F. Supp. 160 (M.D. Pa. 1992), *aff'd*, 980 F.2d 724 (3d Cir. 1992), an excessive force claim arising out of an accidental discharge of a firearm by a police officer. There, the officer approached a suspect in a parked car who was suspected of stealing the car and ordered the suspect out of the car and onto the ground, and the suspect complied. *Id.* at 162. With the gun still drawn, the officer physically searched the suspect and then proceeded to handcuff him. *Id.* After the officer locked the handcuffs, he started to return his weapon to his holster when the weapon accidentally fired, shooting the suspect in the leg. *Id.* After a detailed consideration of *Brower* and a number of pre- and post-*Brower* accidental discharge and accidental injury cases, the court dismissed the

excessive force claim, observing that there was no seizure under the Fourth Amendment as "Troublefield was injured by a bullet fired by accident" and the officer "did not intend the bullet to bring plaintiff within his control or to, perhaps, settle him down were he struggling to break free." *Id*. at 166.

Also decided within the Third Circuit are the following district court cases applying the intentionality requirement for Fourth Amendment seizures: *Brice v. City of York*, 528 F. Supp. 2d 504, 513 (M.D. Pa. 2007) (no seizure where, in the course of arresting a fleeing suspect, a police officer's gun discharged, striking the suspect when he grabbed the suspect by his shoulder while still holding his duty weapon in his hand); and *Clark v. Buchko*, 936 F. Supp. 212, 219 (D.N.J. 1996) (no seizure where the officer's firearm accidentally discharged when the suspect, who had been taken to the ground, lifted himself up off the ground and came into contact with the firearm, causing its accidental discharge).

### 3. Fourth Circuit

In *Culosi v. Bullock*, 596 F.3d 195 (4th Cir. 2011), an officer participating in the stop of a suspect used one hand to open the passenger door in which he was riding while simultaneously unholstering his duty weapon with the other hand. The officer intended to go to a two-hand grip of the weapon to hold it in a ready position but, in executing this maneuver, the weapon unintentionally discharged, fatally wounding

the suspect. *Id*. at 199. The Fourth Circuit recognized that *Brower* required that a Fourth Amendment seizure occur only when there is a governmental termination of freedom of movement through means intentionally applied but upheld the district court's denial of summary judgment on the seizure issue on the basis that the district court had found disputed issues of fact on whether the officer accidentally discharged his weapon. *Id.* at 200-02.

Also decided within the Fourth Circuit is *Glasco v. Ballard*, 768 F. Supp. 176 (E.D. Va. 1991). There, after the officer exited his vehicle with his gun drawn, his vehicle unexpectedly began to roll. Upon leaning back into the car to put his foot on the brake, his gun accidentally discharged, hitting a suspect. *Id*. at 177. The court held that no seizure occurred as the history of the Fourth Amendment "suggests that a wholly accidental shooting is not a 'seizure' within the meaning of the Fourth Amendment." *Id*. at 180.

### B. Circuits Looking to the Intentional Introduction of the Firearm into the Encounter

The Fifth, Sixth, Eighth, and now Tenth Circuits have looked not to the intentionality of the discharge of the firearm, but to the decision to introduce the firearm into the encounter which ultimately resulted

in the unintentional discharge and whether such decision was objectively reasonable.[13]

### 1. Fifth Circuit

In *Watson v. Bryant*, 532 F. App'x 453 (5th Cir. 2013), the Fifth Circuit applied the intentional introduction analysis to an accidental shooting that occurred as a police officer, while holding his service pistol in one hand, took a suspect to the ground and

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[13] The Seventh Circuit does not appear to have a controlling circuit decision regarding accidental discharge. In *Johnson v. City of Milwaukee*, 41 F. Supp. 2d 917 (D.C. Wis. 1999), a district court within the circuit applied an intentional introduction analysis. There, the parties disputed whether the officer had intentionally or accidentally discharged his gun during a physical struggle with the suspect. The court held that: "A firearm does not discharge in a vacuum. The critical question is how the shooting came about. If the cause of the shooting was prior police conduct that was unreasonable under the Fourth Amendment, the accident is compensable." *Id*. at 929. The court noted, however, that the issue posed "difficult analytical problems" in the face of the *Brower* requirement that a seizure be intentional. *Id*. at n.3.

The Ninth Circuit also does not appear to have a controlling circuit accidental discharge case. However, in *Owl v. Robertson*, 79 F. Supp. 2d 1104 (D. Nev. 2000), the defendant officer alleged that his gun discharged accidentally after taking a suspect to the ground with his gun in his hand. *Id*. at 1109-10. The court denied summary judgment for both the plaintiff and the officer on the Fourth Amendment excessive force claim because of disputed issues of material fact. In reaching this conclusion, the court applied an intentional introduction analysis, noting that the "act of drawing the weapon and the act of forcing [the plaintiff] to the ground" were not unreasonable. *Id*. at 1113-14.

attempted to handcuff him. Recognizing that *Brower* required that a seizure involve the intentional termination of freedom, the Fifth Circuit held that "[i]n the absence of evidence showing that [the officer] intended to use deadly force, we must conclude that the negligent shooting here did not itself violate [the suspect's] Fourth Amendment Rights." *Id.* at 457. The court went on, however, to state that even if the shooting were accidental, the officer may have violated the Fourth Amendment if the officer acted objectively unreasonably "by drawing his pistol, or by not re-holstering it before attempting to handcuff" the suspect. *Id.* at 458.

Citing the intentional introduction position in *Watson*, the court in *Briggs v. Edwards*, 2013 WL 5960676, *5 (E.D. La. 2013), held, in the context of a factually-disputed claim of an officer's accidental discharge of his service weapon, that even if accidental, the Fourth Amendment claim would turn on the decision of the officer to point the weapon at the suspect.

In a pre-*Watson* case, the court in *Santibanes v. City of Tomball*, 654 F. Supp. 2d 593 (S.D. Tex. 2009), applied the intentional discharge requirement. There, a police officer alleged that a Fourth Amendment seizure did not occur where he claimed that he stopped the suspect's vehicle for suspicion of auto theft and, after drawing his weapon while still in his own vehicle and commanding the occupants to "get your hands up," his service weapon accidentally discharged. *Id*. at 599. The court, recognizing that a

seizure does not occur "in the context of accidental shootings," found sufficient factual controversy on whether the officer accidentally or intentionally discharged his weapon. *Id*. at 604-05. *See also Kalimah v. City of McKinney*, 213 F. Supp. 2d 698, 702 (E.D. Tex. 2002) (The court stated "a seizure may only be affected by a volitional act, not an accident" but found disputed issues of fact on whether the officer's shooting through a residential door was accidental).

### 2. Sixth Circuit

In *Tallman v. Elizabethtown Police Dept*., 167 F. App'x 459 (6th Cir. 2006), the Sixth Circuit applied the intentional introduction analysis to dismiss a Fourth Amendment claim against an officer who had reached into the vehicle of a suspect with one hand while pointing his gun at the suspect with the other. The court noted that there was no evidence that the officer intentionally discharged his weapon and it was thus required to "focus the reasonableness inquiry on [the officer's] actions leading up to the unintentional discharge of the weapon." *Id*. at 463. In so holding, the court cited with approval the pre-*Brower* decision of *Leber v. Smith*, 773 F.2d 101, 105 (6th Cir. 1985), which had required a look-back to the decision to introduce the firearm into the encounter that ultimately resulted in the unintentional discharge of an officer's weapon when he slipped on ice. *Tallman*, 167 F. App'x at 466.

In *Pleasant v. Zamieski*, 895 F.2d 272 (6th Cir. 1990), *cert. denied*, 498 U.S. 851 (1990), the Sixth Circuit applied the intentional introduction analysis in its review and ultimate affirmance of a jury verdict absolving an officer of Fourth Amendment liability in the accidental shooting death of a car-theft suspect. The suspect had attempted to flee over a fence and, while holding his gun in one hand, the gun discharged when the officer grabbed the suspect from behind to pull him back to the ground. *Id*. at 273. The *Pleasant* court, finding *Leber v. Smith* controlling, saw the issues as two-fold: was the officer objectively reasonable in unholstering his gun, and was his conduct objectively reasonable when he failed to reholster it. *Id*. at 275-77.

### 3. Eighth Circuit

In *McCoy v. City of Monticello*, 342 F.3d 842 (8th Cir. 2003), the Eighth Circuit applied the intentional introduction analysis in a claim against an officer whose firearm accidentally discharged when, approaching a suspect, he slipped and fell on ice. *Id*. at 845. While recognizing the intentionality requirement of *Brower*, the Eighth Circuit held that such intent was met by the officer's show of force in drawing his gun and the suspect's raising his hands above his head. With that, the court went on to determine that the officer's act of drawing the gun was objectively reasonable. *Id*. at 847-49.

### 4. Tenth Circuit

In the instant case, *Estate of Bleck*, 540 F. App'x 866, 876, the Tenth Circuit applied the intentional introduction analysis, looking to the officer's use of his firearm as a show of force and his decision to attempt to control the suspect with his hands while still holding the firearm.

## CONCLUSION

The Tenth Circuit's decision, finding that an undisputed accidental discharge of a firearm by a law enforcement officer is a Fourth Amendment seizure, demonstrates a fundamental misunderstanding of core concepts that separate protections afforded by the Constitution and those afforded by tort law. This case provides an opportunity for this Court, unencumbered by factual disputes surrounding the events leading to, and the accidental nature of the discharge of the firearm, to address long-standing questions regarding the role of intent in Fourth Amendment seizure analysis and to provide guidance to circuits which are deeply divided on the issue. Failing to grant certiorari will invite the use of the Fourth Amendment as a font for constitutional torts and leave the circuits in their current divided state and the cases impacted by the happenstance of circuit boundaries in which the event occurs.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: April 15, 2014

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**UNITED STATES COURT OF APPEALS**

**TENTH CIRCUIT**

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|---|---|
| THE ESTATE OF STEVEN WAYNE BLECK, by Joanna Churchill, Personal Representative for Steven Bleck, deceased,*<br><br>Plaintiff-Appellant,<br><br>v.<br><br>CITY OF ALAMOSA, COLORADO; and JEFF MARTINEZ, individually and in his official capacity as a Law Enforcement Officer of the Alamosa Police Department,<br><br>Defendants-Appellees. | No. 12-1139<br>(D.C. No. 1:10-CV-03177-REB-KMT)<br>(D. Colo.) |

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* While this appeal has been pending, Mr. Bleck died. Consistent with Federal Rule of Appellate Procedure 43(a)(1), the personal representative for Mr. Bleck's estate, Joanna Churchill, filed a motion seeking to be substituted as the Appellant in Mr. Bleck's stead. We hereby **grant** this motion. In the interest of simplicity, however, we continue to refer to the proponent of Appellant's cause as Mr. Bleck. In connection with Ms. Churchill's motion, the parties joust about whether Mr. Bleck's death constricts or otherwise affects the scope of relief available in this litigation to Ms. Churchill, acting on behalf of Mr. Bleck's estate. We do not reach those matters here and properly leave them for the district court to resolve in the first instance.

**ORDER AND JUDGMENT****

(Filed Nov. 4, 2013)

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Before **KELLY**, **MCKAY**, and **HOLMES**, Circuit Judges.

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Plaintiff-Appellant Steve W. Bleck filed an action pursuant to 42 U.S.C. § 1983 in the District of Colorado against Defendants-Appellees City of Alamosa, Colorado ("Alamosa") and Officer Jeff Martinez (collectively "Defendants"), alleging claims for municipal liability based on inadequate training and failure to supervise, and use of excessive force in violation of the Fourth Amendment. The district court granted summary judgment in favor of Defendants. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we **affirm in part** and **reverse in part** and **remand** the case for further proceedings.

## I

On August 6, 2010, Colorado State Patrol Dispatch received a 911 call from a mental-health counselor, who indicated that he had received a

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** This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

distressing call from Mr. Bleck. The counselor said that Mr. Bleck, a Vietnam War veteran, was re-experiencing trauma and was intoxicated, suicidal, and possibly armed. Officers of the Alamosa Police Department were dispatched to the local hotel where Mr. Bleck was reportedly staying.

Officer Martinez entered the room first; he had his duty weapon drawn. Mr. Bleck was sitting on the bed facing away from the door, and Officer Martinez could not see Mr. Bleck's hands. The officers announced that they were the police and commanded Mr. Bleck to show his hands and to lie down on the floor. Mr. Bleck failed to comply, and may have attempted to stand instead. Still holding his gun in his right hand, Officer Martinez attempted to push Mr. Bleck back down onto the bed by reaching around Mr. Bleck's right side with his free (i.e., left) hand, a procedure referred to here as going "hands on." Officer Martinez's weapon discharged while he was going hands on, shooting Mr. Bleck in the hip.

Mr. Bleck filed a lawsuit alleging three claims: (1) a Fourth Amendment claim of excessive force against Officer Martinez, pursuant to § 1983; (2) a claim against Alamosa for inadequate training/supervision with regard to use of force in situations involving mentally ill individuals, pursuant to § 1983; and (3) a state-law claim for battery against Officer

Martinez.[1] Defendants filed a motion for summary judgment. In turn, Mr. Bleck filed a motion for summary judgment on his first and second claims.

The district court concluded that the circumstances of this case did not constitute a seizure within the meaning of the Fourth Amendment, and dismissed with prejudice the excessive-force claim against Officer Martinez. The court then dismissed with prejudice the inadequate-training claim against Alamosa because it found no predicate constitutional violation on the part of Officer Martinez to support municipal liability. The district court declined to continue exercising supplemental jurisdiction over Mr. Bleck's pendent state-law claim, and therefore dismissed that claim without prejudice. Mr. Bleck timely appealed.

## II

We review the district court's grant of summary judgment de novo, employing the same legal standard as the district court. *Martinez v. Beggs*, 563 F.3d 1082, 1088 (10th Cir. 2009). A motion for summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material

[1] In addition, Mr. Bleck alleged an inadequate-training/failure-to-supervise claim against former Alamosa Chief of Police John Jackson and unconstitutional policy on the part of Alamosa. In the district court, Mr. Bleck abandoned both of these claims.

fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "An issue is 'genuine' if there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way." *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998). "The question . . . is 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Shero v. City of Grove*, 510 F.3d 1196, 1200 (10th Cir. 2007) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986)). "An issue of fact is 'material' if under the substantive law it is essential to the proper disposition of the claim." *Adler*, 144 F.3d at 670.

Our review of summary-judgment orders in the qualified-immunity context differs from that applicable to our review of other summary-judgment decisions. *Martinez*, 563 F.3d at 1088. "When a defendant asserts qualified immunity at summary judgment, the burden shifts to the plaintiff to show that: (1) the defendant violated a constitutional right and (2) the constitutional right was clearly established." *Id.*; *see Pearson v. Callahan*, 555 U.S. 223, 232 (2009). Courts have discretion to determine "which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson*, 555 U.S. at 236. Ultimately, however, "[q]ualified immunity is applicable *unless* the official's conduct violated a clearly established constitutional right." *Id.* at 232 (emphasis

added); *see Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

In determining whether the plaintiff has met his burden of demonstrating a violation of a constitutional right that was clearly established, we will construe the facts in the light most favorable to the plaintiff as the nonmoving party. *Scott v. Harris*, 550 U.S. 372, 378, 380 (2007); *see Riggins v. Goodman*, 572 F.3d 1101, 1107 (10th Cir. 2009) ("The plaintiff must demonstrate *on the facts alleged* both that the defendant violated his constitutional or statutory rights, and that the right was clearly established at the time of the alleged unlawful activity." (emphasis added)). "However, because at summary judgment we are beyond the pleading phase of the litigation, a plaintiff's verison [sic] of the facts must find support in the record." *Thomson v. Salt Lake Cnty.*, 584 F.3d 1304, 1312 (10th Cir. 2009); *accord Koch v. City of Del City*, 660 F.3d 1228, 1238 (10th Cir. 2011), *cert. denied*, ___ U.S. ___, 133 S. Ct. 211 (2012). More specifically, "[a]s with any motion for summary judgment, '[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts[.]' " *York v. City of Las Cruces*, 523 F.3d 1205, 1210 (10th Cir. 2008) (second and third alterations in original) (quoting *Scott*, 550 U.S. at 380).

## III

### A

The Fourth Amendment protects individuals against "unreasonable searches and seizures." U.S. Const. amend. IV; *see Bella v. Chamberlain*, 24 F.3d 1251, 1255 (10th Cir. 1994). "To state a claim of excessive force under the Fourth Amendment, a plaintiff must show both that a 'seizure' occurred and that the seizure was 'unreasonable.'" *Bella*, 24 F.3d at 1255 (quoting *Brower v. Cnty. of Inyo*, 489 U.S. 593, 599 (1989)); *see Graham v. Connor*, 490 U.S. 386, 395-97 (1989); *Brooks v. Gaenzle*, 614 F.3d 1213, 1219 (10th Cir. 2010).

The issue of what constitutes a "seizure" has been repeatedly addressed by the Supreme Court. *See Brooks*, 614 F.3d at 1219. A "seizure" triggering Fourth Amendment protection occurs only when government actors have, "by means of physical force or show of authority, . . . in some way restrained the liberty of a citizen[.]" *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968); *see Graham*, 490 U.S. at 395 n.10. In other words, "a person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained." *United States v. Mendenhall*, 446 U.S. 544, 553 (1980).

In the Supreme Court's decision in *Brower*, petitioners' decedent was killed when the stolen car that he had been driving at a high rate of speed in an effort to elude pursuing police crashed into a police roadblock. 489 U.S. at 594. His heirs brought a § 1983

action alleging that the respondents had used "brutal, excessive, unreasonable and unnecessary physical force" in establishing the roadblock, and thereby effected an unreasonable seizure in violation of the Fourth Amendment. *Id.* In concluding that a Fourth Amendment "seizure" had occurred, the *Brower* Court held that "[v]iolation of the Fourth Amendment requires an intentional acquisition of physical control. A seizure occurs even when an unintended person or thing is the object of the detention or taking, . . . but the detention or taking itself must be willful." *Id.* at 596 (citations omitted). The Court offered a hypothetical to illustrate a circumstance that would *not* give rise to a Fourth Amendment violation – that is, a parked, unoccupied police car that slips its brake and pins a passerby against a wall; in that circumstance, "it is likely that a tort has occurred, but not a violation of the Fourth Amendment." *Id.*

The Supreme Court explained that

> a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally *desired* termination of an individual's freedom of movement ([if the passerby were a] fleeing felon), but only when there is a governmental termination of freedom of movement *through means intentionally applied.*

*Id.* at 596-97. Significantly, the Court offered clarification of the necessary nexus between intention and the means applied:

> In determining whether the means that terminates the freedom of movement is the very means that the government intended we cannot draw too fine a line, or we will be driven to saying that one is not seized who has been stopped by the accidental discharge of a gun with which he was meant only to be bludgeoned, or by a bullet in the heart that was meant only for the leg. We think it enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result.

*Id.* at 598-99. Furthermore, the Court's reasoning suggested that the intended instrumentality must in fact be capable under the circumstances of a given case of effectuating a seizure. In this regard, the Court offered another hypothetical:

> The pursuing police car sought to stop the suspect *only* by the show of authority represented by flashing lights and continuing pursuit; and though he was in fact stopped, he was stopped by a different means – his loss of control of his vehicle and the subsequent crash. If, instead of that, the police cruiser had pulled alongside the fleeing car and sideswiped it, producing the crash, then the termination of the suspect's freedom of movement would have been a seizure.

*Id.* at 597 (emphasis added); *see also id.* at 598 ("In marked contrast to a police car pursuing with flashing lights, or to a policeman in the road signaling an oncoming car to halt, a roadblock is not just a significant show of authority to induce a voluntary stop, but is designed to produce a stop by physical impact if voluntary compliance does not occur." (citation omitted)).

In sum, as we have articulated these principles after *Brower*, "[a] person is seized by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer, by means of physical force or show of authority, *terminates or restrains his freedom of movement*, through means intentionally applied." *Brooks*, 614 F.3d at 1221 (quoting *Brendlin v. California*, 551 U.S. 249, 254 (2007)) (internal quotation marks omitted).

**B**

**1**

Mr. Bleck argues that the district court misapplied *Brower* in concluding that there was no seizure that triggered Fourth Amendment protection. However, "[w]e have long said that we may affirm on any basis supported by the record, even if it requires ruling on arguments not reached by the district court or even presented to us on appeal." *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011); *see SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) ("[I]n reviewing the decision of a lower court, it must be

affirmed if the result is correct although the lower court relied upon a wrong ground or gave a wrong reason." (citation omitted) (internal quotation marks omitted)); *Wells v. City & Cnty. of Denver*, 257 F.3d 1132, 1149-50 (10th Cir. 2001). Here, "we decline to consider whether the district court erred in concluding no constitutional violation occurred and instead opt to address whether the rights at issue were clearly established at the time of the alleged violation." *Becker v. Bateman*, 709 F.3d 1019, 1022 (10th Cir. 2013). We feel particularly comfortable doing this because Defendants raised their qualified-immunity argument before the district court – although the court did not reach it – and in their briefing before us as well. And, Mr. Bleck has had an opportunity at each stage of the litigation to respond.

We ultimately conclude that, even assuming that Officer Martinez's conduct amounted to a seizure of Mr. Bleck under the Fourth Amendment (based on the current state of the law), that legal outcome would not have been forecasted by clearly established law at the time. Consequently, Officer Martinez is entitled to qualified immunity. And, on this basis, we uphold the district court's judgment as to him.

**2**

"The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Casey v.*

*City of Fed. Heights*, 509 F.3d 1278, 1283-84 (10th Cir. 2007) (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001), *overruled on other grounds by Pearson*, 555 U.S. at 236) (internal quotation marks omitted). "In other words, a civil rights defendant is entitled to *fair warning* that his conduct deprived his victim of a constitutional right." *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1247 (10th Cir. 2003) (quoting *Hope v. Pelzer*, 536 U.S. 730, 740 (2002)) (internal quotation marks omitted). "Ordinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision *on point*, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Schwartz v. Booker*, 702 F.3d 573, 587 (10th Cir. 2012) (emphasis added) (quoting *Walker v. City of Orem*, 451 F.3d 1139, 1151 (10th Cir. 2006)) (internal quotation marks omitted).

**3**

At the outset, we stress that we are obliged to accept Mr. Bleck's version of the facts, insofar as that version finds support in the record. In this regard, the record indicates that Officer Martinez intended to have his gun in his hand when he went hands on with Mr. Bleck, and that he elected to restrain Mr. Bleck with both hands simultaneously, with his right hand holding the gun. Aplt. App. at 348 (Dep. of Jeffrey Martinez, taken Dec. 14, 2011) ("Q: And you voluntarily kept your gun out when you headed towards Mr. Bleck, correct? A: Yes."). Furthermore, the record

supports the view that Mr. Bleck was not restrained solely by Officer Martinez going hands on. In particular, Officer Martinez testified that he was still attempting to gain control of Mr. Bleck when his gun discharged. *See id.* at 91 (Martinez Aff., filed Aug. 15, 2011) ("As I came within reach of [Steven] Bleck, I attempted to take control of him. . . . As I attempted to gain control of [Steven] Bleck, I still had my duty weapon drawn and in my right hand. As I was attempting to take control of [Steven] Bleck, I heard a muffled sound which I did not immediately but did later realize was a gunshot from the discharge of my duty weapon."). Had Officer Martinez's going hands on successfully terminated or restrained Mr. Bleck's freedom of movement, a seizure would have occurred for purposes of the Fourth Amendment, regardless of any role that Officer Martinez's gun played in the incident.

Under Mr. Bleck's version of the facts, as we see it, Officer Martinez employed the hands-on technique and the gun in tandem – *viz.*, the hands-on technique and the gun were jointly the instrumentality intentionally applied to terminate or restrain Mr. Bleck's freedom of movement, such that it was their joint application that was set in motion to effectuate what we are assuming was a Fourth Amendment seizure of Mr. Bleck. *See* Aplt. Opening Br. at 10 (arguing that "the presence of the gun in restraining Mr. Bleck's freedom of movement was not unintentional," and thus the seizure – namely, the shot to his hip – was achieved by means intentionally applied); *id.* at 20

("Officer Martinez intended to go hands on to exert control over Mr. Bleck with his gun in his hand.").

Recall that, because Officer Martinez has asserted qualified immunity, Mr. Bleck bears the burden at summary judgment of showing, *inter alia*, that Officer Martinez violated a constitutional right that was clearly established at the time of the alleged conduct. *See Martinez*, 563 F.3d at 1088; *Reeves v. Churchich*, 484 F.3d 1244, 1250 (10th Cir. 2007). This, we conclude, he cannot do.

Mr. Bleck contends that *Brower* makes "clear that a seizure can occur where a gun is used as part of a seizure even though there is no intent to actually *shoot* a suspect to stop/seize him or her." Aplt. Reply Br. at 13. Therefore, says Mr. Bleck, "a reasonable officer in Officer Martinez's shoes would understand that if he or she intends to and actually uses a gun while terminating a person's freedom of movement or taking a person into custody, a Fourth Amendment seizure can result." *Id.* at 14.

Mr. Bleck's *Brower* argument is ultimately unpersuasive. In *Brower*, the Court observed, in the abstract, that the accidental discharge of a gun could nonetheless result in a seizure even if one meant only to bludgeon with the gun, *see Brower*, 489 U.S. at 598-99, and it is true that here there was an accidental discharge of a gun. However, the *Brower* Court made the gun-related observation in the context of a short hypothetical that was not rooted in the facts before it – a set of facts that actually bears no resemblance to

those in Mr. Bleck's case. In other words, *Brower*'s holding was not the product of a factually analogous setting. To be sure, we have observed that "we are bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements." *United States v. Serawop*, 505 F.3d 1112, 1122 (10th Cir. 2007) (citation omitted) (internal quotation marks omitted). However, we are not convinced that the *Brower* gun hypothetical would have been sufficient to give a reasonable officer fair warning that the conduct at issue here could effect a Fourth Amendment violation.

Notably, the role of the gun in the *Brower* hypothetical was different. In *Brower*, the gun was the sole tool through which the seizure was intended to be effected. In other words, the actor in *Brower* intended to stop the victim *solely* through use of the gun. However, under Mr. Bleck's version of the facts, the most that could be said is that the gun was intended to operate as a show of authority in tandem with the hands-on technique in effecting the seizure. Thus, the factual circumstances of *Brower* are distinguishable. Moreover, viewed from a more nuanced perspective, in *Brower*'s gun hypothetical, the gun was intentionally employed in a manner that, *standing alone*, was actually capable of effectuating a seizure – a direct application of force through bludgeoning of the victim. In contrast, the gun was not used here in a manner calculated, *without more*, to effectuate a seizure – it was employed as a show of

authority, like the chasing police car in the hypothetical offered by *Brower* as a counterpoint (i.e., as an instance when a seizure would not be found). *See Brower*, 489 U.S. at 597 ("The pursuing police car sought to stop the suspect *only* by the show of authority represented by flashing lights and continuing pursuit. . . ." (emphasis added)). It was only when the gun was employed simultaneously (that is, in tandem) with the hands-on technique that it was capable in this case of effectuating a seizure. In other words, it was the gun in combination with the hands-on technique that constituted the instrumentality that was intentionally applied to effect a seizure, not the gun alone.

This analysis leads us to the conclusion that *Brower*, and in particular, its gun hypothetical, could not have provided adequate notice to Officer Martinez of the assumed unlawfulness of his conduct. "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful. . . ." *Hope*, 536 U.S. at 739; *accord Creighton*, 483 U.S. at 640; *see Schwartz*, 702 F.3d at 588. However, we are not persuaded that *Brower* would have been sufficient authority to make clear to a reasonable officer in Officer Martinez's shoes that his conduct would be unlawful – more specifically, that his conduct could effect an illegal seizure and violate the Fourth Amendment. *See Ashcroft v. al-Kidd*, ___ U.S. ___, 131 S. Ct. 2074, 2083 (2011) ("We do not require a case directly on point, but existing precedent must have placed the

statutory or constitutional question *beyond debate*. The constitutional question in this case falls far short of that threshold." (emphasis added) (citations omitted)). Furthermore, Mr. Bleck has cited no cases – nor have we been able to locate any – where a court, in ruling on a fact pattern like the one at issue here, has found a Fourth Amendment violation.

In sum, viewed objectively, we do not believe that it would have been clear and beyond debate to Officer Martinez that, when he elected to keep his gun in his hand as a show of authority, he could be found to have *intentionally* effected a Fourth Amendment seizure of Mr. Bleck when the gun *accidentally* discharged. Accordingly, we conclude that Officer Martinez cannot be found to have violated clearly established law and is entitled to qualified immunity.

**C**

We now turn to Mr. Bleck's inadequate-training/supervision claim against Alamosa. Specifically, Mr. Bleck claims that Alamosa failed to adequately train or supervise its officers concerning the use of force in situations involving mentally ill individuals. While Officer Martinez may avail himself of a qualified immunity defense, Alamosa may not. *See Becker*, 709 F.3d at 1022 ("While Officer Bateman is entitled to assert the qualified immunity defense, the City is not."); *see also Starkey ex rel. A.B. v. Boulder Cnty. Soc. Servs.*, 569 F.3d 1244, 1263 n.4 (10th Cir. 2009) ("Qualified immunity . . . is available only in suits

against officials sued in their personal capacities, not in suits against governmental entities or officials sued in their official capacities.").

"A plaintiff suing a municipality under section 1983 for the acts of one of its employees must prove: (1) that a municipal employee committed a constitutional violation, and (2) that a municipal policy or custom was the moving force behind the constitutional deprivation." *Becker*, 709 F.3d at 1025 (quoting *Myers v. Okla. Cnty. Bd. of Cnty. Comm'rs*, 151 F.3d 1313, 1317 (10th Cir. 1998)) (internal quotation marks omitted). Our summary of the analytical posture in *Becker* can be neatly repackaged for our purposes here:

> The district court disposed of [Mr. Bleck's] claim against both Officer [Martinez] and [Alamosa] based on its conclusion that Officer [Martinez] did not violate [Mr. Bleck's] constitutional rights. While it was unnecessary to review that conclusion in reviewing the district court's grant of summary judgment to Officer [Martinez], it is necessary to review that conclusion with respect to [Alamosa].

*Becker*, 709 F.3d at 1025. As a consequence, we must determine whether the district court properly granted summary judgment as a matter of law to Alamosa. We conclude that it did not. More specifically, in our view, the district court committed a legal error in assessing the role that Officer Martinez's gun could play in his intentional efforts to restrain Mr. Bleck's

freedom of movement. This legal error led the district court to misconstrue the operative facts and to erroneously conclude that Officer Martinez did not effectuate a Fourth Amendment seizure of Mr. Bleck. Because he could not establish a seizure, reasoned the court, Mr. Bleck's constitutional claim must fail – which in turn doomed his claim against Alamosa. For the reasons explicated below, we cannot uphold that result.

Turning to the district court's legal error, after surveying a number of cases that it admitted did not "reflect[ ] precisely the facts of this case," the court concluded that "[a] Fourth Amendment seizure may be found only where there is evidence suggesting that the officer's decision to fire his weapon was volitional." Aplt. App. at 945. Yet, the court's reasoning in this regard runs directly contrary to the gun hypothetical in *Brower*, in which the victim would have been seized if "stopped by the *accidental* discharge of a gun with which he was meant only to be bludgeoned," so long as the gun was "the very instrumentality set in motion or put in place" in order to effect a seizure. 489 U.S. at 599 (emphasis added). In other words, there is simply no requirement that Officer Martinez had to intend to *fire* the gun in order to effect a Fourth Amendment seizure under *Brower*. As such, the district court's reasoning is legally infirm.

Viewing the facts through this legally distorted lens, the district court failed to recognize that the gun – even if not volitionally fired – could play a significant role in the intentional efforts of Officer Martinez

to restrain Mr. Bleck's freedom of movement. Indeed, it was the court's distorted view that ultimately led it to the conclusion that this case was ripe for summary judgment: "The issue might be inappropriate for summary resolution if the evidence suggested any genuine issue of material fact about whether Officer Martinez *intentionally fired* his weapon. Yet even plaintiff's own experts admit there is no evidence suggesting that the shooting was attributable to anything other than an accidental discharge." Aplt. App. at 944 (emphasis added).

More specifically, the district court found that "there is no genuine issue of material fact to suggest other than that Officer Martinez's intention was to seize [Mr. Bleck] by going hands on and pushing him to the bed or the floor. The instrumentality, therefore, was the hands on technique." *Id.* at 942. The court further reasoned, "Although undoubtedly the gun was intended as a show of the officer's authority, it was not the instrumentality by which Officer Martinez intended to effectuate the seizure itself." *Id.* In other words, in the district court's view, Officer Martinez's use of the gun was "incidental" to the intentional hands-on technique – *viz.*, "[t]he means intentionally applied was the use of hands on, not the gun." *Id.* at 943. Put another way, under the district court's reading of the record, the sole instrumentality intentionally employed to effectuate the seizure was the hands-on technique; so, when the gun discharged the bullet, the resulting stop of Mr. Bleck was not the

product of intention and, consequently, it was of no Fourth Amendment significance.

As noted, Mr. Bleck's version of the facts is to the contrary. In a nutshell, under his view, Officer Martinez intended to have the gun in his hand when he went hands on with Mr. Bleck, *see id.* at 348, and because "the presence of the gun in restraining Mr. Bleck's freedom of movement was not unintentional," Aplt. Opening Br. at 10, the seizure was intentionally accomplished through the tandem action of the hands-on technique and the display of the gun. In other words, under Mr. Bleck's view, "the instant case is *not* an *accidental shooting* case," Aplt. Reply Br. at 3: Officer Martinez's use of the gun in a show of authority was *part of* the instrumentality intentionally applied to effectuate a restraint of Mr. Bleck's freedom of movement. And this two-pronged approach in fact succeeded in intentionally restraining Mr. Bleck (i.e., seizing him), albeit through accidental means (i.e., the gun's discharge).

As we see it, the district court's divergent view of the facts does not suggest the presence of a genuine dispute of material fact because it is predicated on a legal error. *Cf. Pahls v. Thomas*, 718 F.3d 1210, 1232 (10th Cir. 2013) ("[I]f the district court commits *legal* error en route to a *factual* determination, that determination is thereby deprived of any special solicitude it might otherwise be owed on appeal."). As noted, this error rendered Officer Martinez's use of the gun – as a matter of law – incidental to the instrumentality that he intentionally applied to effect a stop of Mr.

Bleck. However, if we assess the facts free from the influence of this legal error, in our view, it is undisputed that the gun was part of Officer Martinez's instrumentality.

This is so, even when we construe the facts in the light most favorable to Alamosa. We are unaware of any evidence in the record to contradict the assessment that Officer Martinez intentionally employed his weapon (through displaying it in a show of authority), while simultaneously intentionally applying the hands-on technique – both with the goal of effecting a stop of Mr. Bleck. Indeed, even the district court did not question that "undoubtedly the gun was intended as a show of the officer's authority," Aplt. App. at 942, but the court deemed this fact to be legally irrelevant because Officer Martinez did not intend to discharge the bullet that struck Mr. Bleck from the gun. As we have demonstrated, the court's reasoning regarding this point is legally infirm.

Accordingly, we believe that there is no genuine factual dispute concerning the issue of seizure *vel non*. That is, as we see it, the evidence undisputedly demonstrates that Officer Martinez intentionally accomplished the termination of Mr. Bleck's freedom of movement through the tandem action of the hands-on technique *and* the display of his gun. And, because this is true under any view of the facts – even the view most favorable to Alamosa – we are situated not only to reverse the district court's judgment in favor of Alamosa on the seizure issue, but also to rule on that issue in Mr. Bleck's favor as a matter of law. *See*

*EEOC v. Abercrombie & Fitch Stores, Inc.*, ___ F.3d ___, 2013 WL 5434809, at *1 (10th Cir. 2013) ("[W]e reverse the district court's grant of summary judgment to the EEOC. Abercrombie is entitled to summary judgment as a matter of law because there is no genuine dispute of material fact. . . ."). In other words, as a legal matter, Mr. Bleck prevails on the seizure issue with regard to his attempt to impose municipal liability on Alamosa.

That does not end the constitutional analysis, however. Then, the "pivotal question," *Abraham v. Raso*, 183 F.3d 279, 288 (3d Cir. 1999), becomes whether the seizure was reasonable. *See*, *e.g.*, *Childress v. City of Arapaho*, 210 F.3d 1154, 1156 (10th Cir. 2000) ("To state a claim under the Fourth Amendment, plaintiffs must show both that a 'seizure' occurred and that the seizure was 'unreasonable.'" (quoting *Brower*, 489 U.S. at 599)). In answering that question, the facts must be assessed through a different prism. As the Supreme Court noted in *Scott*:

> The only question in *Brower* was whether a police roadblock constituted a *seizure* under the Fourth Amendment. In deciding that question, the relative culpability of the parties is, of course, irrelevant. . . . Culpability *is* relevant, however, to the *reasonableness* of the seizure – to whether preventing possible harm to the innocent justifies exposing to possible harm the person threatening them.

550 U.S. at 384 n.10 (citations omitted); *see also Brower*, 489 U.S. at 599 ("This is not to say that the precise character of the roadblock is irrelevant to further issues in this case. 'Seizure' alone is not enough for § 1983 liability; the seizure must be 'unreasonable.' Petitioners can claim the right to recover for Brower's death only because the unreasonableness they allege consists precisely of setting up the roadblock in such manner as to be likely to kill him."). Because the district court here failed to recognize how the facts could be construed in the light most favorable to Mr. Bleck to reflect a significant role for the gun in the intentional efforts of Officer Martinez to restrain him, the district court concluded that there was no seizure; it therefore had no occasion to consider the distinct question of whether any such seizure should be deemed reasonable.

Even though the reasonableness of a seizure in an excessive-force case is partially a legal question, *Cavanaugh v. Woods Cross City*, 718 F.3d 1244, 1254 (10th Cir. 2013) (noting "the mixed factual-legal inquiry in deciding whether the force used was reasonable"), we believe that prudence counsels against reaching this question in the first instance. Indeed, even as to a purely legal question, we benefit in many instances from giving the district court the opportunity to consider it first. *See Cent. Hudson Gas & Elec. Corp. v. EPA*, 587 F.2d 549, 557 (2d Cir. 1978) ("The benefits which result from a system in which issues of law are resolved first by a district court and then by the Courts of Appeals are well known particularly to

the judges on the Courts of Appeals. Whether or not the Court of Appeals agrees with a decision rendered by a district court in any given case, it is invariably true that the primary review of the case by the lower court is of invaluable assistance."); *cf. Weise v. Casper*, 507 F.3d 1260, 1268 n.1 (10th Cir. 2007) (McConnell, J., dissenting) ("[B]ecause the district court addressed only the issue of whether the defendants, as private individuals, are entitled to invoke the protections of qualified immunity, the proper course is for this court to remand and allow the district court to sort through the merits issues in the first instance."). Moreover, even if the district court were to conclude here that Officer Martinez's seizure was unreasonable, that would not mark the end of the road for Mr. Bleck in his efforts to impose municipal liability on Alamosa. There would be – as reflected in our instructions below – additional questions to answer. Accordingly, we consider the better course here to be a remand to the district court for further proceedings.

Specifically, on remand, the district court should initially determine whether there are any genuine disputes of material fact concerning whether Officer Martinez's seizure of Mr. Bleck was unreasonable and whether Mr. Bleck is entitled to judgment on this question as a matter of law – *viz.*, whether Mr. Bleck has established as a legal matter that Officer Martinez violated his Fourth Amendment rights by effecting an unreasonable seizure. If so, then "the district court must determine whether [Mr. Bleck] can withstand summary judgment as to the second

element of his municipal liability claim," *Becker*, 709 F.3d at 1027 – regarding the existence of "a municipal policy or custom [that] was the moving force behind the constitutional deprivation," *Myers*, 151 F.3d at 1316.

## IV

For the foregoing reasons, we **AFFIRM** on the grounds of qualified immunity the district court's summary-judgment ruling with respect to Officer Martinez, and we **REVERSE** the district court's summary-judgment ruling with respect to Alamosa and **REMAND** for further proceedings consistent with this order.

Entered for the Court

JEROME A. HOLMES
Circuit Judge

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO.**
**Judge Robert E. Blackburn**

Civil Case No. 10-cv-03177-REB-KMT

STEPHEN BLECK,

Plaintiff,

v.

CITY OF ALAMOSA, COLORADO, and
JEFF MARTINEZ, individually, and in his
official capacity as a Law Enforcement Officer
of the Alamosa Police Department,

Defendants.

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**ORDER**

(Filed Mar. 14, 2012)

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**Blackburn, J.**

The matters before me are (1) **Defendants' Motion for Judgment on the Pleadings and for Summary Judgment** [#38][1] filed August 15, 2011; and (2) **Plaintiff's Motion for Summary Judgment Pursuant to Federal Rule of Civil Procedure 56** [#130] filed January 20, 2012. I deny

[1] "[#38]" is an example of the convention I use to identify the docket number assigned to a specific paper by the court's electronic case filing and management system (CM/ECF). I use this convention throughout this order.

plaintiff's motion and grant defendants' motion in part and deny it as moot in part.[2]

## I. JURISDICTION

I have jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 (federal question) and 1367 (supplemental jurisdiction).

## II. STANDARD OF REVIEW

Both plaintiff and defendants have moved for summary judgment.[3] Summary judgment is proper when there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of

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[2] The issues raised by and inherent to the cross-motions for summary judgment are fully briefed, obviating the necessity for evidentiary hearing or oral argument. Thus, the motions stand submitted on the briefs. *Cf.* **FED. R. CIV. P**. 56(c) and (d). ***Geear v. Boulder Cmty. Hosp.***, 844 F.2d 764, 766 (10th Cir.1988) (holding that hearing requirement for summary judgment motions is satisfied by court's review of documents submitted by parties).

[3] The mere fact that the parties have filed cross-motions for summary judgment does not necessarily indicate that summary judgment is proper for either party. ***See Atlantic Richfield Co. v. Farm Credit Bank of Wichita***, 226 F.3d 1138, 1148 (10th Cir. 2000); ***James Barlow Family Ltd. Partnership v. David M. Munson, Inc.***, 132 F.3d 1316, 1319 (10th Cir. 1997). ***See also Buell Cabinet Co. v. Sudduth***, 608 F.2d 431, 433 (10th Cir. 1979) ("Cross-motions for summary judgment are to be treated separately; the denial of one does not require the grant of another.").

law.[4] **FED. R. CIV. P**. 56(c); ***Celotex Corp. v. Catrett***, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). A dispute is "genuine" if the issue could be resolved in favor of either party. ***Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp***., 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986); ***Farthing v. City of Shawnee***, 39 F.3d

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[4] Defendants' motion also invokes, as to certain claims, a request for judgment on the pleadings as provided by Fed. R. Civ. P. 12(c). "A motion for judgment on the pleadings under Rule 12(c) is treated as a motion to dismiss under Rule 12(b)(6)," ***Atlantic Richfield Co. v. Farm Credit Bank of Wichita***, 226 F.3d 1138, 1160 (10th Cir. 2000), and, thus, considers the sufficiency of the allegations of the complaint, ***see Ridge at Red Hawk, L.L.C. v. Schneider***, 493 F.3d 1174, 1177 (10th Cir. 2007). However, entry of the **Final Pretrial Order** ([#187], filed March 1, 2012) essentially moots arguments directed toward the complaint, which the Pretrial Order supplants and supersedes. ***See Youren v. Tintic School District***, 343 F.3d 1296, 1304 (10th Cir. 2003) (pretrial order supersedes all other pleadings and governs case thereafter); ***Safety Technologies, L.C. v. LG Technologies, LTEE***, 2000 WL 1585631 at *3-4 (D. Kan. Oct. 11, 2000) ("The focus of the defendants' motions on the failure of the complaint to plead fraud with particularity or to state a claim is, therefore, misguided. The pretrial order sets out the plaintiffs' factual allegations in more detail than the complaint and controls the course of this lawsuit."). Accordingly, I will deny defendants' motion for judgment on the pleadings as moot.

However, I am compelled to point out to plaintiff that, despite his apparent conviction that he has had a motion to amend the complaint pending before the court by virtue of his response to defendants' 12(c) motion, he is mistaken, and in obvious need of a more thorough familiarity with the Local Rules of Practice for the United States District of Colorado-Civil. ***See*** **D.C.COLO.LCivR** 7.1 C. ("A motion shall not be included in a response or reply to the original motion.").

1131, 1135 (10th Cir. 1994). A fact is "material" if it might reasonably affect the outcome of the case. ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); ***Farthing***, 39 F.3d at 1134.

A party who does not have the burden of proof at trial must show the absence of a genuine fact issue. ***Concrete Works, Inc. v. City & County of Denver***, 36 F.3d 1513, 1517 (10th Cir. 1994), ***cert. denied***, 115 S.Ct. 1315 (1995). By contrast, a movant who bears the burden of proof must submit evidence to establish every essential element of its claim or affirmative defense. ***See In re Ribozyme Pharmaceuticals, Inc. Securities Litigation***, 209 F.Supp.2d 1106, 1111 (D. Colo. 2002). In either case, once the motion has been supported properly, the burden shifts to the nonmovant to show by tendering depositions, affidavits, and other competent evidence that summary judgment is not proper. ***Concrete Works***, 36 F.3d at 1518. All the evidence must be viewed in the light most favorable to the party opposing the motion. ***Simms v. Oklahoma ex rel. Department of Mental Health and Substance Abuse Services***, 165 F.3d 1321, 1326 (10th Cir.), ***cert. denied***, 120 S.Ct. 53 (1999). However, conclusory statements and testimony based merely on conjecture or subjective belief are not competent summary judgment evidence. ***Rice v. United States***, 166 F.3d 1088, 1092 (10th Cir.), ***cert. denied***, 120 S.Ct. 334 (1999); ***Nutting v. RAM Southwest, Inc.***, 106 F.Supp.2d 1121, 1123 (D. Colo. 2000).

## III. ANALYSIS

On August 6, 2010, Colorado State Patrol Dispatch received a 911 call from Andrew Tesar, a mental health counselor, reporting that he had received a distressing call from plaintiff. Tesar reported that plaintiff, a Vietnam War veteran, was re-experiencing trauma and further was intoxicated, suicidal, and possibly armed. Officers with the Alamosa Police Department were dispatched to the local hotel where plaintiff was reported to be staying to perform a welfare check. Defendant Jeff Martinez was the first to arrive on the scene, followed by Officers (and former defendants) B. Cooper and Kenneth Anderson and Corporal Robert Lockwood.[5]

The hotel clerk confirmed that plaintiff had checked in and that he had been drinking. Officers recontacted Mr. Tesar, who reported that plaintiff was on the phone with Mr. Tesar's wife and was threatening to "blow his head off." In a subsequent call,

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[5] Corporal Lockwood and Officer Anderson were originally named as defendants in this action but were removed from the caption of the **Amended Complaint** [#23] filed March 11, 2011. Officer Cooper (as well as Alamosa Chief of Police, John Jackson) were dismissed by stipulation after defendants filed the present motion. (***See*** **Stipulated Motion for Partial Dismissal** [#108] filed December 13, 2011.) As I granted the latter motion (***see*** **Order of Dismissal as to Defendants B. Cooper and John Jackson, Only** [#109] filed December 14, 2011), defendants' motion is moot to the extent it seeks relief under Rule 12(c) and/or Rule 56 on behalf of these parties.

Mr. Tesar reported that plaintiff had cut off communication with him.

Based on these facts, the officers believed plaintiff was an imminent danger to himself and potentially to others. Having obtained a key card from hotel personnel, the officers decided to enter the room without knocking. Officer Martinez entered the room first with his duty weapon drawn and in the ready position. The other officers followed immediately.

As he entered the room, Officer Martinez saw plaintiff sitting on the bed facing away from him. Officer Martinez's testimony that he could not see plaintiff's hands is not disputed. The officers announced loudly that they were police and commanded plaintiff to show his hands and lie down on the floor. Plaintiff failed to comply and, in fact, may have attempted to stand instead.

Still holding his gun in his right hand, Officer Martinez attempted to push plaintiff back down on the bed by reaching around plaintiff's right side with his free hand, a procedure that has been referred to herein as "going 'hands on.'" This decision violated police department protocols, which requires an officer to holster his weapon before going hands on with a suspect. Officer Martinez testified that he recalled his finger being outside the trigger guard when he moved to go hands on with plaintiff.[6] Nevertheless, in

[6] An assertion that Corporal Lockwood corroborated at his deposition.

attempting to gain control of plaintiff in this manner, Officer Martinez's weapon discharged, shooting plaintiff in the hip.

This lawsuit followed. Of plaintiff's four original claims, three remain: (1) a Fourth Amendment claim for excessive force against Officer Martinez in his official and individual capacities; (2) a claim against the City of Alamosa for inadequate training/supervision with regard to use of force in situations involving mentally ill individuals;[7] and (3) a state law claim for battery against Officer Martinez in his individual capacity.[8] Because I find that the circumstances of this case fail to establish a seizure within the meaning of the Fourth Amendment, I grant defendants' motion to dismiss the two federal claims. Further, I decline to exercise my discretion to continue to assert supplemental jurisdiction over plaintiff's pendant state law claim, and, therefore, dismiss that claim without prejudice.

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[7] By virtue of the entry of the Final Pretrial Order, plaintiff has abandoned his claim for maintenance of an unconstitutional policy. To the extent defendants' motion seeks relief on that basis, therefore, it is moot.

[8] Plaintiff has confessed the official capacity portion of his battery claim against Officer Martinez in his response to defendants' motion. (***See*** **Plaintiff's Response to August 15, 2011 Defendants' Motion for Judgment on the Pleadings and for Summary Judgment (Doc. No. 38)** at 16 [#47] filed September 15, 2011.)

Plaintiff and defendants agree that the standards for identifying whether a Fourth Amendment violation occurred here must be determined by reference to the Supreme Court's decision in ***Brower v. County of Inyo***, 489 U.S. 593, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989). In ***Brower***, the Court considered whether a fleeing suspect had been seized for purposes of the Fourth Amendment by a police roadblock. ***See id.***, 109 S.Ct. at 1380. The Court concluded that the suspect had been seized because the police, although perhaps not intending the suspect to fatally crash into the roadblock, had established it with the intent to terminate his flight:

> Thus, if a parked and unoccupied police car slips its brake and pins a passerby against a wall, it is likely that a tort has occurred, but not a violation of the Fourth Amendment. And the situation would not change if the passerby happened, by lucky chance, to be a serial murderer for whom there was an outstanding arrest warrant – even if, at the time he was thus pinned, he was in the process of running away from two pursuing constables. It is clear, in other words, that a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally desired termination of an individual's freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of

> movement *through means intentionally applied*. That is the reason there was no seizure in the hypothetical situation that concerned the Court of Appeals. The pursuing police car sought to stop the suspect only by the show of authority represented by flashing lights and continuing pursuit; and though he was in fact stopped, he was stopped by a different means – his loss of control of his vehicle and the subsequent crash. If, instead of that, the police cruiser had pulled alongside the fleeing car and sideswiped it, producing the crash, then the termination of the suspect's freedom of movement would have been a seizure.

***Id***. at 1381 (emphasis in original). In other words, pursuant to ***Brower***, a seizure must be the result of a willful act. ***Id***.

There is no question but that, in the ordinary sense of the term, plaintiff was "seized," and that Officer Martinez intended to seize him. Nevertheless, ***Brower*** teaches that this fact alone is insufficient to give rise to a seizure that implicates the Fourth Amendment. To determine whether the seizure has constitutional dimension, I must focus more precisely on what means or instrumentality Officer Martinez intended to effectuate the seizure. To be clear, this inquiry does not delve into Officer Martinez's subjective intent, *i.e.*, whether he intended to harm plaintiff in the process of effectuating the seizure, which

subjective intent is irrelevant for Fourth Amendment purposes. ***See id***.[9] Instead, the question is whether plaintiff was "stopped by the very instrumentality set in motion or put in place in order to achieve that result." ***Id***. at 1382.

On that score there is no genuine issue of material fact to suggest other than that Officer Martinez's intention was to seize plaintiff by going hands on and pushing him to the bed or the floor. The instrumentality, therefore, was the hands on technique.[10] A gun was not required – indeed, was contraindicated – in the execution of that technique. Although undoubtedly the gun was intended as a show of the officer's authority, it was not the instrumentality by which Officer Martinez intended to effectuate the seizure itself. ***See id***. at 1381 (use of police sirens and flashing lights in pursuit of car that subsequently loses control and crashes is not a seizure: "The pursuing police car sought to stop the suspect only by the show of authority represented by flashing lights and

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[9] This is one principal reason for the Supreme Court's caution that "[i]n determining whether the means that terminates the freedom of movement is the very means that the government intended we cannot draw too fine a line, or we will be driven to saying that one is not seized who has been stopped by the accidental discharge of a gun with which he was meant only to be bludgeoned, or by a bullet in the heart that was meant only for the leg." ***Brower***, 109 S.Ct. at 1382.

[10] Plaintiff's suggestion that Officer Martinez himself was the instrumentality applies the test at to [sic] high a level of generality. Were this the test, a Fourth Amendment seizure would be found in every case.

continuing pursuit; and though he was in fact stopped, he was stopped by a different means[.]"); ***Bella v. Chamberlain***, 24 F.3d 1251, 1256 (10th Cir. 1994) (shots fired at plaintiff did not constitute seizure but only "an assertion of authority"), ***cert. denied***, 115 S.Ct. 898 (1995).

In other words, Officer Martinez's use of the gun was incidental to the intentional use of the hands on technique. The means intentionally applied was the use of hands on, not the gun. Proceeding with the technique while still holding a gun may well have been negligent, but the Constitution is concerned only with intentional conduct. ***See Brower***, 109 S.Ct. at 1381 ("[T]he Fourth Amendment addresses misuse of power, not the accidental effects of otherwise lawful government conduct.") (citation and internal quotation marks omitted); ***Apodaca v. Rio Arriba County Sheriff's Department***, 905 F.2d 1445, 1447 (10th Cir. 1990) ("[O]ne seized unintentionally does not have a constitutional complaint."); ***Koetter v. Davies***, 2010 WL 3791482 at *5 (D. Utah Sept. 22, 2010) ("[T]he Fourth Amendment prohibition on excessive force during arrest does not apply to unintentional or incidental applications of force."). ***See also Dodd v. City of Norwich***, 827 F.2d 1, 7 (2nd Cir. 1987) (opinion on reargument) ("It makes little sense to apply a standard of reasonableness to an accident."), ***cert. denied***, 108 S.Ct. 701 (1988). ***See also Cole v. Bone***, 993 F.2d 1328, 1333 (8th Cir. 1993) ("The Fourth Amendment prohibits unreasonable seizures, not unreasonable or ill-advised conduct in general.").

The issue might be inappropriate for summary resolution if the evidence suggested any genuine issue of material fact about whether Officer Martinez intentionally fired his weapon. Yet even plaintiff's own experts admit there is no evidence suggesting that the shooting was attributable to anything other than an accidental discharge. In considering similar scenarios, the courts have concluded unanimously that, without some dispute regarding volition on the part of the officer who fired the shot, no Fourth Amendment seizure occurs. ***See, e.g., Dodd***, 827 F.2d at 7-8 (suspect who reached for gun while being handcuffed shot when officer reflexively pulled weapon away); ***Brice v. City of York***, 528 F.Supp.2d 504, 513 (M.D. Pa. 2007) (summary judgment appropriate where plaintiff's only evidence of intent was officer's decision to carry his weapon into melee to restrain suspect who had been tackled by several officers while attempting to flee; "An excessive force claim may proceed to substantive analysis only after the excessive force plaintiff establishes a threshold volitional act."); ***Pollino v. City of Philadelphia***, 2005 WL 372105 at *8 (E.D. Pa. Feb. 15, 2005) (granting summary judgment where plaintiff failed to produce credible evidence disputing defendant's assertion that weapon discharged accidentally during struggle with plaintiff); ***Clark v. Buchko***, 936 F.Supp. 212, 219 (D.N.J. 1996) (summary judgment appropriate where suspect, after initially lying prone on floor to be handcuffed, pushed himself back up, backing into gun of officer who was providing cover, and gun discharged); ***Troublefield v. City of Harrisburg***, 789

F.Supp. 160, 166 (M.D. Pa. 1992) (weapon fired as officer was reholstering it after handcuffing suspect; "[S]ome nature of volitional act on the part of the state actor must cause the harm to plaintiff for a fourth amendment excessive force claim to sound. Negligence in pulling out a firearm or in reholstering it is not sufficient[.]"), ***aff'd***, 980 F.2d 724 (3d Cir. 1992); ***Glasco v. Ballard***, 768 F.Supp. 176, 177, 180 (E.D. Va. 1991) (officer exited car to speak to suspect with gun drawn but reached back inside car to stop it drifting forward, accidentally shooting suspect); ***Matthews v. City of Atlanta***, 699 F.Supp. 1552, 1556-57 (N.D. Ga. 1988) (summary judgment appropriate where no evidence to dispute that gun discharged accidentally when, as officer reached through cab of suspect's truck to turn off engine, truck lurched forward, causing shot that killed suspect). ***Cf. Cardona v. Cleveland***, 1997 WL 720383 at *4 (6th Cir. 1997) (affirming denial of summary judgment where physical and forensic evidence raised sufficient doubt as to officer's version of events resulting in fatal shooting of suspect); ***Otey v. Marshall***, 121 F.3d 1150, 1151, 1153-54 (8th Cir. 1997) (affirming denial of summary judgment to officer who claimed his gun accidentally discharged when he slipped and fell in pursuing suspect where witnesses disputed officer's version of events); ***Owl v. Robertson***, 79 F.Supp.2d 1104, 1114 (D. Neb. 2000) (genuine issues of material fact precluded summary judgment where although officer claimed shooting was accidental, witnesses testified that officer had yelled "I'm going to fucking

blow your head off" seconds before shooting suspect in the neck)

Granted, none of these cases reflects precisely the facts of this case, although ***Brice*** comes close. Nevertheless, the principle to be derived is pellucid: A Fourth Amendment seizure may be found only where there is evidence suggesting that the officer's decision to fire his weapon was volitional. No such evidence having been adduced in this case, Officer Martinez is entitled to summary judgment. Moreover, because plaintiff's claim for failure to train/supervise as to the use of force in situations involving mentally ill suspects depends on a showing that a constitutional violation occurred in the first instance, ***see Carr v. Castle***, 337 F.3d 1221, 1228 (10th Cir. 2003), the City of Alamosa is entitled to summary judgment on that claim as well.

Having resolved all plaintiff's federal claims, the only claim remaining is that for battery under state law against Officer Martinez in his individual capacity. When all federal claims have been dismissed prior to trial, the court generally should decline to exercise supplemental jurisdiction over pendant state law claims. ***United States v. Botefuhr***, 309 F.3d 1263, 1273 (10th Cir. 2002). I find it appropriate to do so here, and, thus, will dismiss plaintiff's remaining state law claim.

## IV. ORDERS

**THEREFORE, IT IS ORDERED** as follows:

1. That **Defendants' Motion for Judgment on the Pleadings and for Summary Judgment** [#38] filed August 15, 2011, is **GRANTED IN PART** and **DENIED AS MOOT IN PART** as follows:

a. That the motion is **GRANTED** with respect to plaintiff's First and Second Claims for Relief; and

b. That the motion is **DENIED AS MOOT** with respect to

(1) Defendants' motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c);

(2) Any and all claims asserted against former defendants, John Jackson, individually and in his official capacity as Chief of Police of the Alamosa Police Department, and B. Cooper, individually and in his official capacity as Law Enforcement Officer of the Alamosa Police Department;

(3) Plaintiff's Third Claim for Relief; and

(4) Plaintiff's Fourth Claim for Relief, insofar as it is asserted against defendant, Jeff Martinez, in his official capacity as Law Enforcement Officer of the Alamosa Police Department;

2. That **Plaintiff's Motion for Summary Judgment Pursuant to Federal Rule of Civil Procedure 56** [#130] filed January 20, 2012, is **DENIED**;

3. That plaintiff's First, Second, and Third Claims for Relief, as well as plaintiff's Fourth Claim for Relief, insofar as it is brought against defendant, Jeff Martinez, in his official capacity as Law Enforcement Officer of the Alamosa Police Department, are **DISMISSED WITH PREJUDICE**;

4. That the court **DECLINES** to exercise supplemental jurisdiction over plaintiff's Fourth Claim for Relief, insofar as it is brought against defendant, Jeff Martinez, individually, and that claim is **DISMISSED WITHOUT PREJUDICE**;

5. That judgment **SHALL ENTER** as follows: on behalf of defendants, City of Alamosa, Colorado, and Jeff Martinez, individually and in his official capacity as Law Enforcement Officer of the Alamosa Police Department, against plaintiff, Stephen Bleck, as follows:

a. As to plaintiff's First Claim for Relief, on behalf of defendant, City of Alamosa, Colorado, against plaintiff, Stephen Bleck; provided, further, that the judgment as to this claim shall be with prejudice;

b. As to plaintiff's Second and Third Claims for Relief, on behalf of defendant, Jeff Martinez, individually and in his official capacity as Law Enforcement Officer of the Alamosa Police Department, against plaintiff, Stephen Bleck; provided, further, that the judgment as to this claim shall be with prejudice;

c. As to plaintiff's Fourth Claim for Relief, on behalf of defendant, Jeff Martinez, in his official capacity as Law Enforcement Officer of the Alamosa Police Department, against plaintiff, Stephen Bleck; provided, further, that the judgment as to this claim shall be with prejudice; and

d. As to Plaintiff's Fourth Claim for Relief, on behalf of defendant, Jeff Martinez, individually, against plaintiff, Stephen Bleck; provided, further, that the judgment as to this claim shall be without prejudice;

5. That judgment also **SHALL ENTER** on behalf of defendants, John Jackson, individually and in his official capacity as Chief of Police of the Alamosa Police Department, and B. Cooper, individually and in his official capacity as Law Enforcement Officer of the Alamosa Police Department, against plaintiff, Stephen Bleck, in accordance with my **Order of Dismissal as to Defendants B. Cooper and John Jackson, Only** [#109] filed December 14, 2011; provided, further, that the judgment as to the claims asserted against these defendants shall be with prejudice;

6. That all other currently pending motions, including, but not limited to (a) defendants' **Motion To Strike Plaintiff's Retained Expert Witnesses** [#122], filed January 5, 2012; (b) **Plaintiff's Motion To Strike Defendants' Expert Major Ijames and Request for Sanctions for Failure To Produce Records Pursuant to Subpoena Duces Tecum**

[#123] filed January 5, 2012; and (c) **Plaintiff's Motion To Strike Defendants' Retained Expert Witness Donna Heltzell, R.N.** [#151], filed February 9, 2012, are **DENIED AS MOOT**;

7. That the telephonic setting conference currently scheduled for April 10, 2012, at 10:00 a.m. (MDT), is **VACATED**; and

8. That on all claims dismissed with prejudice, defendants are **AWARDED** their costs, to be taxed by the clerk of the court in the time and manner prescribed by Fed. R. Civ. P. 54(d)(1) and D.C.COLO.LCivR 54.1.

Dated March 14, 2012, at Denver, Colorado.

**BY THE COURT:**

/s/ Bob Blackburn
Robert E. Blackburn
United States District Judge

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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| THE ESTATE OF STEVEN WAYNE BLECK, by Joanna Churchill, Personal Representative for Steven Bleck, deceased,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>CITY OF ALAMOSA, COLORADO, et al.,<br><br>Defendants-Appellees. | No. 12-1139 |

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**ORDER**

(Filed Dec. 16, 2013)

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Before **KELLY**, **McKAY**, and **HOLMES**, Circuit Judges.

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Appellees' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court

requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk