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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MARK ARNOLD, as special administrator and duly-appointed representative and on behalf of heirs of the estate of Ciara Howard,

Plaintiff - Appellant,

v.

CITY OF OLATHE, KANSAS; WADE LANPHEAR; TIM SWEANY; IAN MILLS; STEVE MENKE; JAMESON MILLER; THERON CHAULK; CALVIN HAYDEN; CLINTON PETERSON,

Defendants - Appellees,

and

MICHAEL BUTAUD; CHAD MELLICK; BRIAN WESSLING; JOHNSON COUNTY, KANSAS; BOARD OF COUNTY COMMISSIONERS OF JOHNSON COUNTY, KANSAS; NATE DENTON; TAMARA SPARKS,

Defendants.

No. 21-3152

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 2:18-CV-02703-HLT)

Ryan J. Gavin, Morgan & Morgan, St. Louis, Missouri, for Plaintiff-Appellant.

Kirk T. Ridgway (Alex S. Gilmore, with him on the brief), Ferree, Bunn & Ridgway, Chtd., Overland Park, Kansas, for Defendants-Appellees.

Andrew D. Holder and Michael K. Seck of Fisher, Patterson, Sayler & Smith, L.L.P., Overland Park, Kansas, for Defendants - Appellees.

Before **TYMKOVICH**, Chief Judge, **HARTZ**, and **McHUGH**, Circuit Judges.

TYMKOVICH, Chief Judge.

Ciara Howard brandished a gun at three police officers after an extended standoff with hours of negotiations. The officers shot her, and she died from her wounds. Plaintiff Mark Arnold brought several claims on behalf of Ms. Howard's estate, alleging that the officers used unconstitutionally excessive force. The district court found that the officers did not violate Howard's constitutional rights and dismissed the case.

We affirm. The officers did not recklessly create the need to use deadly force. And when the officers did use force, it was reasonably necessary to prevent harm to themselves and others. The officers are thus entitled to qualified immunity.

I. Background

The plaintiff is Mark Arnold, who is the special administrator of Ciara Howard's estate.[1] For the purposes of this appeal, the defendants are Olathe Police Department

[1] For review of this summary judgment order, the facts are construed in favor of non-movant Arnold. *Henderson v. Inter-Chem Coal Co.*, 41 F.3d 567, 569 (10th Cir. 1994).

(OPD) officers, the City of Olathe, and Jefferson County Sheriff's Office (JCSO) officers. The OPD officers are Tim Sweany, Ian Mills, and Jameson Miller. OPD Major Wade Lanphear was present at the time of the shooting but is not a party on appeal. The JCSO officers are Theron Chaulk and Clinton Peterson.

On August 21 and 22, 2017, the Johnson County District Court issued bench warrants for Howard. The warrants were for felony supervision violations and aggravated escape from custody. On August 23, OPD received a call that Howard was hiding at her boyfriend Larry Sumners's house.

A group of OPD officers including Miller arrived at Sumners's house at 2:48 p.m. OPD was the first agency to arrive and thus took control of the scene. Sumners told the officers that he owned the house and that Howard had left the house after they had gotten into a fight. Sumners initially denied entry to the officers. He later admitted, however, that Howard was inside and gave the officers verbal and written consent to search the house. Sumners also told the police that he kept a .45 caliber pistol with hollow-point bullets in the house under a mattress, but that he had hidden it in a closet and Howard did not know where it was. At 3:04 p.m., officers saw Howard trying to crawl under a mattress, which lead the officers to believe she was searching for the gun.

Between 2:48 p.m. and 3:35 p.m., several JCSO deputies and additional OPD officers arrived. Officer Mills arrived at 3:13 p.m. and called his supervisor, Sweany, to the scene. Sweany arrived at 3:14 p.m. and took control. Sweany learned that there was an unknown female inside who was possibly armed. At some point before 3:30 p.m., JCSO Officers Chaulk and Peterson arrived on the scene. Chaulk and Sweany discussed

whether to request each agency's tactical teams. But neither the police department nor the sheriff's office deployed its tactical team because the officers could not confirm whether Howard was armed.

During the duration of the encounter, between 2:48 p.m. and 5:34 p.m., OPD officers spoke with Howard and tried to convince her to exit the house. She refused their requests to leave.

Around 4:00 p.m., Officer Lanphear, a trained crisis negotiator, arrived on the scene. Though he became the officer in charge, he did not take over for Sweany as a supervisor. At some point after his arrival, Lanphear spoke with Sweany and Sumners and learned that there was a loaded gun in the house. But he did not recommend activation of the OPD Tactical Support Unit (TSU) because it was unclear whether Howard had access to the gun. The TSU team manual states that the TSU will generally be activated for armed or barricaded subjects. Instead of activating the TSU, Lanphear called the Olathe Police Chief and discussed the possibility of sending a K-9 with a team of officers through the front of the house. Lanphear also heard Sweany talking to Howard about unloading the gun. Howard referred to the gun as "her power" and stated she was trying to unload the firearm. Lanphear and Sweany discussed entering the front of the house and sending in a K-9, but Lanphear felt that Howard was talking in circles and the officers' approach should be to elicit Howard's surrender without entering the house.

At 4:12 p.m., Sweany asked Sumners to convince Howard to leave the house. Sumners spoke with Howard and told her that "the SWAT team is coming, and they're

trigger happy." Sumners also asked his girlfriend, "What if they shoot you and you don't die and you're a paraplegic. You want to be a fuckin' vegetable?" Howard responded with comments about committing suicide and said she was ready to die. Sumners told Sweany that a few days earlier Howard had made superficial cuts on her wrists while threatening suicide. Sweany was able to observe Howard from the back window of the house. He observed that she had a clenched jaw and jerky movements. Sweany believed that Howard was under the influence of methamphetamine.

At 5:27 p.m., Howard told Sumners she needed five minutes to think and have a cigarette. Sweany told Howard she had five minutes, requested a shield, and advised he was going to take a team and a K-9 to the front porch. Sweany approached Chaulk, informed him that the Olathe Police Department was going to enter the residence, and asked for a JCSO deputy to assist. Chaulk asked Peterson to assist in the entry, and Peterson agreed.

At 5:34 p.m., officers Sweany, Miller, Mills, and Peterson discussed the layout of the house and formed a line at the front of the house. Mills had a K-9 with him. From 5:34 p.m. to 5:40 p.m., Sweany told Howard to go out the back door and warned her that they would send in the K-9 if she did not leave. Mills had the dog bark several times. At 5:37 p.m., Sweany noted that Howard was in the laundry room. At 5:40 p.m., another officer announced over the radio that Howard's hands were empty. Officers Sweany, Mills (with his K-9), Miller, and Peterson entered the house two hours and fifty-two minutes after they had arrived.

Lanphear was surprised that the officers entered the house. He then entered and evaluated Howard's tone. He did not perceive that the officers' entry had evoked an emotional response. Instead, shut in the laundry room, Howard was mostly asking questions about going to jail.

At 5:42 p.m., an officer outside the house again announced that Howard's hands were empty. At 5:49 p.m., the officers discussed what would happen if Howard exited the laundry room. Until 5:56 p.m., Sweany attempted to convince Howard to come out of the laundry room. The officers directed Howard to leave the laundry room at least 35 times. At one point, Howard opened the laundry room door four to six inches. Miller could see her face, hair, and hands. Howard began making kissing and barking noises at the K-9. As Howard interacted with the K-9, Sweany noticed that she started to become aggressive. Howard looked at the officers as if taking inventory, and then looked back into the laundry room as if trying to orient herself to what items were in the room.

When Howard's demeanor changed, Sweany decided that he needed to enter the laundry room and seize Howard. Sweany realized that Howard "was going to do something that [he] needed to intercept, and retreat was not an option based on the number of people behind [him]." Sweany decided that if Howard started firing through the wall, "there [wa]s no way that [the officers] could have gotten out of that house effectively without an officer getting hurt." Howard said that she was going to call the police and slammed the laundry room door shut. Sweany immediately forced the door open with his shoulder.

Upon entry into the laundry room, Sweany yelled, "Stop! Gun!" Howard was waiving a .45 caliber handgun in the general direction of the officers. Sweany, Miller, and Peterson drew their guns, while Mills attempted to control the K-9. Sweany, Miller, and Peterson repeatedly yelled at Howard to drop the gun. Howard did not comply. Instead, she pointed the gun toward the officers with her finger on the trigger and said, "you ain't cops." When the officers again instructed her to drop the gun, Howard responded, "I'll take every single one of you." Immediately after that statement—about 13 seconds after the officers entered the laundry room—Sweany, Peterson, and Miller fired their guns at Howard. She died from gunshot wounds.

Sumners had informed an officer that Howard was bipolar, but Sweany, Miller, and Peterson testified that they were not aware of this fact before they entered the house.

Arnold, as a special administrator of Howard's estate, brought § 1983 excessive force claims against Peterson, Mills, Miller, and Sweany, along with supplemental state law claims of assault and battery.[2] Arnold also brought a supervisory liability claim against Chaulk and a municipal liability claim against the City of Olathe.

All defendants moved for summary judgment, which the district court granted. The district court found that the individual officers were entitled to qualified immunity because Arnold did not demonstrate that the officers used excessive force or that the

[2] Arnold also brought a wrongful death claim. The district court granted the defendants' motion for summary judgment on this claim because Arnold was not the proper party to bring the claim. Kansas law requires a wrongful-death claim to be pursued by the heirs-at-law of the decedent, and Arnold is not Howard's heir-at-law. *See* K.S.A. § 60-1902. Arnold does not appeal the wrongful death claim.

conduct violated a clearly established constitutional right. The district court also granted summary judgment to Chaulk and the City of Olathe, finding that the supervisory liability and municipal liability claims failed because there was no underlying constitutional violation. Finally, the district court granted summary judgment on Arnold's state law assault and battery claims, determining that the officers' conduct was reasonable and therefore privileged under state law.

Arnold appeals the district court's grant of summary judgment as to the § 1983 excessive force claims, supervisory and municipal liability claims, and the state law assault and battery claims.

II. Analysis

We review the district court's grant of summary judgment based on qualified immunity *de novo*. *Carabajal v. City of Cheyenne*, 847 F.3d 1203, 1028 (10th Cir. 2017). Summary judgment is appropriate only if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In applying this standard, we view the facts and any reasonable inferences in the light most favorable to the non-moving party. *Henderson v. Inter-Chem Coal Co.*, 41 F.3d 567, 569 (10th Cir. 1994).

We address three issues in turn: qualified immunity for individual and supervisory liability, municipal liability, and state law claims of assault and battery.

A. Qualified Immunity

Qualified immunity protects government officials from civil liability so long as "their conduct does not violate clearly established statutory or constitutional rights

of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). The doctrine protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

To overcome a qualified immunity defense, the plaintiff must satisfy a two-part inquiry. *Pearson*, 555 U.S. at 231. First, the plaintiff must establish that the defendant violated a constitutional or statutory right. *Cortez v. McCauley*, 478 F.3d 1108, 1114 (10th Cir. 2007). Second, the plaintiff must prove that the right was clearly established at the time of the defendant's conduct. *Id.* The court can exercise its discretion to decide which prong to address first, considering the particular facts and circumstances of the case. *Pearson*, 555 U.S. at 236. The court must grant the defendant qualified immunity if the plaintiff fails to prove either prong. *Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179, 1186 (10th Cir. 2001).

1. Constitutional Violation

Arnold alleges the officers violated the Fourth Amendment's prohibition on excessive force. *See* U.S. Const. Amend. IV. When a plaintiff claims that officers used unreasonable force during a seizure, we apply the Fourth Amendment's objective reasonableness standard. *Graham v. Connor*, 490 U.S. 386, 388 (1989). To determine whether the use of force was reasonable, we consider the totality of the circumstances from the perspective of a reasonable officer on the scene. *Estate of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1259 (10th Cir. 2008). The reasonableness calculation must embody the reality that officers are forced to make

"split-second judgments," rather than "with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396-97.

The *Graham* Court identified three factors to determine whether a use of force is reasonable: (1) "the severity of the crime at issue," (2) "whether the suspect poses an immediate threat to the safety of the officer or others," and (3) "whether the individual is actively resisting arrest or attempting to evade arrest by flight." *Id.*

The second factor, officer safety, is "undoubtedly the 'most important' and fact intensive." *Pauly v. White*, 874 F.3d 1197, 1216 (10th Cir. 2017) (quoting *Bryan v. MacPherson*, 630 F.3d 805, 826 (9th Cir. 2010)). When an officer has cause to believe there is a serious threat to himself or others, the use of deadly force is reasonable. *Sevier v. City of Lawrence*, 60 F.3d 695, 699 (10th Cir. 1995). To determine the seriousness of a threat, the *Larsen* Court considered multiple non-exclusive factors, including: (1) whether the officers ordered the suspect to drop his weapon and whether the suspect complied with the order, (2) hostile motions made with the weapon toward the officer, (3) the distance separating the officer and the suspect, and (4) the manifest intentions of the suspect. *Larsen*, 511 F.3d at 1260.

In addition to the *Graham* and *Larson* factors, we must also consider whether an officer's "reckless or deliberate conduct during the seizure unreasonably created the need to use such force." *Allen v. Muskogee*, 119 F.3d 837, 840 (10th Cir. 1997); *Estate of Valverde ex rel. Padilla v. Dodge*, 967 F.3d 1049, 1067 (10th Cir. 2020). Our recklessness factor traces back to *Sevier*, 60 F.3d at 699, and *Bella v. Chamberlain*, 24 F.3d 1251, 1256 & n.7 (10th Cir. 1994). In *Bella*, we explained that

"[t]he Fourth Amendment prohibits unreasonable *seizures*, not unreasonable or ill-advised conduct in general . . . Consequently, we scrutinize only the seizure itself, not the events leading to the seizure, for reasonableness under the Fourth Amendment." 24 F.3d at 1256 (citations omitted). But we also noted that "[o]bviously, events immediately connected with the actual seizure are taken into account in determining whether the seizure is reasonable." *Id.* at 1256 n.7. In analyzing conduct immediately associated with a seizure, our cases suggest that recklessness is manifested mostly by "police onslaught at the victim." *Valverde*, 967 F.3d at 1067. For example, in *Allen* the officers ran up to the car while yelling at the victim and attempted to wrench the gun from his hands and open the passenger door. *See* 119 F.3d at 839-41. And in *Estate of Ceballos*, the officers quickly approached the victim, screamed at him to drop the bat he was holding, and refused to give ground as the victim walked toward them. *See* 919 F.3d 1204, 1209-11, 1215-16 (10th Cir. 2019). In both cases, "the officers were dealing with an impaired, emotionally distraught person." *Valverde*, 967 F.3d at 1068.

Yet in the end, our reasonableness inquiry "is always whether, from the perspective of a reasonable officer on the scene, the totality of the circumstances justified the use of force." *Larson*, 511 F.3d at 1260. Whether an officer recklessly creates the need to use force is merely one important consideration in the totality of the circumstances. *See Medina v. Cram*, 252 F.3d 1124, 1132 (10th Cir. 2001) (finding that a court's consideration of an officer's reckless conduct "is simply a

specific application of the 'totality of the circumstances' approach inherent in the Fourth Amendment's reasonableness standard").

It is worth noting that the Supreme Court has not yet adopted the principle that reasonableness requires considering whether an officer recklessly created the need to use force. *See Cty. of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1547 n* (2017) (declining to address the view that assessing the reasonableness of the use of force requires "taking into account unreasonable police conduct prior to the use of force that foreseeably created the need to use it"). Some circuits consider an officer's reckless conduct when evaluating the reasonable use of force. *See, e.g.*, *Est. of Biegert by Biegert v. Molitor*, 968 F.3d 693, 698 (7th Cir. 2020) (noting that an officers' use of force was unreasonable when "the officers acted so far outside the bounds of reasonable behavior that the deadly force was almost entirely a result of the officers' actions"); *Young v. City of Providence ex rel. Napolitano*, 404 F.3d 4, 22 (1st Cir. 2005) (finding that the "totality of the circumstances" includes the actions of government officials leading up to the seizure, not merely the officers' actions at the moment of the shooting). Other circuits, however, examine only the facts that existed at the moment of seizure to determine if the officer's use of force was reasonable. *See, e.g.*, *Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir. 1996) (determining that an officer's "actions leading up to" the use of force are "irrelevant to the objective reasonableness of his conduct"); *Elliot v. Leavitt*, 99 F.3d 640, 642 (4th Cir. 1996) (restricting the court's focus to "the circumstances at the moment force was used"). But binding Tenth Circuit precedent requires us to consider whether the

officers' alleged reckless conduct created the need to use deadly force. *Cox v. Wilson*, 971 F.3d 1159, 1170 (10th Cir. 2020) (following the Tenth Circuit but noting that it is unclear where the Supreme Court stands on the matter).

To determine if the officer unreasonably created the need to use force, we examine conduct that was "immediately connected" to the use of force. *Allen*, 119 F.3d at 840. One particularly important factor in identifying immediately connected conduct is the amount of time between the officer's actions and the use of force. *Allen*, 119 F.3d at 841 (finding that the officer's conduct was immediately connected because the shooting occurred only 90 seconds after the officer arrived); *Ceballos*, 919 F.3d at 1216 (finding immediate connection because the officer shot the suspect within a minute of arriving). But time is not the only factor, and attenuated conduct or mere negligence is not considered. *Ceballos*, 919 F.3d at 1214*; see also Estate of Ronquillo v. City & Cty. of Denver*, 720 F. App'x 434, 438 (10th Cir. 2017) (finding that officers' early attempt to remove a suspect from his car did not create the need for deadly force because the suspect had time to drive away from officers but instead chose to drive toward them); *Medina*, 252 F.3d at 1132 (finding that officers' choice to follow the suspect instead of remaining undercover did not rise to the level of reckless or deliberate conduct). Therefore, conduct that is not immediately connected is still relevant conduct considering the totality of the circumstances under *Graham*. *See* 490 U.S. at 396-97.

A suspect's mental condition may also be "a relevant factor in determining [the] reasonableness of an officer's responses to" an encounter. *Ceballos*, 919 F.3d

at 1214. Where a reasonable officer is aware a suspect has a diminished capacity to reason, he should take that into account before "provoking a fatal encounter." *Id.* at 1217. Of course, no one expects officers to act with perfect foresight. An officer may consider the suspect's mental condition but wrongly predict how the suspect would respond to the officer's conduct and whether that conduct would create a need to use deadly force. *Clark v. Colbert*, 895 F.3d 1258, 1264 (10th Cir. 2018) ("To say [the officers] should have known the plan would create a need to shoot [the suspect] is to indulge in the very sort of hindsight revision the law forbids.").

Arnold's qualified immunity arguments thus require us to resolve two inquiries: (1) whether the officers used reasonable force, even considering their prior conduct, and (2) whether Officer Chaulk is liable pursuant to supervisory liability.

a. Reasonable Force

Regarding whether the officers recklessly created the need to use force, we will consider three potential starting points for conduct to be immediately connected to the use of force: (1) the officers' arrival at Sumner's house, (2) the officers' entry into the house, and (3) Howard's change in demeanor before she slammed the laundry room door.

The officers' conduct just after their arrival at Sumners' house is too attenuated to be immediately connected to the shooting. The officers conducted negotiations for two hours and fifty-two minutes before they entered the house. During that time, some of the officers believed that Howard was not armed and attempted to persuade Howard to surrender. For example, in *Bella* we found events that occurred an hour before the use of force were too attenuated to be immediately connected. *See* 24 F.3d at 1256 ("We do not

look to events that occurred approximately one hour prior to Mr. Bella's actual seizure to determine if the seizure was reasonable."). Here, there was similarly too much intervening time and negotiation to find that the entire interaction was immediately connected to the use of force.

The officers' entry into the house is also too attenuated to be immediately connected to the use of force.[3] Unlike in *Allen*, where officers used force 90 seconds after the initial interaction, here sixteen minutes elapsed between the entry and the use of force. *See* 119 F.3d at 839. And, like the decedent in *Ronquillo*, Howard had time to act and change her situation. *See* 720 F. App'x at 439 (decedent moved car between the officers' arrival and the officers' use of force). From the time the officers entered the house until Howard's demeanor changed, Howard asked questions about going to jail, opened the laundry room door, spoke to the officers, and interacted positively with the K-9. Officer Lanphear, the trained crisis negotiator, did not perceive that the officers' entry had elicited any emotional response from Howard. She made no suicidal comments after the officers entered the house. Even when Howard opened the laundry room door and interacted with the officers, the officers continued to negotiate with her. The officers noted that

[3] Even if we were to find that the entry into the house was immediately connected, entering the house was reasonable. Further, Officer Lanphear's incorrect assessment of Howard's mental state—that the officers' entry had not evoked an emotional response—does not make the officers' actions reckless. *See Clark v. Colbert*, 895 F.3d 1258, 1264 (10th Cir. 2018) ("To say [the officers] should have known the plan would create a need to shoot [the suspect] is to indulge in the very sort of hindsight revision the law forbids.").

Howard's hands were empty, and they attempted to use non-threatening tactics to get Howard to surrender. Thus, the officers' entry into the house was not immediately connected to their use of force.

The officers' conduct only became immediately connected to the use of force after Howard's demeanor changed and she slammed the laundry room door shut. Less than a minute before officers shot Howard, she started to become aggressive and slammed the door, stating "you ain't cops." Sweany then forced open the door, concerned that it would be impossible for officers to retreat if Howard had a gun. When the officers entered the laundry room, Sweany's fears were confirmed: Howard pointed a gun at the officers. The officers' conduct after Howard's change in demeanor is what we consider immediately connected to the use of force.

While the officers' breaking into the laundry room was immediately connected to the use of force, it was not reckless. The officers only entered the laundry room after Howard became aggressive; Officer Sweany determined that he had to take quick action to stop Howard and that retreat was not an option based on the number of officers in the house. He was concerned for officer safety and acted accordingly. This was a reasonable determination.

We next evaluate the three *Graham* factors to determine whether the officers used reasonable force. *See Graham*, 490 U.S. at 396.

The first *Graham* factor, severity of the crime, favors the officers. *Id.* Howard's warrants for felony supervision violations and aggravated escape from custody are serious because the latter is a felony. *See* K.S.A. § 21-59119(c)(2); *Valverde*, 967 F.3d at

1061 (noting that felonies are "a serious crime" for purposes of the first *Graham* factor); *Lee v. Tucker*, 904 F.3d 1145, 1149 (10th Cir. 2018) (explaining that evaluating severity using the felony/misdemeanor distinction is "consistent with the many cases in which we have held that the first *Graham* factor may weigh against the use of significant force if the crime at issue is a misdemeanor"); *Pauly*, 874 F.3d at 1215 & n.5 (finding that reckless driving and driving while intoxicated were "minor crimes" because they were misdemeanors).

The second *Graham* factor, officer safety, weighs in favor of the officers. *Id.* The officers chose to enter the laundry room because Howard's demeanor changed from friendly to hostile, the officers suspected that she may be armed, and the officers could not readily retreat. When the officers entered the laundry room, they encountered Howard holding a gun. The officers ordered Howard to drop the gun, but she did not comply. Howard brandished the weapon in the direction of officers who were only a few feet away. The officers could reasonably believe that Howard planned to use the firearm—her finger was on the trigger—and she told the officers, "I'll take every single one of you." All the *Larson* factors were present: (1) the officers ordered Howard to drop her weapon and she did not comply, (2) Howard waved the weapon in the direction of the officers, (3) Howard was physically close to the officers, and (4) Howard's manifest intentions were violent. *Larsen*, 511 F.3d at 1260.

The third *Graham* factor, resisting arrest, also weighs in favor of the officers. *See* 490 U.S. at 396. The officers engaged Howard for an extended period without success:

Howard refused to comply with the officers for nearly three hours while the officers were outside the house and during the sixteen minutes the officers were inside the house before entering the laundry room. Howard actively ignored the officers' commands to surrender when she retreated to the laundry room. When the officers entered the laundry room, Howard continued to resist arrest by pointing a firearm at the officers, refusing to drop the firearm, and verbally threatening the officers. Her unwillingness to comply with the officers' requests to surrender aggravated and escalated the lawful encounter that ended in tragedy.

In short, all three *Graham* factors weigh in favor of the officers. The officers' use of force was reasonable given the totality of the circumstances and the severe threat to officer safety.

b. Supervisory Liability

Arnold next claims that Officer Chaulk is personally responsible for the shooting in his capacity as the supervising officer on the scene. Arnold contends that Chaulk failed to stop the officers from using unreasonable force and to adequately supervise his subordinate, Officer Peterson, who assisted the entry into the house. Arnold argues that if Chaulk had questioned the decision to enter the residence and if he had declined to offer Peterson to assist in the entry, Howard would not have died.

A supervisor may be liable for the actions of other officers if an "affirmative link" exists between the supervisor's personal participation, his exercise of control or direction, or his failure to supervise, and the constitutional deprivation. *Fogarty v. Gallegos*, 523 F.3d 1147, 1162 (10th Cir. 2008). The supervisor must have more

than abstract authority over his subordinates to be found liable. *Jenkins v. Wood*, 81 F.3d 988, 994-95 (10th Cir. 1996). And the supervisor must have set into motion a series of events that he "knew or reasonably should have known would cause others to deprive the plaintiff of her constitutional rights." *Estate of Booker v. Gomez*, 745 F.3d 405, 435 (10th Cir. 2014) (quoting *Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 768 (10th Cir. 2013)).

Here, no affirmative link exists between Chaulk's supervision and a constitutional violation because Peterson's use of force was reasonable under the Fourth Amendment. *See Booker*, 745 F.3d at 435. As previously noted, the officers' decision to enter the house was reasonable.

Further, the actions of Chaulk's subordinate, Peterson, did not cause the shooting. Arnold claims that if Peterson had not assisted in entering the house, then the officers would not have shot Howard. But Howard's sudden shift in demeanor and brandishing of a weapon caused Peterson and two other officers to draw and fire their guns. Thus, the officers would likely have shot Howard even without Peterson's participation. Chaulk is not liable as a supervisor because his alleged failure to supervise Peterson did not cause the alleged harm.

In sum, Officer Chaulk is not liable for supervisory liability because no officer violated Howard's constitutional rights.

2. Clearly Established

For purposes of qualified immunity, a right is clearly established if it is confirmed by either Supreme Court or Tenth Circuit precedent that is directly on

point, or if the weight of authority from other courts supports the plaintiff's contention. *Cortez v. McCauley*, 478 F.3d 1108, 1114-15 (10th Cir. 2007). It is particularly important that a Fourth Amendment right be clearly established in a specific factual scenario because it can be difficult for an officer to determine how the prohibition against excessive force will apply in novel situations. *City of Tahlequah v. Bond*, 142 S. Ct. 9, 11 (2021) (per curiam) (quoting *Mullenix v. Luna*, 577 U.S. 7, 12 (2015)). A constitutional right is clearly established when every reasonable officer would have understood that his conduct violated that right. *Reichle v. Howards*, 566 U.S. 658, 664 (2012). But it is important the right is not defined at "too high a level of generality." *Bond*, 142 S. Ct. at 11. Unless existing precedent "squarely governs" the specific facts at issue, the police officer is entitled to qualified immunity. *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (quoting *Mullenix*, 577 U.S. at 13).

Arnold relies on *Allen*, *Hastings*, *Ceballos*, and *Sevier* to argue that Howard had a clearly established right to be free from an unreasonable seizure even after hours of negotiations. He argues that the officers were on notice that their conduct was unconstitutional, claiming it is clearly established "that an officer acts unreasonably when he aggressively confronts an armed and suicidal/emotionally disturbed individual without gaining additional information or by approaching him in a threatening manner." *Bond v. City of Tahlequah*, 981 F.3d 808, 818 (10th Cir. 2020), *rev'd*, 142 S. Ct. 9, 11 (2021).

But as we have already explained, the cases Arnold cites are distinguishable from the present case. In each case, only a few minutes separated the initial police action and

the use of force. *Allen*, 119 F.3d at 841 ("The entire incident, from the time [the officer] arrived, to the time of the shooting, took only ninety seconds."); *Hastings v. Barnes*, 252 F. App'x 197, 200 (10th Cir. 2007) (noting decedent was pepper-sprayed and shot after refusing to drop his sword, and the entire incident lasted less than four minutes); *Ceballos*, 919 F.3d at 1216 (officer shot decedent within one minute of arriving at the scene); *Sevier*, 60 F.3d at 698 (less than five minutes between the officer's arrival and the use of deadly force). Here, however, the police interaction with Howard lasted hours, not minutes. Extensive negotiations and intervening events occurred over the course of three hours, in contrast to the short timelines in the cases Arnold cites. Four cases that involved shootings from one to five minutes after officers arrived on the scene do not clearly establish that officers cannot confront a potentially armed suspect after hours of protracted negotiation.

Additionally, the clearly established prong reinforces our holding that the officers did not recklessly create the need to use deadly force. Any reliance on *Allen* to determine whether the officers' conduct "was reckless or that their ultimate use of force was unlawful" requires sufficient factual symmetry. *Bond*, 142 S. Ct. at 12; *Lennen v. City of Casper*, No. 21-8040, 2022 WL 612799, at *9 (10th Cir. Mar. 2, 2022). The officers in *Allen* responded to a potential suicide call by sprinting toward a parked car, screaming at the suspect, and attempting to physically wrest a gun from his hands. 119 F.3d at 841. The officers in this case, by contrast, conversed with Howard for many hours, engaged her from within the house at a safe distance, and did not yell until she threatened them with a gun. There is insufficient factual

symmetry between the facts in *Allen* and the present case to clearly establish that the officers recklessly created the need to use deadly force.

Lastly, Arnold argues it was clearly established that officers were required to consider Howard's mental status before using force. *See Ceballos*, 919 F.3d at 1214. To be sure, a suspect's mental condition is a factor in determining the reasonableness of a seizure under the Fourth Amendment. *Id.* But at the time of the shooting, there was no caselaw that would have put the officers on notice that they were violating a constitutional right by failing to consider her mental condition. Even assuming officers knew or should have known Howard had a bipolar disorder, they could not have known that they were required to consider her mental status. The Tenth Circuit published *Ceballos* in 2019, and the officers confronted Howard two years earlier, in 2017.

No clearly established law applies to the facts of this case.

B. Municipal Liability

Arnold also argues the City of Olathe is liable for Howard's death because the City's policy requiring a visual observation and confirmation of a firearm before activating the Tactical Support Unit (TSU) creates a high probability of lethal force situations.

Municipality liability is limited to actions "for which the municipality is actually responsible." *Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 770 (10th Cir. 2013) (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479

(1986)).[4] To prove municipal liability under § 1983, the plaintiff must show: (1) a municipality enacted or maintained a policy, (2) the municipality was deliberately indifferent to the resulting constitutional violations, and (3) the policy caused the underlying constitutional violation. *Schneider*, 717 F.3d at 769.

A court may find that the challenged practice is an official policy or custom for municipal liability purposes if "it is a formally promulgated policy, a well-settled custom or practice, a final decision by a municipal policymaker, or a deliberately indifferent training or supervision." *Id.* at 770.

A municipality acts with deliberate indifference when it has "actual or constructive notice that its action or failure to act is substantially certain to result in a constitutional violation," and the municipality "consciously or deliberately chooses to disregard the risk of harm." *Id.* at 771 (quoting *Barney v. Pulsipher*, 143 F.3d 1299, 1307 (10th Cir. 1998)). Notice can be established by proving the existence of a pattern of constitutional violations or, in a narrow range of circumstances, if a "violation of federal rights is a highly predictable or plainly obvious consequence of a municipality's action or inaction." *Id.* at 771 (quoting *Barney*, 143 F.3d at 1307).

[4] Municipal liability is also known as *Monell* liability, after *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978). A municipality, however, cannot be held liable under § 1983 based solely on an employer-employee relationship. *Id.* at 692. "[M]unicipalities are responsible only for their own illegal acts and 'are not vicariously liable under § 1983 for their employees' actions.'" *George v. Beaver County*, No. 21-4006, 2022 WL 1310982 (10th Cir. May 3, 2022) (quoting *Connick v. Thompson*, 563 U.S. 51, 60 (2011)).

A plaintiff can establish a direct causal link by showing that the municipal practice was closely related to the deprivation of rights. To do so, the plaintiff must prove that the municipality was the "moving force" behind the alleged injury. *Id.* at 770 (quoting *Bd. of Cty. Comm'rs v. Brown*, 520 U.S. 397, 404 (1997)). We must rigorously scrutinize the causation element when the municipal policy is not itself unconstitutional to ensure that the municipality is not held liable solely for its employees' actions. *Id.*

Arnold fails to prove that Olathe is subject to supervisory liability. We assume without deciding that the City established an official policy. *See Schneider*, 717 F.3d at 770. Even so, Arnold fails to show that the policy was enacted with deliberate indifference. Arnold argues that the City was deliberately indifferent to the high likelihood of a constitutional violation because the City's policy mandating confirmation of a firearm before activating the TSU creates a high probability of lethal-force situations. But Arnold has not presented evidence showing that the TSU activation policy results in a higher likelihood of lethal force. He has not presented a pattern of similar constitutional violations, nor could he argue that the policy would obviously result in constitutional violation in the absence of such a pattern.

And Arnold did not establish that the City's policy caused the constitutional violation. *See City of Oklahoma City v. Tuttle*, 471 U.S. 808, 824 n.8 (1985) ("The fact that a municipal policy might lead to police misconduct is hardly sufficient to satisfy *Monell*'s requirement that the particular policy be the moving force behind a constitutional violation."). Arnold argues that if law enforcement had activated the TSU,

Officer Sweany would not have had the authority to decide to enter the home. But nothing in the record suggests that the TSU would have necessarily assumed control of the scene. For almost three hours, the officers negotiated with Howard, both from outside and within the home. The use of deadly force only became necessary after Howard's demeanor changed and she threatened police officers with a firearm, which could have happened even if the TSU were present.

In sum, Arnold is unable to show that the alleged municipal policy directly caused Howard's death. The district court correctly granted summary judgment to the City on Arnold's municipal liability claim.

C. Assault and Battery

In Kansas, whether an officer is liable for intentional use of force—known formally as assault and battery—turns on whether the use of force was privileged. *Est. of Randolph v. City of Wichita*, 459 P.3d 802, 817 (Kan. Ct. App. 2020). Under Kansas law, officers justifiably use deadly force when they "reasonably believe [] that such force is necessary to prevent death or great bodily harm to such officer or another person." K.S.A. 21-5227(a).

As we explained above, the officers' use of force was reasonably necessary under *Graham* to prevent imminent harm to the officers. *See* 490 U.S. at 396. The same rationale applies here. Thus, Arnold's state law claims also fail.

III. Conclusion

For the reasons discussed above, we find that (1) the officers are entitled to qualified immunity because they used reasonable force, (2) the City of Olathe is not

liable because the City did not create a policy that caused a constitutional violation, and (3) the officers are not liable for assault and battery because their use of force was privileged under Kansas law. Accordingly, we affirm the district court.