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United States Court of Appeals
Tenth Circuit

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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MICHAEL VALDEZ,

Plaintiff - Appellee/Cross-Appellant,

v.

JOHN MACDONALD, Denver Police Officer, in his individual capacity; CITY AND COUNTY OF DENVER, a municipality,

Defendants - Appellants/Cross-Appellees.

Nos. 21-1401 & 21-1415

MICHAEL VALDEZ,

Plaintiff - Appellee,

v.

ROBERT MOTYKA, JR., Denver Police Officer, in his individual capacity; CITY AND COUNTY OF DENVER, a municipality,

Defendants - Appellants.

No. 22-1152

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:15-CV-00109-WJM-STV)

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Before **HARTZ**, **EBEL**, and **MATHESON**, Circuit Judges.

MATHESON, Circuit Judge.

In 2013, Sergeant Robert Motyka, a Denver police officer, shot Michael Valdez, who was lying unarmed on the ground and surrendering.

In the ensuing lawsuit brought under 42 U.S.C. § 1983, a jury awarded Mr. Valdez $131,000 from Sergeant Motyka for excessive force in violation of the Fourth Amendment[1] and $2,400,000 from the City and County of Denver ("Denver") for failure to train its officers. The district court awarded $1,132,327.40 in attorney fees and $18,199.60 in costs to Mr. Valdez's lawyers. We address three appeals arising from this litigation. We have jurisdiction under 28 U.S.C. § 1291.

[1] The Fourth Amendment applies against state law enforcement officials as incorporated through the Due Process Clause of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

In 21-1401, Denver challenges the district court's (1) denial of its motion for summary judgment, (2) reversal of a discovery order and permission for Mr. Valdez to present additional municipal liability theories, and (3) jury instructions on municipal liability. We affirm the judgment against Denver.

(1) At summary judgment, the district court correctly decided pure issues of law. Denver may not, after losing at trial, appeal mixed questions of law and fact decided at summary judgment.

(2) The court acted within its discretion in permitting Mr. Valdez to take a deposition on Denver's officer training and to modify his theories alleging Denver's failure to train.

(3) At trial, the court properly instructed the jury on failure-to-train municipal liability.

In 21-1415, Mr. Valdez cross-appeals the district court's grant of qualified immunity to Lieutenant John Macdonald, another Denver police officer who shot at him. We affirm because Mr. Valdez has not shown the district court erred.

In 22-1152, Sergeant Motyka and Denver contend that the district court abused its discretion in awarding attorney fees and costs. We affirm the attorney fee award and reverse the award of costs.

I. BACKGROUND

A. *Factual History*[2]

1. The 2013 Shooting

On January 16, 2013, Mr. Valdez was walking to a bus stop in Denver when his childhood acquaintance, Johnny Montoya, pulled over and offered Mr. Valdez a ride in his red pickup truck. Mr. Valdez accepted and climbed into the bed of the truck. Jude Montoya and Alyssa Moralez were passengers in the front seat. Chuck Montoya was in the truck's bed with Mr. Valdez.

Soon after Mr. Valdez got into the truck, Denver police officers, responding to an incident involving the truck earlier that day, began chasing it in their patrol cars. The Montoyas began shooting at the police vehicles. Fearing for his life, Mr. Valdez climbed into the cab. He braced himself and pushed Ms. Moralez down with him to protect her.

Sergeant Motyka, who had just parked his patrol car, heard the gunshots, ran back to his car, and joined the chase. Seeing the truck approaching, he swerved toward it and tried to make the truck crash or flip. When that failed, he made a U-turn and began to chase the truck. While driving behind the truck, Sergeant Motyka was shot in the upper left arm. After slowing down to see if he could still

[2] This factual summary is based on the evidence presented at trial, stated in the light most favorable to the jury's verdict. *See United States v. Kaspereit*, 994 F.3d 1202, 1207 (10th Cir. 2021).

use his left hand, he decided to resume pursuit of the truck. Sergeant Motyka observed a man in the back of the truck shooting at him.

The truck crashed into a tree. Jude Montoya jumped out of the cab and ran down an alley. Mr. Valdez and Ms. Moralez crawled out of the passenger side of the truck and were lying on the ground with their hands above their heads.

Sergeant Motyka, who had been driving with his gun ready in his hand, arrived at the scene, walked to the police car parked in front of his, and began shooting at Mr. Valdez.[3] Sergeant Motyka did not communicate with the officer who had arrived first at the scene and who was assessing the situation, or with the other officers who had pulled up at the same time as he had. He fired six shots at Mr. Valdez, paused, and then fired six more. Lieutenant Macdonald, Sergeant Motyka's supervisor, arrived. Seeing Sergeant Motyka firing, he shot seven bullets at Mr. Valdez.

The other officers eventually shot and killed the driver, Johnny Montoya, after he refused to comply with the officers' commands to surrender, raised a gun, and pointed it toward them. The final passenger, Chuck Montoya, was taken into custody.

[3] In an interview conducted two days after the incident, Sergeant Motyka stated, "I prepared myself for the fact, and if this vehicle stops there's going to be a gunfight. I already had my gun in my hand, I did the check on my left hand, ma[d]e sure I could use it, took off the seat belt, and got out of my car." App., Vol. XXXI at 8237. In the same interview, he described the individual shooting from the truck as "the m----------r who shot [me]." *Id.* at 8237-38.

In the officer-involved shooting investigation conducted within days of the incident, Sergeant Motyka admitted that he did not see a gun in Mr. Valdez's possession and that he issued no commands before shooting. He said, "I was carrying my probable cause in my shoulder and the windshield of my police car," referring to the bullets shot from the truck. App., Vol. V at 1325 (investigation transcript); *see also* App., Vol. XXXI at 8339 (discussing the statement at trial); App., Vol. XXXIV at 8919.

In a post-incident interview, Lieutenant Macdonald recalled, "[A]s I came out of my car and I was running up towards Motyka, Motyka was shooting at [Mr. Valdez]. That's what directed my attention to that guy. You know, if Motyka is shooting at him, that's the bad guy. He's some sort of threat. I have that trust in Motyka." App., Vol. XXXII at 8593-94. Lieutenant Macdonald admitted that his adrenaline was running high at the time.

The bullets struck Mr. Valdez in his back and hand, severing his finger, shattering part of his spine, transecting his bowel, and leaving him temporarily paralyzed. A ballistic investigation concluded that the bullet that hit Mr. Valdez's back came from Sergeant Motyka's gun, but it was not possible to determine which officer's bullet hit Mr. Valdez's finger. The investigation also determined that Mr. Valdez was not carrying a weapon when he was shot, and his DNA was not found on any of the guns recovered from the truck.[4]

[4] After he was treated at a hospital for his injuries, Mr. Valdez was arrested and taken to jail. He was later charged with attempted murder and other crimes

2. **Denver's Police Training**[5]

These events implicated the Denver Police Department's officer training program. In the years preceding the 2013 shooting of Mr. Valdez, Denver's training manual contained a policy on the use of deadly force. It instructed that "[w]hen all reasonable alternatives appear impractical, a law enforcement officer may resort to the lawful use of firearms," including "[t]o defend him/herself, or a third person from what he/she reasonably believes to be the use or imminent use of deadly [] force . . . ." App., Vol. XX at 5516. At Denver's police academy, officers were trained on the use-of-force standards of the Colorado Peace Officer Standards and Training

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arising from his encounter with the officers. He also was charged with crimes related to the Montoyas' criminal activity that occurred earlier that day. Unable to post bail, Mr. Valdez spent two months in jail before all of the charges were dismissed and he was released. *See Valdez v. Derrick*, 681 F. App'x 700, 702 (10th Cir. 2017) (unpublished).

[5] Much of the information about Denver's police training practices derives from the deposition of Brad McKiernan, Denver's Rule 30(b)(6) witness on officer training. Excerpts from that deposition were presented at trial, but the appendix for this appeal does not identify which excerpts were presented. As Mr. Valdez points out, *see* Aplee. Br. at 12 n.2, we do not have a precise record to evaluate the failure-to-train claim.

Denver thus has not met its "duty to cause an adequate record on appeal to be transmitted to the appellate court," *United States v. Dago*, 441 F.3d 1238, 1251 (10th Cir. 2006); *see* 10th Cir. R. 10.4(B) ("When the party asserting an issue fails to provide a record or appendix sufficient for considering that issue, the court may decline to consider it."). Because we affirm on the merits, we need not address whether the appeal should be dismissed on this basis.

The factual account presented above on Denver's police training draws from (1) the police manual reprinted in Judge Martinez's ruling on summary judgment, (2) Mr. McKiernan's deposition, and (3) trial testimony from Mr. Valdez's police practices expert, but it should be read with the foregoing in mind.

Board and the Colorado Revised Statutes. App., Vol. XIV at 3755, 3890. Denver had no policies or training in place on how officers should respond with deadly force after being wounded, nor were they trained that force may not be used as a form of retaliation or punishment. App., Vol. XXXIII at 8759-66.

After officers graduated from the police academy, Denver required them to take a two-hour "handgun-in-service" training once every three years. *Id.* at 8760. During this training, an officer would spend three to five minutes on video-game-based exercises responding to on-screen scenarios where deadly force may or may not be warranted, and also observe other officers performing the same exercise. *Id.* at 8762-63. The police department also offered an optional class called "Shooting Under Stress" to prepare officers to respond to situations when they have elevated heartrates. *Id.* at 8765-66.

B. ***Procedural History***

Mr. Valdez initiated this action in 2015. He later filed an amended complaint, the operative complaint in this litigation, alleging claims under 42 U.S.C. § 1983 against five officers, including Sergeant Motyka and Lieutenant Macdonald, for excessive force, malicious prosecution, manufacture of inculpatory evidence, unreasonable seizure, false imprisonment, and conspiracy. He also claimed Denver was liable for failing to properly hire, train, supervise, and discipline its officers as to

each of these claims.[6] The case was assigned to Senior Judge Richard Matsch of the U.S. District Court for the District of Colorado.

The individual officers asserted qualified immunity defenses and moved to dismiss all but the excessive force claims. The district court denied that motion, and the officers appealed. We granted qualified immunity to the individual officers on the malicious prosecution, manufacture of inculpatory evidence, unreasonable seizure, false imprisonment and conspiracy claims and remanded for further proceedings. *See Valdez*, 681 F. App'x at 704. After remand, these claims were apparently dismissed.[7] Mr. Valdez voluntarily dismissed all individual defendants except Sergeant Motyka and Lieutenant Macdonald, leaving only the excessive force claim against them and the municipal liability claim against Denver.

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[6] The amended complaint asserted municipal liability as to each of the claims against the individual officers. *See* App., Vol. I at 86-93. After the malicious prosecution, manufacture of inculpatory evidence, unreasonable seizure, false imprisonment, and conspiracy claims were dismissed against the individual officers, counsel for Mr. Valdez clarified in a status conference that he sought municipal liability on only the excessive force claim. *See* App., Vol. IV at 1109.

Relatedly, Mr. Valdez did not develop his wrongful hiring theory of municipal liability alleged in the amended complaint, and this theory appears to have dropped out of the case without a formal ruling. *See, e.g.*, App., Vol. III at 743 n.20. It is not mentioned in either of the two orders on summary judgment and is not relevant on appeal.

[7] After we reversed the district court's denial of qualified immunity, we remanded "for further proceedings consistent with [our] order and judgment." App., Vol. I at 24. After remand, the parties asserted that all claims, except the excessive force claim, were dismissed. *See* App., Vol. I at 228-29. We can find no district court order dismissing the claims.

Before discovery closed, Judge Matsch denied Mr. Valdez's motion to depose a Denver representative under Federal Rule of Civil Procedure 30(b)(6) on police training and policies. He said a deposition would be unnecessary because he thought Denver did not dispute that the officers were following city policy when they shot Mr. Valdez. *See* App., Vol. XII at 3165. He thus said Denver would be liable if any individual officer were found liable. *Id*.

1. **First Summary Judgment Motion**

The officers and Denver jointly moved for summary judgment. The officers claimed qualified immunity. Judge Matsch (1) denied qualified immunity to Sergeant Motyka, (2) granted qualified immunity to Lieutenant Macdonald, and (3) denied summary judgment to Denver.[8] For the municipal liability claims, the district court allowed Mr. Valdez to proceed on a theory that Denver had failed to discipline its officers and thus ratified Sergeant Motyka's conduct,[9] but it did not address his other theory of municipal liability—failure to train.

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[8] Sergeant Motyka filed an interlocutory appeal of the order denying him qualified immunity, and Mr. Valdez asserted a cross-appeal challenging the grant of qualified immunity to Lieutenant Macdonald. We dismissed Sergeant Motyka's appeal for lack of jurisdiction and declined to exercise pendent jurisdiction over Mr. Valdez's cross-appeal. *See Valdez v. Motyka*, 804 F. App'x 991, 992 (10th Cir. 2020) (unpublished) (holding that we lack jurisdiction to review the district court's finding that the record contained a genuine issue of fact for trial).

[9] In his opposition to summary judgment, Mr. Valdez argued that Denver had an unwritten policy of tolerating excessive force because it had failed to discipline the officers after the event and had exonerated and celebrated them, thus ratifying their constitutional violations. *See* App., Vol. V at 1309.

Judge Matsch referred to this theory of municipal liability as "ratification." Judge Martinez, who later took over the case, described it as "failure to adequately

2. **Rule 30(b)(6) Deposition, New Municipal Liability Theories, and Second Summary Judgment Motion**

Judge Matsch died in 2019, and the case was reassigned to Judge William Martinez. Finding that Judge Matsch had erred in preventing Mr. Valdez from deposing a Denver representative, Judge Martinez allowed Mr. Valdez to take a Rule 30(b)(6) deposition on officer training, ordered him to submit an amended notice of municipal liability theories, and allowed Denver to move again for summary judgment.

Mr. Valdez submitted an Amended Notice of Municipal Liability Theories, listing ten failure-to-train contentions. Denver filed its second motion for summary judgment. Denver argued that Mr. Valdez's failure-to-train claim failed because (1) Denver cannot be liable for failing to train officers to avoid obviously inappropriate conduct, *see* App., Vol. XIV at 3774; (2) Mr. Valdez failed to identify any constitutionally deficient training,[10] *see id.* at 3772, 3775; (3) Mr. Valdez presented no evidence that Denver was deliberately indifferent to the plainly obvious consequences of any training deficiency, *see id.* at 3784-86; and (4) Mr. Valdez could not show that deficient training caused his injury, *see id.* at 3787-88.

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investigate and discipline." *Compare* App., Vol. IX at 2377-79, *with* App., Vol. XX at 5506-07. Judge Matsch originally denied summary judgment on this theory, but Judge Martinez granted summary judgment to Denver on it in the second summary judgment order. Mr. Valdez does not appeal this ruling.

[10] As discussed below, Denver argues on appeal that its training met constitutional standards and therefore was not deficient. Denver did not explicitly present or develop this argument in its summary judgment motion.

The district court rejected all but two of Mr. Valdez's failure-to-train contentions. In its order, the court assumed Mr. Valdez's version of what happened:

> "● [W]hen the truck in which Valdez was a passenger crashed into a tree, ending the car chase, Valdez exited and immediately went to the ground in a prone position, with his hands raised over his head; but
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> "● Motyka, motivated by anger and a desire to retaliate for being shot in the shoulder during the car chase, and with no legitimate public safety need, fired at Valdez at least twelve times."

App., Vol. XX at 5505. The court also noted, "It is undisputed that one of Motyka's bullets struck Valdez in the lower back." *Id.* at 5506.

In its discussion of the applicable law, the district court recognized that "[a] municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train," and that "[a] pattern of similar constitutional violations by untrained employees is ordinarily necessary." *Id*. at 5511 (quoting *Connick v. Thompson*, 563 U.S. 51, 61-62 (2011)). But it noted the Supreme Court "left open the possibility" of "single-incident liability," *id.* at 5512 (quoting *Connick*, 563 U.S. at 63-64), when "the need to train officers . . . can be said to be 'so obvious[]' that failure to do so could properly be characterized as 'deliberate indifference' to constitutional rights," App., Vol. XX at 5512 (quoting *City of Canton v. Harris*, 489 U.S. 378, 390 n.10 (1989)).

The district court said it was "undisputed" that "Denver trained its police officers regarding use of 'deadly physical force,'" and that "Denver's policies were obviously based on, and perhaps more restrictive than, the relevant constitutional standard as pronounced by the Supreme Court" in *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985).

Id. at 5515-18. Nonetheless, the court denied Denver's summary judgment motion on Mr. Valdez's failure-to-train contention that:

> For at least 5 years before January 16, 2013, Denver had a policy of not training its police officers that force will not be used as a means of retaliation, punishment or unlawful coercion, which caused Mr. Motyka to shoot Mr. Valdez out of anger and an intent to retaliate against or punish all of the truck's occupants for the gunshot wound he sustained instead of dis-engaging and allowing other on-scene officers handle the pursuit and scene control on January 16, 2013.

Id. at 5521-23 (quotations omitted).

The court said, "It is not beyond the province of a lay jury to infer that police officers, when shot at (and especially when struck), will react angrily and conflate what has already happened to them with probable cause to use deadly force." *Id.* at 5521. As an example, it pointed to Sergeant Motyka's statement that he had probable cause because he had been shot. *Id.* at 5522. Further, "a reasonable jury could conclude, through common experience and common-sense inferences, that it is 'so obvious' that some police officers, once shot at, will believe that the shooter is inviting a gunfight and is therefore fair game for deadly force *no matter what happens next*, such that failure to train police officers in this regard 'could properly be characterized as deliberate indifference to constitutional rights.'" *Id.* at 5522 (quoting *City of Canton*, 489 U.S. at 390 n.10).

For the same reasons, the district court also denied summary judgment on Mr. Valdez's related contention that Denver failed to train officers in managing stress and not

"distort[ing]" or "disregard[ing] the probable cause standard" when under fire. App., Vol. XX at 5524. It considered this contention an "elaboration" of the first one. *Id.*

3. **Trial**

In September 2021, the case went to trial on Mr. Valdez's excessive force claim against Sergeant Motyka and his failure-to-train claim against Denver. Mr. Valdez presented testimony from police officers and detectives involved in the incident; an emergency room doctor, an EMT, and a surgeon who had treated Mr. Valdez on the day he was shot; a rehabilitation specialist; a crime scene investigator; a forensic DNA analyst; and an expert in firearm and toolmark identification. Alyssa Moralez, Sergeant Motyka, and Mr. Valdez also testified. Finally, Mr. Valdez submitted, through a reader, excerpted deposition testimony of Denver's Rule 30(b)(6) designee, Brad McKiernan.

At the close of Mr. Valdez's case-in-chief, Denver moved for judgment as a matter of law under Rule 50(a) of the Federal Rules of Civil Procedure. The court took the motion under advisement. Denver and Sergeant Motyka, represented by the same attorneys, then presented evidence. They called other Denver detectives and police officers, including Lieutenant Macdonald, and an expert in forensic pathology. The district court then allowed Mr. Valdez to present testimony from a rebuttal expert on best practices in police training. At the close of evidence, Denver renewed its Rule 50(a) motion for judgment as a matter of law. The district court denied the motion.

The jury found for Mr. Valdez and awarded him $131,000 in compensatory damages from Sergeant Motyka; $2,400,000 in compensatory damages from Denver; and

$0 in punitive damages.[11] The district court awarded Mr. Valdez $1,132,327.40 in attorney fees and $18,199.60 in costs.[12]

The district court proceedings produced three appeals. In 21-1401, Denver challenges its municipal liability. Sergeant Motyka has not appealed the liability and damages judgment against him. In 21-1415, Mr. Valdez cross-appeals the grant of qualified immunity to Lieutenant Macdonald. In 22-1152, Sergeant Motyka and Denver appeal the award of attorney fees and costs against them.

II. DISCUSSION – DENVER'S APPEAL – CASE NO. 21-1401

Denver asserts in 21-1401 that the district court erred when it (1) denied Denver summary judgment,[13] (2) reopened discovery and permitted Mr. Valdez to assert new municipal liability claims, and (3) rejected one jury instruction and parts of another.

A. *Denial of Summary Judgment*

Mr. Valdez claimed that Denver's failure to train its police officers caused Sergeant Motyka to shoot him in violation of the Fourth Amendment.[14] The Supreme

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[11] After the jury verdict, Denver did not move for judgment as a matter of law under Federal Rule of Civil Procedure 50(b).

[12] The clerk of the court had previously awarded Mr. Valdez $31,858.75 in taxable costs, which Denver does not appeal. We will explain the different cost awards below.

[13] Denver's challenge is to Judge Martinez's denial of its second summary judgment motion.

[14] "[A] failure-to-train claim may not be maintained against a municipality without a showing of a constitutional violation by the allegedly un-, under-, or

Court has said a municipality may be liable for failure to train under § 1983 based on a single incident, but a plaintiff must meet a demanding burden to show a city's deliberate indifference to an obvious need for training caused the injury. Even so, Mr. Valdez convinced the district court to deny Denver's summary judgment motion, and he convinced a jury to find Denver liable.

On appeal, Denver does not argue the trial evidence was insufficient for the jury verdict. Instead, it argues the district court should have granted its summary judgment motion. But however meritorious Denver's position may have been at summary judgment, it may seek post-trial review of the court's denial of its motion only on pure questions of law.

In short, Mr. Valdez faced a high legal bar to establish municipal liability in district court, and Denver faces a procedural roadblock to fully challenge summary judgment on appeal. We conclude that Denver's pure legal arguments fail, and we do not consider its remaining arguments because they raise mixed issues of law and fact.

1. **Post-Trial Appeal of a Summary Judgment Denial Limited to Pure Questions of Law**

When we have jurisdiction to review a district court's denial of summary judgment, we review it "de novo." *See Sawyers v. Norton*, 962 F.3d 1270, 1282 (10th Cir. 2020) (quotations omitted) ("Within this court's limited jurisdiction, we

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improperly-trained officer." *Crowson v. Washington Cnty., Utah*, 983 F.3d 1166, 1187 (10th Cir. 2020); *see Estate of Burgaz v. Bd. of Cty. Comm'rs*, 30 F.4th 1181, 1189 (10th Cir. 2022). On appeal, Denver does not contest that Sergeant Motyka used excessive force in violation of Mr. Valdez's Fourth Amendment rights.

review the district court's denial of a summary judgment motion . . . de novo."). "The court shall grant summary judgment if the movant shows that 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). But because this case proceeded to trial, Denver's attempt to appeal the district court's denial of summary judgment faces procedural limitations.

a. Haberman *rule*

Post-trial appeals of summary judgment denials are proper only if they concern pure issues of law.[15] *See Haberman v. Hartford Ins. Grp.*, 443 F.3d 1257, 1264 (10th Cir. 2006). "[T]he denial of summary judgment based on factual disputes is not properly reviewable on an appeal from a final judgment entered after trial." *Copar Pumice Co. v. Morris*, 639 F.3d 1025, 1031 (10th Cir. 2011) (quotations omitted); *see Richards v. City of Topeka*, 173 F.3d 1247, 1252 (10th Cir. 1999) ("Summary judgment issues based on factual disputes end at trial, and are not subject to appellate review."); *Wolfgang v. Mid-Am. Motorsports, Inc.*, 111 F.3d 1515, 1521 (10th Cir. 1997). Even if the district court erred in concluding that a disputed fact exists to deny summary judgment, "the proper redress would not be through appeal of

[15] Certain other circuits do not permit post-trial appellate review of denials of summary judgment, including appeals based on pure issues of law. *See, e.g.*, *Varghese v. Honeywell Int'l, Inc.*, 424 F.3d 411, 423 (4th Cir. 2005); *Ji v. Bose Corp.*, 626 F.3d 116, 127 (1st Cir. 2010).

On January 13, 2023, the Supreme Court granted certiorari in *Dupree v. Younger,* U.S. No. 22-210, on the following issue: "Whether to preserve the issue for appellate review a party must reassert in a post-trial motion a purely legal issue rejected at summary judgment."

that denial but through subsequent motions [at trial] for judgment as a matter of law . . . and appellate review of those motions if they were denied." *Whalen v. Unit Rig, Inc.*, 974 F.2d 1248, 1251 (10th Cir. 1992). But "when the material facts are not in dispute and the denial of summary judgment is based on the interpretation of a purely legal question, such a decision is appealable after final judgment." *Haberman*, 443 F.3d at 1264.

In applying the *Haberman* rule, we must account for the Supreme Court's holding that "[o]nce the case proceeds to trial, the full record developed in court supersedes the record existing at the time of the summary-judgment motion." *Ortiz v. Jordan*, 562 U.S. 180, 184 (2011). After trial, the appellate arguments "must be evaluated in light of the character and quality of the evidence received in court." *Id.*

As recounted above, the district court denied Denver's motion for summary judgment. At trial, the court denied Denver's motion for judgment as a matter of law under Rule 50(a). Rather than appeal the Rule 50(a) denial, Denver attempts to appeal only the summary judgment denial. To do so under *Haberman*, it must convince us that it raises only pure questions of law.

b. *Pure questions of law*

The Supreme Court has explained that pure questions of law do not "immerse courts in case-specific factual issues—compelling them to marshal and weigh evidence, make credibility judgments, and otherwise address . . . multifarious, fleeting, special, narrow facts that utterly resist generalization." *See U.S. Bank Nat. Ass'n ex rel. CW Capital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960,

967 (2018) (quotations omitted). Rather, a "pure issue of law" is "one 'that could be settled once and for all and thereafter would govern numerous [cases]'" without any "fact-bound and situation-specific" aspects. *Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 701 (2006) (quoting R. Fallon, et al., Hart & Wechsler's The Federal Courts and the Federal System 65 (2005 Supp.)). As the Seventh Circuit has explained, a pure legal issue is a "context-free inquiry into the meaning" of a statute or legal doctrine. *Bennett v. Sw. Airlines Co*., 484 F.3d 907, 910 (7th Cir. 2007); *see also Lawson v. Sun Microsystems, Inc.*, 791 F.3d 754, 761 (7th Cir. 2015) ("[Q]uestions of contract interpretation," for example, "involve pure questions of law unrelated to the sufficiency of the trial evidence.").

The Tenth Circuit has adjudicated post-trial appeals of denials of summary judgment raising pure questions of law. For example, in *Haberman* we reviewed the district court's legal interpretation of an insurance contract. *See* 443 F.3d at 1264. We also have interpreted the notice provision of a state statute, *see Osterhout v. Bd. of Cnty. Commissioners of LeFlore Cnty., Oklahoma*, 10 F.4th 978, 983 (10th Cir. 2021), and the scope of a federal safety statute, *see Wilson v. Union Pac. R. Co*., 56 F.3d 1226, 1229 (10th Cir. 1995); and we have determined whether collateral estoppel precludes a plaintiff from filing a claim, *see Ruyle v. Cont'l Oil Co*., 44 F.3d 837, 843 (10th Cir. 1994). But we have not reviewed issues that would "require[] conclusions about facts that were in dispute." *Richards*, 173 F.3d at 1252 (in a post-trial appeal from the denial of summary judgment, whether "less discriminatory

means were available to handle pregnant firefighters requires conclusions about facts that were in dispute" and is, "[a]t best," a "mixed question[] of law and fact").

2. **Single-Incident Municipal Liability for Deficient Training**

a. *Supreme Court cases*

In *City of Canton*, the Supreme Court said that § 1983 municipal liability may be based on a municipality's deliberately indifferent training that causes the violation of a federal right. 489 U.S. at 389. "Only where a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality . . . can a city be liable for such a failure under § 1983." *Id.* A municipality may be liable when, "in light of the duties assigned to specific officers or employees[,] the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *Id.* at 390. A deliberate indifference claim may be based on a single incident when the need for training "can be said to be 'so obvious,' that failure to do so could probably be characterized as 'deliberate indifference' to constitutional rights." *Id.* at 390 n.10. The Court used as an example a city's failure to train police officers on the constitutional restrictions for the use of deadly force. *Id.*

Since *City of Canton*, the Supreme Court has reaffirmed single-incident failure-to-train municipal liability "in a narrow range of circumstances[] [where] a violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations." *Bd. of Cnty. Comm'rs of Bryan Cnty., Okl. v. Brown*, 520 U.S. 397, 409 (1997). In

Connick v. Thompson, the Court said that "[a] pattern of similar constitutional violations by untrained employees is ordinarily necessary to demonstrate deliberate indifference for purposes of failure to train." 563 U.S. at 62 (citation and quotations omitted). But it also recognized that *City of Canton* "sought not to foreclose the possibility, however rare, that the unconstitutional consequences of failing to train could be so patently obvious that a city could be liable under § 1983 without proof of a pre-existing pattern of violations." *Id*. at 64.

b. *Tenth Circuit cases*

Since *City of Canton*, our court has determined that summary judgment was not appropriate in several single-incident failure-to-train cases. Each of the following cases determined that deliberate indifference and causation presented factual questions that should be decided by a jury. In *Allen v. Muskogee*, 119 F.3d 837, 843-45 (10th Cir. 1997), we reversed the grant of summary judgment for the city on the claim that the city had failed to train its officers on the proper way to approach emotionally disturbed persons who were armed and suicidal. We said that failing to train officers on how to properly "deal with armed emotionally upset persons, and the predictability that officers . . . will provoke a violent response, could justify a finding that the City's failure to properly train its officers reflected deliberate indifference to the obvious consequence of the City's choice." *Id.* at 845. We determined that a reasonable juror could find the constitutional violations were a "highly predictable consequence of failure to train officers to handle recurring situations with an obvious potential for such a violation." *Id.*

Similarly, in *Olsen v. Layton Hills Mall*, 312 F.3d 1304 (10th Cir. 2002), we reversed the grant of summary judgment on a claim that a county failed to train its officers on booking procedures for individuals with certain mental disorders. We said that "[g]iven the frequency of [plaintiff's] disorder, [the county's] scant procedures on dealing with mental illness and the prebooking officers' apparent ignorance to his requests for medication, a violation of federal rights is quite possibly a 'plainly obvious consequence' of [the county's] failure to train its prebooking officers to address the symptoms . . . . And this is for a jury to decide." *Id.* at 1320 (quotations omitted).

Most recently, in *Lance v. Morris*, 985 F.3d 787, 800 (10th Cir. 2021), we reversed summary judgment on a claim that the county had failed to train jail guards on how to determine the immediacy of medical complaints. *Id*. at 801. We said a factfinder could reasonably determine that (1) "county policymakers had known 'to a moral certainty' that jail guards would need to independently assess detainees' medical conditions"; (2) "training would have helped jail guards make the difficult decision of whether to call the nurse when she was off duty"; and (3) "the jail guards' lack of training would frequently lead to disregard of serious pain complaints, violating detainees' constitutional right to medical care." *Id.* at 802-803.[16]

[16] Although *Lance* does not use the term "single-incident," its facts concerned a single incident of delayed medical care, not a pattern. Further, it adopted the three-part test for deliberate indifference from *Walker v. City of New York*, 974 F.2d 293, 297-98 (2d Cir. 1992), which expressly relied on the single-incident exception of *City of Canton*.

Lance provided this court's most recent articulation of the single-incident failure-to-train claim: (1) "the existence of a [municipal] policy or custom involving deficient training"; (2) an injury caused by the policy that is "obvious" and "closely related"; and (3) that the municipality adopted the "policy or custom with deliberate indifference" to the injury. 985 F.3d at 800.

On this third element, we adopted the Second Circuit's three-part test for deliberate indifference: (i) the municipality's policymakers "know to a moral certainty that their employees will confront a given situation"; (ii) the situation "presents the employee with a difficult choice of the sort that training or supervision will make less difficult"; and (iii) "[t]he wrong choice will frequently cause the deprivation of a citizen's constitutional rights." *Id.* at 802 (quoting *Walker v. City of New York*, 974 F.2d 293, 297-98 (2d Cir. 1992)).

In each of these cases—*Allen*, *Olsen*, and *Lance*—we determined that summary judgment was not appropriate because there were issues of fact regarding whether the municipality was deliberately indifferent and should be liable for failure to train.

3. **Denver's Legal Challenges Fail. We Do Not Review Denver's Challenges Raising Mixed Questions of Law and Fact.**

Denver contends the district court erred when it denied summary judgment on Mr. Valdez's municipal liability theory that Denver failed to train officers "that force will not be used as a means of retaliation, punishment or unlawful coercion" and failed to "train and refresh officers concerning stress inoculation." App., Vol. XX at 5521, 5524.

Denver argues it cannot be liable because (a) its officer training on the use of deadly force met the constitutional standard, (b) its employee was not completely untrained, (c) the conduct was plainly illegal or inappropriate, (d) Mr. Valdez could not show an obvious need for new or additional training, and (e) the district court failed to analyze causation.

Denver's legal arguments fail because the district court did not err. We do not consider its remaining post-trial summary judgment arguments because they raise issues of fact or mixed issues of law and fact.

a. *Deadly force training*

Denver argues that so long as it has trained police officers on the constitutional limits of the use of deadly force, it cannot be liable as a matter of law. Aplt. Br. at 28-31. But Denver did not explicitly present this argument in district court in its motion for summary judgment nor adequately develop it.[17] *See* App., Vol. XIV at 3749-89. Generally, "we do not address arguments raised in the [d]istrict [c]ourt in a perfunctory and underdeveloped manner." *GeoMetWatch Corp. v. Behunin*, 38 F.4th

[17] Although Denver's motion asserted that its training surpassed constitutional standards, it never made the argument to the district court, nor cited any law, that this shielded it from liability. *See* App., Vol. XIV at 3772 ("Denver's use of force policy" and "training with respect to the same . . . both were constitutionally compliant" and "[o]n these grounds alone, Denver is entitled to summary judgment"); *id.* at 3775 ("Valdez's theories fail to identify any constitutionally deficient training by Denver."); *id.* at 3776 ("Valdez's theory seeks to impose municipal liability on the basis that Denver's training, though even more restrictive than the constitutional standard, was still not protective enough. This ignores the exacting standard attendant to failure to train claims.").

1183, 1207 (10th Cir. 2022) (quotations and alterations omitted). We will nonetheless address it here because the district court in its summary judgment order said it was "undisputed" that "Denver trained its police officers regarding use of 'deadly physical force,'" and that "Denver's policies were obviously based on, and perhaps more restrictive than, the relevant constitutional standard as pronounced by the Supreme Court." App., Vol. XX at 5515-17 (footnote omitted).[18] Because the court did not consider this sufficient to grant summary judgment for Denver, it arguably passed upon the issue. *See Tesone v. Empire Marketing Strategies*, 942 F.3d 979, 991 (10th Cir. 2019) (stating that the "forfeiture rule does not apply when the district court explicitly considers and resolves an issue of law on the merits").

Denver's pure legal argument is that we need only look to "whether [its] officers were trained on the parameters of the use of deadly force" and the inquiry "stops" there. Aplt. Br. at 29. Mr. Valdez counters that Denver failed to train officers on the use of deadly force where, as here, an officer has been shot while pursuing a suspect and catches up to him. Aplee. Br. at 33. He does not contend on appeal that there was a pattern of such occurrences, so he relies on the *City of Canton* test for single incident liability—whether the need for training on this subject is obvious and lack of training is likely to cause a violation of constitutional rights. 489 U.S. at 390.

[18] The Supreme Court articulated the Fourth Amendment standard for deadly force in *Tennessee v. Garner*, 471 U.S. 1 (1985): "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Id.* at 11.

Denver's legal argument runs counter to *City of Canton*'s single-incident liability test that "in light of the duties assigned to specific officers or employees the need for more or different training" may be "so obvious" that failing to train constitutes deliberate indifference. *Id.* The district court correctly recognized that just because Denver trains on the constitutional standard for deadly force does not mean there is no "need for more or different training." App., Vol. XX at 5512, 5522.[19]

The remainder of Denver's deadly force argument is that the "need for more or different training" should not have gone to trial. This is not a purely legal question.[20]

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[19] Denver quotes *Connick* and *City of Canton* to argue that showing only that "more or better" training would have been helpful is insufficient to establish a failure to train. *See* Aplt. Br. at 29-30 (citing *Connick*, 563 U.S. at 68; *City of Canton*, 489 U.S. at 391). But the district court explained the failure-to-train claim here was not merely that more training "would have been helpful." *Connick*, 563 U.S. at 68. Instead, the claim Mr. Valdez presented at trial was whether the "need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights" that liability attaches, *City of Canton*, 489 U.S. at 390. *See* App., Vol. XX at 5521-22; Aplee. Br. at 18, 32-33.

[20] Denver argues that "Mr. Valdez was required to show that Denver's officers were not 'equipped with the tools [necessary] to interpret and apply legal principles.'" Aplt. Br. at 28 (quoting *Connick*, 563 U.S. at 65, 68). But in denying summary judgment, the district court determined there was a factual issue for trial. Denver now raises a factual issue on appeal.

Also, Denver stretches *Connick* too far. There, the Court held that the city was not liable under a single-incident theory for Sixth Amendment violations by district attorneys who failed to disclose exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963). *Connick*, 563 U.S. at 71-72. But the Court distinguished "[t]he obvious need for specific []training" for "[a]rmed police [who] must sometimes make split-second decisions with life-or-death consequences" from the need to train prosecutors who have years of professional training, bar licensure, and ethical obligations. *Id.* at 64-66. Because attorneys already receive extensive legal training, it should be less "obvious" to municipal employers that further training is necessary.

The district court allowed Mr. Valdez the opportunity to prove at trial that this need was "obvious." *See Brown v. Gray*, 227 F.3d 1278, 1286 (10th Cir. 2000) (even where the city's "policy itself is not unconstitutional, a single incident of excessive force can establish the existence of an inadequate training program if there is some other evidence of the program's inadequacy"); *see also Carr v. Castle*, 337 F.3d 1221, 1228 (10th Cir. 2003) (reviewing "the allegedly improper training that the [o]fficers received" even when "the City's written policy on the use of deadly force is constitutional"). And because that issue is at least partly factual and the jury considered it at trial, we do not review it on an appeal from the denial of summary judgment. *See Haberman*, 443 F.3d at 1264.

b. *Untrained officers*

Denver argues that a "single-incident failure-to-train municipal liability claim" is "available only when officers are completely 'untrained.'" Reply Br. at 7 (quoting *Connick*, 563 U.S. at 61-62); *see* Aplt. Br. at 27-28. This is a legal argument, but Denver has waived it, and it otherwise fails on the merits.

Denver did not make this argument in its summary judgment motion and thus forfeited it in district court.[21] Because Denver does not argue plain error on appeal, it

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This "regime of legal training and professional responsibility" prevented the *Brady* violations from being an "'obvious consequence' of failing to provide prosecutors with formal in-house training about how to obey the law." *See id.* at 66.

[21] Denver's only mention of the word "untrained" in its motion supported its argument that a municipality need not train on acts that "[e]ven an untrained law enforcement officer" would recognize as "inappropriate." App., Vol. XIV at 3774 (quoting *Waller v. City and Cnty. of Denver*, 932 F.3d 1277, 1288 (10th Cir. 2019)).

has waived consideration of this argument. *See Platt v. Winnebago Indus., Inc*., 960 F.3d 1264, 1273 (10th Cir. 2020) (quotations and alterations omitted) ("failure to argue for plain error and its application on appeal surely marks the end of the road for an argument for reversal not first presented to the district court").

Denver's argument otherwise fails. It reads *Connick* too narrowly. *Connick* did not hold that a failure-to-train claim applies only to officers who have received no training at all. For liability, "a municipality's failure to train its employees *in a relevant respect* must amount to 'deliberate indifference.'" 563 U.S. at 61 (emphasis added). And, as noted, *City of Canton* refers to "the need for more or different training." 489 U.S. at 390.

Connick and *City of Canton* do not suggest that as long as there is any training on deadly force, a municipality can never be deliberately indifferent.[22] Also, Denver's "completely untrained" argument conflicts with our decisions that have described employees as untrained when they did not receive proper training on a particular aspect of their jobs, not just when they have no training at all. *See, e.g.*, *Lance*, 985 F.3d at 801 (not training jail guards in assessing the immediacy of inmates' medical needs can constitute failure to train); *Brown*, 227 F.3d at 1291

It argues for the first time on appeal that single-incident failure-to-train claims apply only to wholly untrained employees.

[22] For its "untrained" argument, Denver's cites only *Pena v. City of Rio Grande City*, 879 F.3d 613, 624 (5th Cir. 2018), a nonbinding out-of-circuit case that is factually distinguishable from the case before us.

(training was deficient due to the "dearth of instruction" officers "received on implementing [a particular] policy while off-shift").

c. *Patently obvious criminal conduct*

Denver argues that "[t]raining is not required for patently obvious criminal conduct." Aplt. Br. at 31. It contends the district court erred in holding that failure to train officers "to not shoot others out of anger could establish municipal liability." *Id*. But Denver's argument oversimplifies Mr. Valdez's failure-to-train claim as a legal matter, and it otherwise raises factual issues.

Under *City of Canton*, failure-to-train municipal liability turns on whether "the need for more or different training is so obvious" "in light of the duties assigned" to the officers. 489 U.S. at 390. Denver's argument is legally flawed because it fails to recognize that even if acts are illegal or clearly inappropriate does not mean officers need not be trained to avoid them.[23] Indeed, as the Second Circuit has explained, an

[23] Denver's citation to cases like *Schneider v. City of Grand Junction Police Department*, 717 F.3d 760 (10th Cir. 2013), *see* Aplt. Br. at 32, is misplaced. In *Schneider*, the plaintiff alleged that the police department's failure to train caused one of its officers to sexually assault her after responding to a 911 call from her home. 717 F.3d at 774. We affirmed summary judgment for the city. *Id.* at 780.

As we explained, before the sexual assault incident, the police department had issued a "notice of discipline" to the officer instructing him "that it was unacceptable to engage in sexual relationships with women whom he met through his job." *Id.* He then "acted in violation of this direct warning." *Id.* The plaintiff therefore could not show deliberate indifference or causation. *Id.* at 773-74.

Denver notes our quotation in *Schneider* from *Barney v. Pulsipher*, 143 F.3d 1299, 1308 (10th Cir. 1998), that "training hardly seems necessary for a jailer to know that sexually assaulting inmates is inappropriate behavior." 717 F.3d at 774. But the jailer in *Barney* had received "instruction on offenders' rights, staff/inmate relations, sexual harassment, and cross-gender search and supervision." 143 F.3d at 1308.

employee may still need training in circumstances where, "although the proper course is clear, the employee has powerful incentives to make the wrong choice," *Walker*, 974 F.2d at 297—which may include when a suspect has shot a police officer.

What remains of Denver's argument is factual. We may not review a post-trial appellate challenge to the district court's determination at summary judgment that a reasonable jury could decide training was obviously needed on when it is constitutional to fire on a suspect after a police chase during which the officer was shot. Denver's "patently obvious criminal conduct" argument therefore fails.

d. *Notice, difficult decision, and obviousness*

Denver argues the district court (1) erred in concluding Mr. Valdez could show Denver was "on notice" of the need to train on the use of deadly force when an officer has been shot and is angry, Aplt. Br. at 34; and (2) erred in failing to identify a "difficult decision" that additional training "would have eased," *id.* at 36. These arguments are variations of Denver's general argument that the district court should have granted summary judgment because Mr. Valdez could not show an "obvious" need for additional training on the use of deadly force under *City of Canton*. *Id.* at 34-36.

Unlike these cases, Denver provided no training on use of deadly force after an officer has been shot and confronts a suspect. Whether officers obviously need training for those circumstances is a factual question. It is a far cry from whether officers need to be told not to engage in sexual abuse inside or outside the jail.

Denver's arguments raise mixed questions of law and fact that we may not review on a post-trial challenge to summary judgment. Even if the district court had "erroneously denied [summary judgment], the proper redress would not be through appeal of that denial but through subsequent motions for judgment as a matter of law . . . and appellate review of those motions if they were denied." *Whalen*, 974 F.2d at 1251. We do not see how the questions of whether "the need for more or different training is so obvious" and whether "the inadequacy [is] so likely to result in violation of constitutional rights," *City of Canton*, 489 U.S. at 390, can be answered as a pure legal determination in this case.

As noted above, Denver's assertion that its training of officers on the deadly force standard automatically shields it from municipal liability lacks legal authority and conflicts with *City of Canton*, but it also leaves much unanswered that depends on factual context. For example, is it "obvious" that officers chasing fleeing felons will sometimes be shot? Is it "obvious" that officers need instruction on how being shot and angered affects application of the deadly force standard? Is it "obvious" that an officer lacking such training is likely to violate an individual's constitutional rights?

Denver argues the answers to these questions should be no, but the questions are not purely legal ones, and the answers depend on evidence of the training that was and was not provided.[24] Even if Denver could plausibly dispute the district court's

[24] Denver's citation in its brief to Sergeant Motyka's trial testimony about training undermines the notion that Denver's argument is purely legal. *See* Aplt. Br. at 38.

determinations that a reasonable jury could find that (1) Denver was "on notice" of an obvious need for training and (2) Sergeant Motyka confronted a "difficult choice" in evaluating whether deadly force was still authorized after he was shot,[25] these are "factual disputes," not "purely legal question[s]," *see Haberman*, 443 F.3d at 1264.[26] Denver's post-trial challenges to the denial of summary judgment are not appropriate for review.

e. *Causation*

Denver argues the district court erred by failing to address causation in its order denying summary judgment on the municipal liability claim. Aplt. Br. at 38-40. That is, Denver contends the court did not expressly address its contention that there was insufficient evidence from which a reasonable jury could find that Denver's failure to train its officers not to shoot in anger caused Sergeant Motyka to shoot the unarmed and surrendering Mr. Valdez.

To the extent resolution of Denver's argument requires us to engage with the facts of the case or examine the summary judgment record, *Haberman* bars our

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[25] The district court described the potential for an officer to "conflate" being shot with "probable cause to use deadly force" and the "belie[f] that the shooter is inviting a gunfight." App., Vol. XX at 5521-22. It did not use the phrase "difficult choice" because *Lance*, the origin of that phrase, was decided after the district court issued its order on summary judgment. *See* App., Vol. XX at 5503; *see also Lance*, 985 F.3d at 800.

[26] This analysis of the district court's denial of summary judgment accords with our decisions holding that a jury must decide failure-to-train claims when a plaintiff has raised a genuine issue of material fact as to whether the city was deliberately indifferent. *See e.g.*, *Olsen*, 312 F.3d at 1320 (whether a violation of federal rights is a plainly obvious consequence of the deficient training "is for a jury to decide"); *see also Lance*, 985 F.3d at 802; *Allen*, 119 F.3d at 844.

review. Under *Haberman*, we may review only pure issues of law on an appellate challenge to the denial of summary judgment. Inspection of the summary judgment record would thus violate the *Haberman* rule. It would also violate *Ortiz*, where the Supreme Court explained, "Once the case proceeds to trial, the full record developed in court supersedes the record existing at the time of the summary-judgment motion." *Ortiz*, 562 U.S. at 184.[27]

If, on the other hand, Denver's argument is that the district court legally erred by failing to address causation in its summary judgment order, such an error may be corrected at trial. *See Sanpete Water Conservancy Dist. v. Carbon Water Conservancy Dist.*, 226 F.3d 1170, 1176-77 (10th Cir. 2000) ("If the district court made [] a blunder at the summary judgment stage, surely it was more than corrected at trial, where the court examined a myriad of [] evidence" on the disputed claim). At trial, both the district court and the jury considered causation. First, the court, applying a standard that "mirrors the standard" for summary judgment, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986), denied Denver's motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(a) and sent the case to

[27] If Denver had instead argued on appeal that the evidence was insufficient on causation to support the jury verdict, we could review the trial evidence to decide that question. But Denver waived its right to raise this challenge when it failed to move for judgment as a matter of law under Federal Rule of Civil Procedure 50(b). *See Ortiz*, 562 U.S. at 189 ("Absent [a Rule 50(b)] motion, we have repeatedly held, an appellate court is 'powerless' to review the sufficiency of the evidence after trial.").

the jury.[28] The court thus determined causation to be a jury question. Second, and even more compelling, the jury found municipal liability, including causation. *See* App., Vol. XXVI at 7059 (instructing the jury that municipal liability required finding "Denver's deficient training directly caused or was the moving force behind Plaintiff Michael Valdez's injuries").

The foregoing dooms Denver's attempt to vacate the jury verdict through its claim that the district court failed to address causation at summary judgment.[29]

* * * *

We reject Denver's attempt to challenge the district court's denial of its summary judgment motion. Its legal arguments lack merit. Its remaining arguments are not purely legal and therefore, because this case went to trial, are improperly raised on appeal. Denver moved for judgment as a matter of law at trial under Rule 50(a), raising arguments similar to those it raised at summary judgment. It did not appeal the denial of the Rule 50(a) motion. We affirm the district court's summary judgment ruling on Mr. Valdez's municipal liability claim against Denver.

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[28] In support of the Rule 50(a) motion, Denver counsel argued that "the rigorous standard of causation . . . has not been met here." App., Vol. XXXII at 8480. And in denying the motion, the district court expressly addressed causation. *See* App., Vol. XXXIII at 8829-30 (explaining "a reasonable jury could conclude that Denver's allegedly deficient training directly caused or was the moving force behind plaintiff's injuries" based on Mr. Valdez's rebuttal expert's testimony that "appropriate training would have made a difference in the outcome").

[29] Judge Hartz concurs in the result on the causation issue.

B. *Rule 30(b)(6) Deposition and Related "Moving Target" Arguments*

The district court did not abuse its discretion in allowing Mr. Valdez to take a Rule 30(b)(6) deposition after the close of discovery, to amend his municipal liability theories, or to present its failure-to-train theories at trial. Denver generally complains of having to defend against a "moving target," *see* Aplt. Br. at 40; Reply Br. at 21, 24. We affirm because Denver cannot show the district court abused its discretion.

1. **Additional Procedural Background**

While the case was before Judge Matsch, Mr. Valdez moved to compel a Rule 30(b)(6) deposition of a Denver representative about the city's police officer training, hoping to uncover evidence that would support his failure-to-train claim. Judge Matsch denied this motion, stating it was unnecessary for Mr. Valdez to seek evidence from Denver because "the city is going to be liable if [its officers are] liable." App., Vol. IV at 1113.[30] After this ruling, Denver voluntarily withdrew its expert on police practices. *Id.* at 1125.

Judge Matsch denied summary judgment for Denver based on Mr. Valdez's theory that Denver ratified the officers' alleged constitutional violations. His order briefly mentioned, but did not rule on, Mr. Valdez's failure-to-train claim. *See* App.,

[30] Judge Matsch later described this statement as "unfortunate" and clarified that he was not ruling on municipal liability. App., Vol. IX at 2377; *see also Monell v. New York City Dept. of Soc. Serv.*, 436 U.S. 658, 691 (1978) (a municipality cannot be held liable under § 1983 on a *respondeat superior* theory).

Vol. IX at 2377-78. Mr. Valdez continued to assert that the "City remains liable for failure to train, supervise and discipline Mr. Motyka and Mr. Mac[d]onald." App., Vol. X at 2623.

Soon after Judge Martinez took over the case, he ruled that Mr. Valdez was improperly denied an opportunity to depose Denver's Rule 30(b)(6) representative. "[T]o ensure that th[e] case proceed[ed] to trial on solid legal footing, and to cure potential prejudice to Valdez," Judge Martinez gave Mr. Valdez an opportunity to take the deposition. App., Vol. X at 2828. He also ordered Mr. Valdez to file an amended notice of municipal liability theories and set a deadline for Denver to move for summary judgment on those theories.

The district court granted summary judgment to Denver on Mr. Valdez's failure to investigate and discipline theory.[31] But it denied summary judgment on two failure-to-train theories: that Denver failed to train "that force will not be used as a means of retaliation, punishment or unlawful coercion" and to "train and refresh officers concerning stress inoculation."[32] App., Vol. XX at 5521, 5524.

At the close of trial, the jury was instructed to consider whether "Defendant City and County of Denver failed to train its police officers that force will not be used either:

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[31] As previously discussed, Judge Matsch called this Mr. Valdez's "ratification" theory.

[32] The court considered the second theory as an "elaboration" of the first and instructed Mr. Valdez not to use the words "stress inoculation" in describing the theory to a lay jury. App., Vol. XX at 5524.

(1) as a means of retaliation, punishment or unlawful coercion; or (2) out of adrenaline, or anger, after having been shot at or struck during a citizen encounter." App., Vol. XXVI at 7059.

2. **Analysis**

Denver contends that Judge Martinez impermissibly allowed Mr. Valdez to change his failure-to-train theories after the Rule 30(b)(6) deposition, *see* Aplt Br. at 45; Reply Br. at 22, and to expand those theories during trial, *see* Reply Br. at 24. Denver asserts it suffered prejudice because it could not redesignate its police training expert, whom it had withdrawn in reliance on Judge Matsch's order holding Denver's training practices irrelevant. Aplt. Br. at 45-46. Denver also argues it could not adequately defend itself with testimony from fact witnesses on relevant points because Mr. Valdez's theories fluctuated throughout trial. *Id*.

a. *Pretrial*

The district court did not abuse its discretion in reversing Judge Matsch's ruling on the Rule 30(b)(6) deposition and ordering Mr. Valdez to submit his amended theories of municipal liability.

"[D]istrict courts generally remain free to reconsider their earlier interlocutory orders."[33] *Been v. O.K. Indus., Inc*., 495 F.3d 1217, 1225 (10th Cir. 2007). "This

[33] Judge Matsch's denial of the motion to compel the deposition and his denial of summary judgment to Denver were not final orders. *See Stewart v. Oklahoma*, 292 F.3d 1257, 1259 (10th Cir. 2002) (a denial of summary judgment is usually not a final appealable order).

principle remains true even when a case is reassigned from one judge to another in the same court." *Rimbert v. Eli Lilly & Co.*, 647 F.3d 1247, 1251 (10th Cir. 2011) (affirming the reconsideration of a *Daubert* ruling by a district judge who had taken over the case).

Neither Judge Martinez's decision to order a limited reopening of discovery to correct a legal error nor his order instructing Mr. Valdez to file amended theories of municipal liability constitutes an "arbitrary, capricious, whimsical, or manifestly unreasonable judgment." *United States v. Silva*, 889 F.3d 704, 709 (10th Cir. 2018) (quotations omitted). The parties agree that Judge Matsch based his denial of the motion to compel the deposition on a legal error. Denver does not suggest that Judge Martinez lacked authority to reconsider Judge Matsch's rulings, only that he should not have done so. But reversing an interlocutory order after discovering legal error falls within a district court judge's discretion. *See Been*, 495 F.3d at 1225 (no abuse of discretion in reversing prior judge's denial of a motion for judgment on the pleadings after finding persuasive authority from other circuits). Judge Martinez acted within his discretion to order the deposition and permit Mr. Valdez to develop municipal liability claims that had been erroneously foreclosed.

Denver has not demonstrated prejudice from the district court's order. The court ordered Mr. Valdez to identify his new theories of municipal liability in a filed notice, and it gave Denver the opportunity to move for summary judgment on each of the municipal liability claims. After the court denied summary judgment, Denver had

14 months to prepare for trial on those theories.[34] Judge Martinez acted reasonably in correcting Judge Matsch's legal error, allowing Mr. Valdez to take the Rule 30(b)(6) deposition and supplement his legal theories, and allowing Denver to submit its second summary judgment motion. Judge Martinez's order on the deposition was manifestly reasonable and, by allowing Denver to move again for summary judgment, the district court cured any prejudice to Denver.

b. *Trial*

The district court did not abuse its discretion in managing the municipal liability theories at trial. Denver asserts that Mr. Valdez's theories were "framed differently than in his final notice or in the summary judgment order." Aplt. Br. at 44. We are not persuaded. The district court denied summary judgment on whether Denver was deliberately indifferent for (1) failure to train "that force will not be used as a means of retaliation, punishment or unlawful coercion" and (2) failure "to train and refresh officers concerning stress inoculation." *See* App., Vol. XX at 5521-24. At trial, as articulated in the jury instructions, Mr. Valdez said Denver was liable for failure to train "that force will not be used either: (1) as a means of retaliation, punishment or unlawful coercion; or (2) out of adrenaline, or

[34] Contrary to Denver's assertion that it "never meaningfully presented anything other than a ratification theory of municipal liability until Judge Martinez *sua sponte* questioned its viability," *see* Reply Br. at 23, Mr. Valdez briefed single-incident failure-to-train in the summary judgment briefing before Judge Matsch. *See* App., Vol. V at 1312 (citing *City of Canton*, 489 U.S. at 388).

anger, after having been shot at or struck during a citizen encounter," *see* App., Vol. XXVI at 7059. We discern no material difference between these sets of theories.

Denver contends the district court erred in allowing Mr. Valdez to reference "adrenaline" at trial because the "stress inoculation" theory was "dismissed." Reply Br. at 24. But contrary to Denver's argument, the second summary judgment order permitted Mr. Valdez to proceed on a theory that Denver failed to "train and refresh officers concerning stress inoculation." The court instructed Mr. Valdez to avoid using the phrase "stress inoculation," which it deemed "beyond the capacity of a lay jury." App., Vol. XX at 5524. Consistent with this guidance, Mr. Valdez replaced "stress inoculation" with "adrenaline" in his proposed jury instructions, and the district court's final instructions included the term "adrenaline." *See* App., Vol. XXV at 7000 (Mr. Valdez's proposed instructions); App., Vol. XXVI at 7059 (final instructions on failure to train).[35]

We fail to see how the district court committed any abuse of discretion. Denver's prejudice arguments are otherwise unavailing. Denver had 14-months' notice between Judge Martinez's summary judgment order and the trial on Mr. Valdez's failure-to-train theories. At trial, Denver presented testimony from multiple fact witnesses, including Denver detectives and police officers and an expert in

[35] When Denver objected at the charging conference to "adrenaline" being included in the jury instructions, the district court overruled the objection and clarified its position that the adrenaline theory is "properly in the case." App., Vol. XXXIII at 8869. Denver does not raise this as a jury instruction challenge on appeal.

forensic pathology. It also elicited testimony from witnesses on whether adrenaline affects officers' decisions to use deadly force.[36] *See* App., Vol. XXXII at 8500; *id.* at 8520; *id.* at 8601; *id.* at 8605; App., Vol. XXXIII at 8657. Denver has not shown that the theories advanced at trial caused prejudice.

* * * *

We find no abuse of discretion by the district court or prejudice to Denver.

C. ***Challenge to Jury Instructions***

Denver contends the district court erred in (1) declining to give its proposed instruction defining "deficient training" and (2) modifying its proposed deliberate indifference instruction. Aplt. Br. at 46-49. Denver thus argues error based on "a failure to give an instruction." Fed. R. Cir. P. 51(d)(1)(B).

Denver's challenges fail. The jury was instructed under the single-incident municipal liability standard we stated in *Lance v. Morris*, which fully and accurately expressed the law. Denver's proposed instruction on deficient training and its proposed language that the court omitted on deliberate indifference were both thus unnecessary.

[36] Denver argues it was "deprived" "of its opportunity to present expert testimony on Plaintiff's newly developed failure to train claims" because the deadline for expert disclosures had passed before the second summary judgment order. *See* Aplt. Br. at 46. But Denver fails to identify any motion in which it requested such relief and admits to "voluntarily withdr[awing]" its expert in the first instance. *See* Aplt. Br. at 45.

1. **Additional Procedural Background**

a. *Denver's proposed jury instructions*

Before the charging conference, which occurred at the close of evidence, the parties separately filed proposed jury instructions.[37] As relevant here, Denver proposed the following instruction on deficient training:

Defendants' Disputed Proposed Instruction I

> For Plaintiff Michael Valdez to prevail on his failure to train claim against Defendant Denver, he must show that Denver's training was in fact deficient. Deficiency in training is not established by merely showing that an injury or accident could have been avoided if an employee had better or different training, because in virtually every instance, a plaintiff will be able to point to something the city could have done to prevent the unfortunate incident. That alone is insufficient to demonstrate liability. Instead, Mr. Valdez must point to a specific deficiency in Denver's training that renders it constitutionally deficient, not just a mere general ineffectiveness of training in the tasks Denver police officers must perform.

App., Vol. XXII at 5914.

Denver also proposed an instruction on deliberate indifference:

Defendants' Disputed Proposed Instruction K

> "Deliberate indifference" to the rights of others is the conscious or reckless disregard of the consequences of one's acts or omissions. Deliberate indifference requires

[37] The parties had previously submitted proposed disputed instructions during the second summary judgment briefing. After Judge Martinez's ruling on summary judgment, Denver moved for leave to file revised jury instructions. The court granted that motion as to instructions affected by the second summary judgment ruling. These proposed instructions, submitted shortly before the charging conference, are the ones relevant to this appeal.

more than negligence or ordinary lack of due care. It requires a showing that Defendant Denver's policymakers consciously and deliberately chose to disregard a plainly obvious risk of harm.

Deliberate indifference may exist when a city fails to train police officers on how to handle recurring situations presenting an obvious potential to violate the Constitution. To determine whether a particular problem is likely enough to recur to alert officials to an obvious deficiency in Denver's training and amount to deliberate indifference, Mr. Valdez must show by a preponderance of the evidence that:

1. Denver's policymakers know to a moral certainty that its police officers will confront a situation like the incident in this case;

2. That situation presents police officers with a difficult choice of the sort that training will make less difficult; and

3. The wrong choice will frequently cause the deprivation of a citizen's constitutional rights.

Deliberate indifference cannot be shown by a failure to train on a matter that is obvious to all without training. The imposition of liability against a city for the actions of one of its officers requires a likelihood that the failure to train will result in the officer making the wrong decision. A city is entitled to rely on the common sense of its employees not to engage in wicked and criminal conduct. The question is not whether better or different training might have prevented the violation. **To find deliberate indifference, you must determine that the situation Defendant Motyka confronted involved technical knowledge or ambiguous gray areas in the law** that made it highly predictable or patently obvious that a police officer in Defendant Motyka's position would need to be explicitly instructed to not use deadly force as a means of retaliation or punishment to know how to handle the situation correctly.

App., Vol. XXII at 5917-18 (emphasis added).[38]

b. *Charging conference*

The district court compiled a set of jury instructions based on the proposed instructions and distributed them to the parties shortly before the charging conference.

The district judge opened the conference by summarizing how the court had responded to the proposed instructions from each party. The court said it had rejected Denver's proposed Instruction I on deficient training and had modified its proposed Instruction K on deliberate indifference. App., Vol. XXXIII at 8844-45. For Instruction I, the court explained that "it is unnecessary to instruct the jury that the plaintiff must point to a specific deficiency in Denver's training when the" jury instructions already "set forth the [two] specific theories underlying the plaintiff's failure to train claim." *Id*. It did not explain why it had modified Instruction K.

After the district court addressed the proposed instructions, it asked the parties if there were "any objections to the Court's final set of jury instructions." *Id.* at 8845. Each party made limited objections on the record. Denver did not object to

[38] Denver provided this proposed deliberate indifference instruction. The district court gave portions of the proposed instruction, but modified and omitted some language. On appeal, Denver challenges the district court's omission of certain passages, which we have bolded above.

the court's rejection of its Instruction I on deficient training.[39] It did object to the court's modified deliberate indifference instruction.

2. **The Final Jury Instructions**

At trial, the district court gave the following instructions on municipal liability that are relevant to Denver's appeal:

> **Claim 2: Failure to Train Claim**
>
> If you find that Plaintiff Michael Valdez has proven that Defendant Robert Motyka violated Plaintiff's constitutional right to be free from excessive force, you must next consider whether Plaintiff has proven his claim that Defendant City and County of Denver failed to train its police officers that force will not be used either: (1) as a means of retaliation, punishment or unlawful coercion; or (2) out of adrenaline, or anger, after having been shot at or struck during a citizen encounter.
>
> To prevail on Claim 2 against Defendant City and County of Denver, Plaintiff Michael Valdez must prove by a preponderance of the evidence both that Defendant Robert Motyka violated Plaintiff[] Michael Valdez's constitutional rights as instructed in Claim 1, as well as the following three elements:

[39] Mr. Valdez contends that, because Denver did not object at this point in the charging conference, it failed to preserve for appeal the rejection of its proposed Instruction I. We disagree. The objection was preserved because Denver "properly requested" Instruction I, and the district "court rejected the request in a definitive ruling on the record." Fed. R. Civ. P. 51(d)(1)(B). "For the denial of the proposed instruction to be a *definitive* rejection of the argument raised on appeal in support of the instruction, the district court must expressly reject that specific argument." *See First Am. Title Ins. Co. v. Nw. Title Ins. Agency*, 906 F.3d 884, 895 (10th Cir. 2018). The court did so here when it explained why it denied the proposed instruction and then provided the parties with its "final set of jury instructions." App., Vol. XXXIII at 8843.

> *First*, for at least five years prior to January 16, 2013, Defendant City and County of Denver had a policy or custom involving deficient training in the use of force during or after a citizen encounter in which the officer is shot at or struck, in that it: (a) failed to train its police officers that deadly force will not be used as a means of retaliation, punishment or unlawful coercion; or (b) failed to train and refresh its police officers that deadly force will not be used out of adrenaline or anger;
>
> *Second*, Defendant City and County of Denver's deficient training directly caused or was the moving force behind Plaintiff Michael Valdez's injuries; and
>
> *Third*, Defendant City and County of Denver adopted its policy or custom of deficient training with deliberate indifference to Plaintiff's constitutional rights . . . .

App., Vol. XXVI at 7059.

Deliberate Indifference

> "Deliberate indifference" is the conscious or reckless disregard of the consequences of one's acts or omissions. Deliberate indifference requires more than negligence or ordinary lack of due care. It may be shown when a municipality has actual or constructive notice that its action or failure to act is substantially certain to result in a constitutional violation, and it consciously or deliberately chooses to disregard the risk of harm. Moreover, deliberate indifference can occur when a municipality fails to train its employees to handle recurring situations presenting an obvious potential for such a violation.
>
> To show that Defendant City and the County of Denver acted with deliberate indifference, Plaintiff Michael Valdez must prove each of the following by a preponderance of the evidence:
>
> *First*, that the Defendant City and County of Denver's policymakers know to a moral certainty that its

> police officers will confront a situation like the incident in this case;
>
> *Second*, that the situation presents police officers with a difficult choice of the sort that training or supervision will make less difficult; and
>
> *Third*, that the wrong choice will frequently cause the deprivation of a citizen's constitutional rights.

App., Vol. XXVI at 7062.

3. **Analysis**

We review jury instructions "de novo in the context of the entire trial to determine if they accurately state the governing law and provide the jury with an accurate understanding of the relevant legal standards and factual issues in the case." *United States v. Jean-Pierre*, 1 F.4th 836, 846 (10th Cir. 2021) (alterations and quotations omitted). And we review "the district court's refusal to give requested instructions for abuse of discretion." *United States v. Cushing*, 10 F.4th 1055, 1073 (10th Cir. 2021) (alterations and quotations omitted), *cert. denied*, 142 S. Ct. 813 (2022).

a. *Deficient training instruction*

The district court did not abuse its discretion in declining to give Denver's proposed instruction on deficient training. The proposed instruction contained two key parts. First, it described what deficient training "is not"—mere "better or different training" that "could have" prevented the "injury or accident." App., Vol. XXII at 5914. Second, it said that "Mr. Valdez must point to a specific deficiency in Denver's training that renders it constitutionally deficient." *Id.*

When the district court rejected this proposed instruction at the charging conference, it focused on the second part. As noted above, the court said it was "unnecessary to instruct the jury that the plaintiff must point to a specific deficiency in [Denver's] training when the claim 2 [failure-to-train instruction already] set forth the specific theories underlying the plaintiff's failure to train claim." App., Vol. XXXIII at 8844-45. We agree.

The court's jury instruction on failure to train specified what type of training Denver failed to provide—it "(a) failed to train its police officers that deadly force will not be used as a means of retaliation, punishment or unlawful coercion; [and] (b) failed to train and refresh its police officers that deadly force will not be used out of adrenaline or anger." App., Vol. XXVI at 7059. And as to whether "a specific deficiency in Denver's training renders it constitutionally deficient," the court's instruction on deliberate indifference enabled the jury to make that determination.

Because the second part of Denver's proposed deficient-training instruction was unnecessary, there also was no need to instruct using the words of the first part—that mere lack of "better or different training" to avoid injury is not deficient training. The specific deficiencies listed in the court's failure-to-train instruction combined with the requirements in its deliberate indifference instruction precluded the jury, contrary to Denver's contention, from finding that Denver's training was deficient if it "merely determined that Mr. Valdez's injury could have been avoided with better or different training, contrary to settled law." Aplt. Br. at 48.

Also, Denver's proposed deficient-training instruction would have distorted Mr. Valdez's failure-to-train claim, which was not just that more training "would have been helpful," *Connick* 563 U.S. at 68, but instead that the "need for more or different training" was "so obvious, and the inadequacy so likely to result in the violation of constitutional rights" that liability attaches, *City of Canton*, 489 U.S. at 390. *See* App., Vol. XX at 5521-22; Aplee. Br. at 18, 32-33.

The district court did not abuse its discretion in determining that Denver's proposed instruction on "deficient training" would have been redundant. *See Cushing*, 10 F.4th at 1073.

b. *Deliberate indifference instruction*

Denver's second challenge concerns the district court's deliberate indifference instruction. The court gave most of Denver's proposed instruction on deliberate indifference but modified and omitted some parts. Denver challenges the omission of its proposed language that "[d]eliberate indifference cannot be shown by a failure to train on a matter that is obvious to all without training," but instead the jury must find "that the situation Defendant Motyka confronted involved technical knowledge or ambiguous gray areas in the law." App., Vol. XXII at 5917-18; Aplt. Br. at 48. Denver preserved this argument by objecting at the charging conference. We review the district court's refusal to give the requested language for abuse of discretion, *see Cushing*, 10 F.4th at 1073, and we review de novo whether the instructions given to the jury accurately stated the governing law, *see Jean-Pierre*, 1 F.4th at 846.

The omitted language was redundant.[40] The court's instruction to the jury listed each element of deliberate indifference:

- *First*, that the Defendant City and County of Denver's policymakers know to a moral certainty that its police officers will confront a situation like the incident in this case;
- *Second,* that the situation presents police officers with a difficult choice of the sort that training or supervision will make less difficult; and
- *Third*, that the wrong choice will frequently cause the deprivation of a citizen's constitutional rights.

App., Vol. XXVI at 7062. This language, taken from our recent decision *Lance v. Morris*,[41] is based on the deliberate indifference standard of *City of Canton*.[42] The jury instructions "correctly stated the governing law and provided the jury with an

[40] We also find the words "technical knowledge or ambiguous gray areas in the law," as used in Denver's proposed instruction, to be unclear. They likely would have confused the jury. *See United States v. Bradshaw*, 580 F.3d 1129, 1131 (10th Cir. 2009) (courts retain discretion to refuse to give instructions that would confuse the jury).

[41] In *Lance v. Morris*, we adopted these elements for deliberate indifference from *Walker v. City of New York*, 974 F.2d 293 (2d Cir. 1992). *See Lance*, 985 F.3d at 801-02. *Walker* based its formulation on *City of Canton*. *See Walker*, 974 F.2d at 297 ("From the[] examples" of deliberate indifference in *City of Canton*, "we discern three requirements that must be met before a municipality's failure to train or supervise constitutes deliberate indifference to the constitutional rights of citizens.").

[42] In *City of Canton*, the Supreme Court said that a municipality may be liable under § 1983 for deliberate indifference when "in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." 489 U.S. at 390.

ample understanding of the issues and applicable principles." *Jensen v. W. Jordan City*, 968 F.3d 1187, 1197 (10th Cir. 2020) (quotations omitted).

The court's instructions precluded the jury from finding Denver liable for failing to train on a matter that is obvious to all or that did not require technical knowledge. The court instructed the jury to identify a "difficult choice." A choice cannot be "difficult" if it would be "obvious to all without training." As the Second Circuit explained in *Walker*, "Whether to use deadly force in apprehending a fleeing suspect qualifies as a 'difficult choice' because more than the application of common sense is required" and "[a] choice might also be difficult where, although the proper course is clear, the employee has powerful incentives to make the wrong choice." *Walker*, 974 F.2d at 297.[43] The Supreme Court in *Connick* acknowledged that officers who are "arm[ed] . . . with firearms and deploy[ed] . . . into the public to capture fleeing felons" will likely "lack[] specific tools to handle that situation" without additional training. 563 U.S. at 63-64 (quotations omitted).

The district court's omission of Denver's proposed language was not an abuse of discretion. *See United States v. Kalu,* 791 F.3d 1194, 1200–01 (10th Cir. 2015).

* * * *

[43] Being shot by a fleeing suspect may qualify as a "powerful incentive" under *Walker*.

The district court did not err in its denial of Denver's second motion for summary judgment, its management of Mr. Valdez's municipal liability claims, and its handling of the jury instructions. We affirm on all issues in 21-1401.

III. DISCUSSION - MR. VALDEZ'S CROSS APPEAL – CASE NO. 21-1415

We next consider Mr. Valdez's cross appeal in 21-1415 challenging summary judgment for Lieutenant Macdonald based on qualified immunity.

A. *Qualified Immunity*

"Qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights." *Wilkins v. City of Tulsa, Oklahoma*, 33 F.4th 1265, 1272 (10th Cir. 2022) (quotations omitted). "When a defendant asserts qualified immunity in a summary judgment motion, the plaintiff must show that (1) a reasonable jury could find facts supporting a violation of a constitutional right and (2) the right was clearly established at the time of the violation." *Id.* A defendant is entitled to qualified immunity if the plaintiff fails to satisfy either prong. *See Pearson v. Callahan*, 555 U.S. 223, 236-37 (2009); *Soza v. Demsich*, 13 F.4th 1094, 1099 (10th Cir. 2021).

B. *Factual Background*

As discussed above, Lieutenant Macdonald arrived at the scene after Sergeant Motyka. After seeing Sergeant Motyka shooting at Mr. Valdez, Lieutenant Macdonald believed Mr. Valdez to be a threat and fired seven bullets at him while Sergeant Motyka shot another round. The ballistics investigation could not

determine whether any of Lieutenant Macdonald's bullets hit Mr. Valdez or which officer shot the bullet that severed Mr. Valdez's finger. App., Vol. IX at 2372. It did determine that the bullet wounding Mr. Valdez's back came from Sergeant Motyka's gun. *Id*.

C. ***Procedural Background***

The first summary judgment order, authored by Judge Matsch, granted Lieutenant Macdonald qualified immunity and dismissed him from this case.

First, the district court concluded that Lieutenant Macdonald "cannot be held liable" in his individual capacity for the wound to Mr. Valdez's finger because determining whether a bullet from Lieutenant Macdonald's gun caused the injury was "too speculative." App., Vol. IX at 2376.

Second, on supervisory liability, the court determined that Mr. Valdez had not established a constitutional violation and "[t]here is no clearly established law that [Lieutenant Macdonald's] conduct violated the Fourth Amendment." *Id.* at 2377.

On appeal, Mr. Valdez challenges these rulings.

D. ***Analysis***

As previously noted, "[w]e review a district court's grant of summary judgment de novo, applying the same legal standard as the district court." *Rowell v. Bd. of Cnty. Commissioners of Muskogee Cnty., Oklahoma*, 978 F.3d 1165, 1170 (10th Cir. 2020) (quotations omitted). In doing so, "we review the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving

party." *Brewer v. City of Albuquerque*, 18 F.4th 1205, 1216 (10th Cir. 2021) (quotations omitted).

We affirm the district court. On individual liability, Mr. Valdez has failed to show the district court erred in finding the record on causation too speculative to establish a constitutional violation, and he has waived his other appellate arguments. On supervisory liability, Mr. Valdez has failed to show Lieutenant Macdonald acted contrary to clearly established law.

1. **Individual Liability**

The district court concluded that Mr. Valdez could not establish a constitutional violation for excessive force because he could not show Lieutenant Macdonald caused him injury. It held that Lieutenant Macdonald was therefore entitled to qualified immunity under prong one of qualified immunity. As discussed below, the court did not err in determining there was no factual issue for the jury to decide on causation. Mr. Valdez has waived his other arguments.

a. *Causation*

In § 1983 cases, courts employ general tort principles of causation to determine whether a defendant's alleged constitutional violation caused the plaintiff's injury. *See Monroe v. Pape*, 365 U.S. 167, 187 (1961), *overruled in part on other grounds by Monell v. New York City Dept. of Soc Servs.*, 436 U.S. 658 (1978); *Martinez v. Carson*, 697 F.3d 1252, 1255 (10th Cir. 2012). Defendants may be held liable only for "the harm proximately or legally caused by their tortious conduct." *Trask v. Franco*, 446 F.3d 1036, 1046 (10th Cir. 2006) (quotations

omitted); *Snell v. Tunnell,* 920 F.2d 673, 700 (10th Cir. 1990) (to establish personal liability, plaintiff must establish "cause in fact between the conduct complained of and the constitutional deprivation").

b. *District court proceedings*

In its motion for summary judgment, Denver argued there was no evidence "from which a reasonable conclusion could be drawn that *any* bullet from Lt. Macdonald's gun actually struck Mr. Valdez when he was on the ground." App., Vol. III at 729; App., Vol. VII at 1798-99 (Mr. Valdez "cannot establish that Lt. Macdonald violated his Fourth Amendment rights by merely showing that he fired his gun" without "evidence showing any of the bullets . . . hit him"). Mr. Valdez did not respond to this argument in his opposition to summary judgment or explain why Lieutenant Macdonald would be liable absent some evidence that he physically injured Mr. Valdez.

The district court concluded that (1) Sergeant Motyka fired the bullet that injured Mr. Valdez's back and (2) it was impossible to ascertain which officer fired the bullet that hit Mr. Valdez's finger. Applying general tort principles, the court found that Lieutenant Macdonald "cannot be held liable for th[e] wound" to Mr. Valdez's finger because determining whether a bullet from Lieutenant Macdonald's gun hit Mr. Valdez was "too speculative." App., Vol. IX at 2376. The court thus concluded Mr. Valdez could not show causation and therefore could not show that Lieutenant Macdonald was liable to him for excessive force. *See Trask*, 446 F.3d

at 1046 (quotations omitted) (officers can only be held liable for "the harm proximately or legally caused by their tortious conduct").

c. *Mr. Valdez's arguments*

First, Mr. Valdez argues that even without evidence that any of Lieutenant Macdonald's bullets hit Mr. Valdez, the jury should have decided causation. *See* Aplee. Br. at 66-67 ("Once Valdez introduced evidence that one of the two [officers] fired the bullet, it became a jury question which one actually did."). Neither Mr. Valdez's opposition to summary judgment nor Judge Matsch's summary judgment order specifically addressed the argument Mr. Valdez raises here. Even so, we find it unconvincing.

At summary judgment, a court must ask "whether there is evidence upon which a jury can properly proceed to find a verdict." *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) (quotations and alterations omitted). Mr. Valdez's opposition to summary judgment stated that "either Defendant Motyka or Macdonald" fired the bullet that struck his finger, *see* App., Vol. V at 1239, but he failed to point to any evidence that would have allowed a reasonable jury to find that Lieutenant Macdonald caused that injury. The district court thus did not err in finding the record on causation was "too speculative" to present to the jury, and summary judgment was appropriate.[44]

[44] Mr. Valdez cites out-of-circuit cases to suggest that theories of joint and several liability may be available in this case. *See Grandstaff v. City of Borger, Tex.*, 767 F.2d 161, 168 (5th Cir. 1985); *see also Velazquez v. City of Hialeah*, 484 F.3d 1340, 1342 (11th Cir. 2007). These cases are nonbinding and distinguishable. Also, Mr.

Second, Mr. Valdez argues that even if none of Lieutenant Macdonald's bullets hit Mr. Valdez, the district court should still have denied summary judgment on his excessive force claim because "it is axiomatic that an officer's use of force may be objectively unreasonable even if no physical harm results." Aplee. Br. at 65. He has waived this argument.

Mr. Valdez is correct that a plaintiff need not prove physical injury to prevail on an excessive force claim. *Cortez v. McCauley*, 478 F.3d 1108, 1129 (10th Cir. 2007). But he alleged only physical injuries in his amended complaint. *See* App., Vol. I at 85 ¶ 33 ("Mr. Valdez sustained serious and significant injuries, including but not limited to a gunshot wound in his back and a gunshot wound to his finger . . . ."). And he never argued in district court that Lieutenant Macdonald should be liable for any nonphysical injury. *See Cortez*, 478 F.3d at 1129 (stating "some actual injury . . . be it physical or emotional," is required). Nor did he contend that Mr. Valdez suffered nonphysical injuries. Because he has not argued plain error here, he has waived any argument that Lieutenant Macdonald should be individually liable for nonphysical injuries.[45] *Richison*

Valdez did not raise joint and several liability in district court, and because he does not argue plain error on appeal, he has waived this argument. *See Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1128-31 (10th Cir. 2011) ("[T]he failure to argue for plain error and its application on appeal []surely marks the end of the road for an argument for reversal not first presented to the district court."). Nor did he argue that the burden of proof on causation should be shifted to Defendants Motyka and Macdonald. *See Summers v. Tice*, 199 P.2d 1, 4 (Cal. 1948) (en banc).

[45] Although Mr. Valdez argued in district court that "there is sufficient causal connection between Defendant Macdonald's acts and the injuries caused to Mr. Valdez, because he either directly caused Mr. Valdez's injury to his finger, or at the least joined, encouraged, and incited Defendant Motyka's continuing unconstitutional

v. Ernest Grp., Inc., 634 F.3d 1123, 1128-31 (10th Cir. 2011); *see also Xlear, Inc. v. Focus Nutrition, LLC*, 893 F.3d 1227, 1234 (10th Cir. 2018) (quotations and alterations omitted) ("Generally, an issue is waived if it was not raised below in the district court.").

Third, Mr. Valdez argues that Lieutenant Macdonald should be liable for the bullet wound caused by Sergeant Motyka under a failure to intervene theory. Aplee. Br. at 66. He briefly argued this point to the district court, *see* App., Vol. V at 1283, which rejected it, *see* App., Vol. IX at 2377. He has waived this argument on appeal under Federal Rule of Appellate Procedure 28(a)(8)(A), which requires an appellant's opening brief to identify "contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies."

In his opening brief, Mr. Valdez merely asserts that "Macdonald failed to intervene to prevent Motyka from using excessive force." *See* Aplee. Br. at 66. He does not argue failure to intervene in his Reply. Mr. Valdez's "perfunctory" statement fails to "frame and develop" his failure-to-intervene argument and is "insufficient to invoke appellate review." *Holmes v. Colo. Coal. for Homeless Long Term Disability Plan*, 762 F.3d 1195, 1199 (10th Cir. 2014) (quotations omitted). His argument is conclusory, underdeveloped, and thus inadequately briefed and waived. We will therefore not consider it further. *See Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007) ("[W]e routinely have declined to consider arguments that

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use of force," *see* App., Vol. V at 1292, he made this argument only as to supervisory liability, not individual liability. We address Mr. Valdez's supervisory liability arguments in the next section.

are not raised, or are inadequately presented, in a[] [party's] opening brief."); *Adler v. Wal–Mart Stores, Inc.*, 144 F.3d 664, 679 (10th Cir.1998) ("Arguments inadequately briefed in the opening brief are waived.").

* * * *

Mr. Valdez thus has presented no basis to reverse the district court's summary judgment determination on Lieutenant Macdonald's individual liability.

2. **Supervisory Liability**

On the supervisory liability claim, the district court did not err in concluding that Mr. Valdez has not shown that Lieutenant Macdonald violated clearly established law. Dismissal was proper based on prong two of qualified immunity.

To demonstrate that the law is clearly established, a party opposing qualified immunity must either "(1) identif[y] an on-point Supreme Court or published Tenth Circuit decision, or (2) show[] the clearly established weight of authority from other courts has found the law to be as the [party] maintains." *Perry v. Durborow*, 892 F.3d 1116, 1123 (10th Cir. 2018) (quotations and citations omitted). Supervisory liability is available when a "supervisor's subordinates violated the Constitution" and the plaintiff can demonstrate an "affirmative link" between the supervisor and the violation, which includes showing "(1) personal involvement, (2) sufficient causal connection, and (3) culpable state of mind." *Dodds v. Richardson*, 614 F.3d 1185, 1195-98 (10th Cir. 2010).

Mr. Valdez asserts that "*Butler* [*v. City of Norman*, 992 F.2d 1053, 1056 (10th Cir. 1993)] and other Tenth Circuit cases clearly establish that supervisors have

liability when they personally participate in a subordinate's violation of constitutional rights and when their failure to supervise results in a constitutional deprivation." Aplee. Br. at 69-70. In his opposition to summary judgment, Mr. Valdez did not cite *Butler*. *See* App., Vol. V at 1295-98.

Mr. Valdez's argument fails. He cites only one published Tenth Circuit case, *Butler*; one Supreme Court case, *Tennessee v. Garner*, 471 U.S. 1, 21 (1985); and one unpublished Tenth Circuit case, *Trusdale v. Bell*, 85 F. App'x 691, 693 (10th Cir. 2003). These cases do not place the "constitutional question beyond debate" or do more than establish a "broad general proposition." *See Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (quotations omitted).

In *Butler*, we held that a chief of police was not liable as a supervisor because the plaintiff had not demonstrated an "'affirmative link' . . . between the constitutional deprivation and either the supervisor's personal participation, his exercise of control or discretion, or his failure to supervise." 992 F.2d at 1055. Mr. Valdez seems to argue that Lieutenant Macdonald should be liable because, unlike the supervisor in *Butler*, he participated in the incident. But in addition to the record lacking any evidence that Lieutenant Macdonald caused Sergeant Motyka to shoot Mr. Valdez, the factual circumstances in this case and *Butler* starkly differ. *Butler* does not show that any alleged violation by Lieutenant Macdonald's "*particular* conduct [was] clearly established." *See Mullenix*, 577 U.S. at 12.

Tennessee v. Garner and *Trusdale v. Bell* are also factually distinguishable. *Tennessee v. Garner* established the constitutional standard for the use of deadly

force. But it did not involve a claim for supervisory liability, nor did it address whether it would be unlawful for a supervising officer to begin shooting based on a subordinate's firing at a suspect. *See* 471 U.S. at 21. In *Trusdale*, we held supervising officers were not liable for any excessive force used by an officer executing a no-knock warrant because the plaintiff failed to show the supervisors' "personal participation" in "the use of excessive force." 85 F. App'x at 693.[46]

Mr. Valdez has identified no "Tenth Circuit or Supreme Court precedent close enough on point to make the unlawfulness of [Lieutenant Macdonald's] actions apparent." *See Mascorro v. Billings*, 656 F.3d 1198, 1208 (10th Cir. 2011).

* * * *

We affirm the district court's grant of summary judgment based on qualified immunity to Lieutenant Macdonald.

IV. DISCUSSION – SERGEANT MOTYKA AND DENVER'S APPEAL OF ATTORNEY FEES AND COSTS – CASE NO. 22-1152

Finally, we consider Sergeant Motyka's and Denver's appeal of the district court's award of attorney fees and nontaxable costs in 22-1152.

After the entry of final judgment, the district court awarded $1,132,327.40 in attorney fees and $18,199.60 in nontaxable costs to Mr. Valdez's lawyers under

[46] Even if *Trusdale* were on point, because it is unpublished, it "provides little support for the notion that the law is clearly established." *Mecham v. Frazier*, 500 F.3d 1200, 1206 (10th Cir. 2007).

42 U.S.C. § 1988. Sergeant Motyka and Denver (collectively "Denver" for ease of reference) argue that the court abused its discretion by:

- Accepting Mr. Valdez's counsel's hourly rates without explaining its findings;
- Reducing the total fees requested by Mr. Valdez by 12.5 percent without recalculating the total compensable hours or providing a reasonable explanation; and
- Awarding 50 percent of Mr. Valdez's requested nontaxable costs after determining Mr. Valdez had not substantiated them.

See Aplt. Br. at 1-2.

We hold that the district court did not abuse its discretion on the attorney fee award but did so on the costs award.

A. ***Legal Background***

Section 1988 of Title 42 provides that in any action brought under § 1983 and other civil rights statutes, "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee." 42 U.S.C. § 1988(b). Because the purpose of § 1988 is to ensure "effective access to the judicial process" for persons with civil rights grievances, "a prevailing plaintiff should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (quotations omitted).

1. **Determining Reasonable Attorney Fees**

"'The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate,'" which produces the "so-called 'lodestar amount.'" *Flitton*

v. Primary Residential Mortg., Inc., 614 F.3d 1173, 1176 (10th Cir. 2010) (quoting *Hensley*, 461 U.S. at 433); *see Gisbrecht v. Barnhart*, 535 U.S. 789, 801-02 (2002).

"To determine what constitutes a reasonable [hourly] rate" for each person who worked on the case, the district court considers the "prevailing market rate for similar services by lawyers of reasonably comparable skill, experience, and reputation in the relevant community" including "experience in civil rights or analogous litigation." *Lippoldt v. Cole*, 468 F.3d 1204, 1224-25 (10th Cir. 2006) (quotations omitted).

To evaluate the number of hours reasonably expended on the litigation, the district court considers "whether the attorney's hours were 'necessary' under the circumstances." *Robinson v. City of Edmond*, 160 F.3d 1275, 1281 (10th Cir. 1998). "Counsel for the prevailing party" must exercise "billing judgment" and "should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary." *Hensley*, 461 U.S. at 434 (quotations omitted).

The Supreme Court has explained that "[t]he product of reasonable hours times a reasonable rate does not end the inquiry," and "other considerations," including the "results obtained" and the extent to which a party prevailed, may "lead the district court to adjust the fee upward or downward." *Id.* at 434; *see also Jane L. v. Bangerter*, 61 F.3d 1505, 1511 (10th Cir. 1995) ("[T]he district court must make a qualitative assessment to determine . . . to what extent plaintiffs' 'limited success' should effect a reduction in the lodestar.").

Further, "[w]here the documentation of hours is inadequate, the district court may reduce the award accordingly." *Hensley*, 461 U.S. at 433. "There is no precise rule or formula for making these determinations," and when a district court concludes that some billed hours should be eliminated but cannot "identify specific hours," it "may simply reduce the award." *Id.* at 436-37 (explaining that to account for partial success on the merits, the district court may exercise its discretion to reduce the award commensurate with the degree of success but must provide a concise and clear explanation for its reasons).

Although "[d]etermining a 'reasonable attorney's fee'" is "committed to the sound discretion of a trial judge," "the judge's discretion is not unlimited." *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 558 (2010) (quoting 42 U.S.C. § 1988). "It is essential that the judge provide a reasonably specific explanation for all aspects of a fee determination" because "[u]nless such an explanation is given, adequate appellate review is not feasible." *Id.* And when a district court decides to reduce fees by a percentage, "[t]he record ought to assure us that the district court did not 'eyeball' the fee request and cut it down by an arbitrary percentage." *Browder v. City of Moab*, 427 F.3d 717, 723 (10th Cir. 2005) (alterations in original) (quoting *Robinson v. City of Edmond*, 160 F.3d 1275, 1281 (10th Cir. 1998)).

2. **Determining Reasonable Costs**

In awarding costs, we distinguish between those that are taxable under 28 U.S.C. § 1920 and those that are nontaxable. The latter may qualify for reimbursement as expenses under a separate statute, such as 42 U.S.C. § 1988.

Rule 54(d) of the Federal Rules of Civil Procedure provides that "costs—other than attorneys' fees—should be allowed to the prevailing party." Fed. R. Civ. P. 54(d)(1). "[28 U.S.C.] § 1920 defines the term 'costs' as used in Rule 54(d)." *Taniguchi v. Kan Pac. Saipan, Ltd*., 566 U.S. 560, 565 (2012) (quoting *Crawford Fitting Co. v. J. T. Gibbons, Inc*., 482 U.S. 437, 441 (1987)). "Taxable costs are limited to relatively minor, incidental expenses as is evident from § 1920, which lists such items as clerk fees, court reporter fees, expenses for printing and witnesses, expenses for exemplification and copies, docket fees, and compensation of court-appointed experts." *Taniguchi*, 566 U.S. at 573.[47] The cost of "deposition transcripts or copies" is taxable under § 1920 if they "were offered into evidence, were not frivolous, and were within the bounds of vigorous advocacy." *In re Williams Sec. Litig.-WCG Subclass*, 558 F.3d 1144, 1148 (10th Cir. 2009) (quotations omitted).

[47] Under 28 U.S.C. § 1920, "[a] judge or clerk of any court of the United States may tax as costs the following:

> (1) Fees of the clerk and marshal;
> (2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;
> (3) Fees and disbursements for printing and witnesses;
> (4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;
> (5) Docket fees under section 1923 of this title;
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title."

To recover other out-of-pocket expenses, the prevailing party in a civil rights case must separately file a motion to collect "attorney's fees and related nontaxable expenses," which are awarded under 42 U.S.C. § 1988. *See* Fed. R. Civ. P. 54(d)(2). "[O]ther out-of-pocket expenses incurred during litigation may be awarded as attorneys fees under section 1988 if (1) the expenses are not absorbed as part of law firm overhead but are normally billed to a private client, and (2) the expenses are reasonable." *Jane L.*, 61 F.3d at 1517.

B. ***Additional Procedural Background***

1. **Rule 54(d) Motion for Costs**

Following the entry of final judgment, Mr. Valdez filed a motion to recover taxable costs under Federal Rule of Civil Procedure 54(d) and 28 U.S.C. § 1920. The clerk awarded him taxable costs of $31,858,75. Denver does not appeal this award.

2. **Motion for Fees and Costs**

Mr. Valdez also filed a motion to recover attorney fees and nontaxable costs under 42 U.S.C. § 1988. In his motion, Mr. Valdez proposed a lodestar calculation of $1,294,088.50. To substantiate this request, he submitted a list of hourly rates and hours worked for

- two shareholders, Jeffrey Pagliuca and Laura Menninger who billed at $595 and $575 per hour, respectively;
- four associates, each billing at $375 per hour;
- one law clerk billing at $100 per hour;
- one investigator billing at $75 per hour;

- three senior paralegals billing at $200 per hour; and
- two paralegals billing at $100 per hour.[48]

He also submitted

- an affidavit by Mr. Pagliuca that described the work performed and hours billed and included the individual timesheets for each member of staff, and
- an expert report by Ben Lebsack, a Denver attorney, to support the reasonableness of the rates and hours requested.

Mr. Valdez's motion argued the hourly rates were reasonable because they were based on each attorney's skill and experience[49] and Denver's market rates. Suppl. App., Vol. I at 148-49. He argued that the 3,101.15 hours billed were reasonable because he had succeeded on all claims presented to the jury; counsel had diligently exercised billing judgment to omit any unreasonable time; the case was important, complex and vigorously litigated; and counsel minimized attorney time spent on each matter. *Id.* at 141-46.

Mr. Valdez also attached an exhibit requesting $36,399.19 in additional costs under § 1988 that were not included in his Rule 54(d) taxable cost submission.

[48] Mr. Valdez's list also included hours worked by two appellate specialists, Norman Mueller and Ty Gee, but he did not request fees for that work.

[49] Mr. Valdez's motion referred the court to Mr. Pagliuca's affidavit to establish the qualifications and experience of each staff member, *see* Suppl. App., Vol. I at 148, including the legal experience and education of each of the associates and partners, *see id.* at 160-64.

3. **Denver's Opposition**

Denver opposed both the rates and hours underlying Mr. Valdez's lodestar calculation and urged the court to award "no more than $467,657.50 in reasonable attorneys fees" and none of Mr. Valdez's costs. Suppl. App., Vol. II at 342.

a. *Attorney rates*

Denver opposed the rates that Mr. Valdez proposed and requested market rates of $500 for partners, $250 for associates, and $100 for paralegals. It argued that all of the proposed rates were "on the high end of the relevant market for civil rights lawyers in the Denver area" and, in particular, charging $375 per hour for two associates who had no prior civil litigation experience was unreasonable. *Id.* at 341.

b. *Hours*

Denver argued that any hours spent on claims that were resolved before trial are not compensable. *Id.* at 330. It also argued that because many of the hours were "block-billed"—listed as the total hours spent working on a case per day without itemizing the amount of time spent on each case-related task—it was difficult to differentiate time spent on successful versus unsuccessful claims. *Id.* at 332. Denver suggested that the court "need not parse counsel's block-billed timesheets" because it "has broad discretion to further reduce" the fee request. *Id.* at 336-37.

Denver requested a 50 percent overall reduction to Mr. Valdez's hours, specifically:

- 15 percent for block billing;
- 25 percent for work done on non-compensable claims; and

- 10 percent "to account for counsel's failures of billing judgment." *Id* at 340.

It also asked the court to deduct the 42.3 hours spent on the mediation and 22.3 hours billed for travel time. And it asked the court to subtract the hours billed by six employees because Mr. Valdez had not provided information about their relevant qualifications and experience.

c. *Costs*

Denver argued the court should deny Mr. Valdez's request for nontaxable costs because he had failed to show they were reasonable and necessary and because some of itemized charges were not compensable. *See id.* at 341-42 (identifying unspecified Westlaw charges, parking fees, courier costs, and consulting fees for the mediator).

4. **District Court's Fees and Costs Award**

The district court:

- approved Mr. Valdez's hourly rates;
- reduced Denver's requested lodestar figure by 12.5 percent to compensate for errors in the hours billed; and
- reduced Mr. Valdez's requested nontaxable costs by 50 percent.

The total award was $1,132,327.40 in attorney fees and $18,199.60 in costs. The court's explanations for these decisions were sparse.

a. *Attorney rates*

The court said, "[a]fter carefully considering the parties' arguments, supporting documentation, and applicable case law," it would apply Mr. Valdez's

requested hourly rates because they were "reasonable for civil rights attorneys of comparable skill and experience in the Denver area." Suppl. App., Vol. II at 373.

b. *Hours*

The court determined that "a moderate discount" to Mr. Valdez's "requested attorneys' fee award is appropriate" because counsel had engaged in block-billing, failed to provide relevant qualifications for some of the staff, and had not prevailed on a number of claims pled in the amended complaint. *Id.* at 375. It concluded that "some reduction in the fee award is appropriate," but that Denver's "requested reduction of Plaintiff's total fee request is excessive." *Id.* at 376.

The court reduced the total fee request—the proposed lodestar—by 12.5 percent, awarding Mr. Valdez $1,132,327.40.

c. *Costs*

The court said that Mr. Valdez's bill of costs was "unhelpful[]" and that the affidavit Mr. Valdez attached attesting that his costs were reasonable was "conclusory." *Id.* at 376-77. It found that "Plaintiff has failed to adequately substantiate his costs," listing as examples the unexplained charges for Westlaw research and other overhead costs. *Id.* at 378. It reduced Mr. Valdez's proposed costs by 50 percent to "adequately incorporate[] Plaintiffs' deficiencies in adequately supporting his entitlement to the full amount of costs sought"—awarding him $18,199.60. *Id.* at 378-79.

C. ***Standard of Review***

We review a district court's award of attorney fees for abuse of discretion, which calls for review of the legal analysis de novo and factual findings for clear error. *See In re Syngenta AG MIR 162 Corn Litigation*, ---F.4th---, 2023 WL 2262878, at *35 (10th Cir. 2023); *United States v. Johnson*, 920 F.3d 639, 647 (10th Cir. 2019); *Leathers v. Leathers*, 856 F.3d 729, 763 (10th Cir. 2017). We also review cost awards for abuse of discretion. *See In re Williams Sec. Litig — WCG Subclass*, 558 F.3d 1144, 1148 (10th Cir. 2009); *ClearOne Commc'ns, Inc. v. Biamp Sys*., 653 F.3d 1163, 1184 (10th Cir. 2011).

In reviewing these awards, we owe deference to the district court's "superior understanding of the litigation" and recognize the "desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley*, 461 U.S. at 437; *see also Zisumbo v. Ogden Reg'l Med. Ctr.*, 801 F.3d 1185, 1207 (10th Cir. 2015) ("Because the district court is in a better position than an appellate court to determine the amount of effort expended and the value of the attorney's services, we review an attorney's fee award for abuse of discretion.") (quotations omitted).

D. ***Analysis***

The district court did not abuse its discretion in awarding attorney fees. It had a rational basis in the record to approve Mr. Valdez's rates as reasonable. It exercised reasonable discretion in reducing the lodestar by 12.5 percent to adjust for unsuccessful claims and other billing irregularities in Mr. Valdez's hours. But the district court abused its discretion in awarding 50 percent of the requested nontaxable

costs after concluding that the itemized expenses Mr. Valdez submitted were unsubstantiated and failing to identify expenses that were compensable.

1. **Attorney Rates**

Denver argues the district court (1) incorrectly determined the reasonable hourly rate for Mr. Valdez's counsel, and (2) inadequately explained its determination. Aplt. Br. at 18.

First, Denver contends the rates for some of Mr. Valdez's attorneys were too high because the lawyers lacked expertise in civil rights litigation. *Id*. at 19. It asserts that because Mr. Valdez's partner-level attorneys have worked mostly in the areas of criminal defense and complex commercial litigation, their rates for this case should not reach the level of "prominent and experienced civil rights litigators in Denver." *Id*. at 8, 19-21. Denver also asserts that because two associates were new to the firm and had limited civil rights litigation experience, the district court approved inflated rates for them. *Id.* at 19.

Denver's arguments fail to account for our cases that allow the district court to consider lawyer experience more broadly. The awarded rates must be commensurate with the market rates of attorneys with "reasonably comparable skill," and "experience in civil rights *or analogous litigation*." *See Lippoldt*, 468 F.3d at 1224-25 (quotations omitted; emphasis added); *see also Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984) (requested rates should be "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation").

Mr. Pagliuca's affidavit showed that the partner-level attorneys had litigation experience analogous to other successful civil rights lawyers based on the partners' decades of criminal and civil trial experience. *See* Suppl. App., Vol. I at 154-160. On the two associates, the affidavit said that one of them had joined the firm with more than 10 years of clerkship experience, including four years clerking on the United States District Court for the District of Colorado, and the other associate came to the firm after working for nearly a decade at the Public Defender Service for the District of Columbia. *Id.* at 160-63.

Based on the foregoing, the district court did not abuse its discretion. Its decision that the proposed attorney rates were reasonable had adequate "factual support in the record." *See National Fitness Holdings, Inc*., 749 F.3d at 1206.

Second, we agree with Denver that the district court's explanation for the rates "was minimal," Aplt. Br. at 21-22, but it was adequate in light of the evidence presented. District courts are obliged to "provide a reasonably specific explanation for all aspects of a fee determination," including the approval of attorney rates, or "adequate appellate review is not feasible." *Perdue*, 559 U.S. at 558. Here, the court said that it had "carefully consider[ed] the parties' arguments, supporting documentation, and applicable case law" and had determined Mr. Valdez's "requested hourly billing rates are reasonable for civil rights attorneys of comparable skill and experience in the Denver area." Suppl. App., Vol. II at 373.[50]

[50] Denver argues that the court's sparse explanation merits reversal under *Ellis v. University of Kansas Medical Center*, 163 F.3d 1186, 1204 (10th Cir. 1998). But

The district court's explanation, though brief, was sufficient in light of the record. *See Diperna v. Icon Health & Fitness, Inc.*, 491 F. App'x 904, 907 (10th Cir. 2012) (unpublished) ("Often the record will be clear enough that we can fairly trace the district court's path even if its opinion fails to give exacting point-by-point directions of the route it followed."); *see also Hambelton v. Canal Ins. Co.*, 405 F. App'x 321, 324 (10th Cir. 2010) (finding the district court's explanation of its fee calculation adequate where it "applied prevailing [market] rates").[51] The affidavit from Mr. Pagliuca and the opinion letter from Mr. Lebsack provided detailed information on the background and litigation experience of each attorney who worked on the case. *See* Suppl. App., Vol. I at 153-249, 250-61. Mr. Valdez also provided the district court with case law showing similar rates charged by litigators with comparable skill and experience in analogous litigation in the Denver market. *Id.* at 148-50. The record is clear enough to permit "meaningful appellate review," *see Perdue*, 559 U.S. at 558, for abuse of discretion. Finding none, we affirm.

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in that case, we found abuse of discretion because the district court gave no explanation for its reduction of one attorney's requested fee from $150 to $100 when evidence in the record supported a market rate of $150-$235. *Id.* at 1204-05. The record in this case supports the district court's decision to approve Mr. Valdez's proposed rates.

[51] Unpublished cases cited in this opinion are not binding precedent, but we may consider them for their persuasive value. *See* Fed. R. App. 32.1(a); 10th Cir. R. 32.1(A).

a. *The 12.5 percent reduction of the lodestar*

Denver argues that the district court erred in applying a percentage reduction to the total fee requested rather than first adjusting hours and rates to calculate a new lodestar amount. Aplt. Br. at 17. But we have upheld a district court's discretion to apply such a reduction. In *Zisumbo*, we held that the district court did not abuse its discretion in reducing the total fee award by 40 percent of the requested lodestar to compensate for plaintiff's "limited success overall" and its "generally haphazard" litigation of the case. 801 F.3d at 1208. We affirmed that there is "no precise rule or formula" for calculating a reasonable fee award, but the court must "provide [a] concise and clear explanation" of its reasons for the reduced fee. *Id.* (quoting *Hensley*, 461 U.S. at 436).[52]

[52] Denver relies on *Kerner v. City and County of Denver*, 733 Fed. App'x 934 (10th Cir. 2018) (unpublished). But in *Kerner*, the district court found plaintiff's rates to be reasonable. *Id*. at 936. Then, instead of calculating a percentage reduction in reasonable hours, the court just adopted defendant's lodestar figure. *Id.* at 936-37. Thus, *Kerner* held that a district court may not "avoid performing its own lodestar analysis (or perform only part of the lodestar analysis) and then adopt the fee amount that the losing party left unchallenged." *Id.* at 937.

Here, once the district court approved Mr. Valdez's counsel's hourly rates, it did not simply adopt Denver's suggested fee calculation, but instead reduced Mr. Valdez's lodestar to reach a sum that fell between what the two parties suggested. Reducing the total lodestar fee by a percentage while approving the hourly rates charged is no different than a "general write-down" of total hours logged. And that practice is consistent with the law of our circuit. *See Mares v. Credit Bureau of Raton*, 801 F.2d 1197, 1203 (10th Cir. 1986) ("As anyone who has been in private practice well knows, for billing purposes such adjustments can take many forms, including a general write-down of hours logged."). We also have condoned reducing the lodestar fee directly. *See Zisumbo*, 801 F.3d at 1208.

Based on *Zisumbo* and other Tenth Circuit cases, a district court may reduce a requested lodestar as one means to compensate for partial success and defects in hours claimed. *See Zisumbo*, 801 F.3d at 1208; *see also Berry v. Stevinson Chevrolet*, 74 F.3d 980, 990 (10th Cir. 1996) (district court's decision to "reduce the lodestar by 20%" to reflect plaintiffs' success was not an abuse of discretion) (quotations omitted); *Stockard v. Red Eagle Res. Corp.*, 972 F.2d 357 (Table), 1992 WL 180131, at *6 (10th Cir. 1992) (unpublished) (district court's "across-the-board" 10 percent reduction of the lodestar amount to account for time spent on unsuccessful claims was not an abuse of discretion); *United States v. $114,700.00 in United States Currency*, No. 20-1387, 2023 WL 142257, at *4 (10th Cir. Jan. 10, 2023) (unpublished) (affirming a 25 percent across-the-board reduction to the fee); *Latin v. Bellio Trucking, Inc*., 720 F. App'x 908, 911 (10th Cir. 2017) (unpublished) (holding that the district court did not abuse its discretion by decreasing the total fee award by 10 percent after finding that some of the time entries were vague and duplicative). We still review to ensure that the district court provided a sufficiently "concise and clear explanation," *see Zisumbo*, 801 F.3d at 1208, and that the record "assure[s] us that the district court did not 'eyeball' the fee request and cut it down by an arbitrary percentage," *see Browder*, 427 F.3d at 723 (quotations omitted).

In district court, Denver argued that Mr. Valdez's hours suffered from errors arising from block-billing, redundancy, and hours billed for claims upon which Mr. Valdez did not prevail. The district court largely agreed with Denver. First, it found that that "a moderate discount" to Mr. Valdez's "requested fee award is appropriate"

because Mr. Valdez was unsuccessful on certain claims. Suppl. App., Vol. II at 375. The court did not specify what a "moderate discount" would be. Second, the court found that the requested fees should be decreased for hours billed by certain individuals because Mr. Valdez had failed to provide information on their qualifications and experience. Third, the court found that a reduction was warranted because billing entries were block billed and/or duplicative.

The court concluded that as a percentage of all billed hours, the surplus hours billed by unsubstantiated employees or block-billed was "relatively modest." *Id* at 376.[53] Determining Denver's cumulative requested reduction of 50 percent to be "excessive," the court "elect[ed] to exercise its discretion to reduce Plaintiff's fee award request by a more modest 12.5%." *Id.*

The district court's reasoning was sufficient to support the 12.5 percent fee reduction because it has a "rational basis" in the record. *See In re Williams Sec. Litig. — WCG Subclass*, 558 F.3d at 1148. The court found the hours to be excessive but that the overbilling was "relatively modest." It chose a percentage that corresponded with these findings. Denver cites no precedent requiring a district court to give a precise numerical explanation for a percentage reduction. On the

[53] In footnotes, the district court rejected Denver's argument that the hours billed for mediation were not compensable. It also stated that "in the Court's view, Plaintiff's counsel achieved a remarkable result in this difficult, hard-fought, and years-long case." Suppl. App., Vol. II at 375-76 n.1.

contrary, "[t]here is no precise rule or formula for making these determinations." *Hensley*, 461 U.S. at 436.

b. *The 50 percent reduction in requested costs*

Denver argues the court abused its discretion when it concluded that Mr. Valdez had not substantiated his nontaxable costs but still awarded him 50 percent of his requested amount. Aplt. Br. at 8, 24. We agree. The cost award cannot be reconciled with the court's finding that Mr. Valdez had "failed to adequately substantiate his costs." Suppl. App., Vol. II at 378.

Mr. Valdez requested $36,399.19 as "[c]osts not included as part of the taxable costs." Suppl. App., Vol. I at 150; Suppl. App., Vol. II at 379. The court had already granted Mr. Valdez $31,858.75 in taxable costs under Rule 54(d) and 18 U.S.C. § 1920 for "court filing fees," "court hearing transcripts," necessary "copies," "witness fees," "depositions/transcripts," and "service of process." Suppl. App., Vol. I at 283-88.

Mr. Valdez argues that we should affirm because the 50 percent award amounted to less than his deposition costs. Aplee. Br. at 32-33. But his motion for attorney fees and costs did not seek recovery for deposition expenses because he had

already recovered them through his Rule 54(d) motion.[54] Suppl. App., Vol. I at 43, 283-88.[55]

The district court failed to explain its award of costs after finding that Mr. Valdez had not substantiated them. It therefore "did not employ a methodology that permitted meaningful appellate review." *See Perdue*, 559 U.S. at 558. The district court abused its discretion because "no rational basis exists in the evidence to support its ruling." *See In re Williams Sec. Litig. — WCG Subclass*, 558 F.3d at 1148. We therefore remand on this issue for the district court to reexamine whether costs should be awarded.

V. CONCLUSION

In 21-1401, we affirm the district court's denial of summary judgment, its reopening of discovery and management of the liability theories, and its jury instructions on municipal liability.

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[54] At oral argument, counsel for Mr. Valdez abandoned the deposition justification and argued instead that the awarded costs were reasonable because they covered the consulting fees for expert witness Dan Montgomery. *See* Oral Argument at 29:15-34. But Mr. Valdez's appellate briefing lacked this explanation, which is waived. *See Ross v. Univ. of Tulsa*, 859 F.3d 1280, 1292 n.10 (10th Cir. 2017) (arguments made for the first time at oral argument are waived).

[55] No deposition charges appear in the itemized costs that Mr. Valdez submitted to the district court with this motion for attorney fees. Suppl. App., Vol. I at 276-80. Mr. Valdez's itemized list consisted of charges for meals ($30.90), parking ($140.25), courier service ($57.96), outside consulting fees ($26,254.17), delivery service ($860.43), legal research ($8,917.48), and miscellaneous expenses ($138). *Id*. His brief erroneously cites to his proposed bill of taxable costs, *see* Aplee. Br. at 32-33 (citing Suppl. App., Vol. I at 91-117), rather than to the list of charges he submitted with the motion under review.

In 21-1415, we affirm the district court's grant of summary judgment based on qualified immunity to Lieutenant John Macdonald.

In 22-1152, we affirm the award of attorney fees, reverse the award of nontaxable costs, and remand to the district court for further proceedings consistent with this opinion.