UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 20-3132

LISA G. FINCH and DOMINICA C. FINCH, as Co-Administrators of the Estate of Andrew Thomas Finch, deceased,
Plaintiffs/Appellees,
v.
Wichita Police Officer JUSTIN RAPP,
Defendant/Appellant.

No. 20-03190

LISA G. FINCH and DOMINICA C. FINCH, as Co-Administrators of the Estate of Andrew Thomas Finch, deceased,
Plaintiffs/Appellants,
v.
CITY OF WICHITA, KANSAS,
Defendant/Appellee.

COMBINED RESPONSE AND REPLY BRIEF OF DEFENDANTS

Appeal from the United States District Court for the District of Kansas
The Honorable John W. Broomes
Case No. 18-CV-01018-JWB-ADM

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STATEMENT OF THE CASE

Statement of the Case on Plaintiffs' Appeal.

Wichita Police Department's ("WPD") use of force policy authorizes, and limits, the use of force consistent with Kansas and constitutional law. AA618-28.[1]

[1] Defendants utilize the same citation convention as plaintiffs, with AA signifying Appellant's Appendix and SA referring to the Supplemental Appendix.

WPD's Professional Standards Bureau ("PSB") handles internal and external complaints of officer conduct for conformance to WPD rules, regulations, policies and procedures, and standard operating policies. AA292. WPD policy 901 requires PSB investigate all incidents involving the discharge of a firearm. AA295, 297-98, 301. WPD policy 904.01 requires WPD also perform a criminal investigation whenever an officer is involved in an action that either could have resulted in serious injury or death or did result in serious injury or death. AA299, 305.

Accordingly, WPD investigators investigate every officer involved shooting, and the Sedgwick County District Attorney ("DA") reviews each case for objective reasonableness. AA128. The WPD and KBI share responsibility for investigating officer involved shootings, jointly participate in witness interviews, and jointly present the case to the district attorney. AA282-83, 579. The DA participates in the process and generally responds to the scene of an officer involved shooting, observes the initial interviews, and watches body camera footage. When the investigation is complete, the DA and a charging attorney confirm the investigation is complete and review the case for charging decisions. AA287-88. The DA's office will conduct follow up investigation if necessary, including with help from the KBI, which occurred in the Finch investigation. AA998-99. WPD Chief Gordon Ramsay has not reviewed any criminal investigations of officer involved shootings where he was

concerned that homicide detectives were not objective, and if he did have concerns, he would investigate further. AA313-14.

By policy, the criminal investigation must be completed before the administrative investigation so that the administrative investigation does not taint, and to ensure the integrity of, the criminal investigation. AA293-94, 311. The PSB detectives generally open a file and collect information that comes in, and may watch the witness interviews, but they are not actively involved in an investigation until the criminal investigation is complete. AA312. An officer involved shooting criminal investigation is generally expedited. AA311.

The PSB investigation can be based on a review of the criminal investigation, it can include follow-up investigation, or it can include a separate investigation. AA298. When reviewing the criminal investigation, the PSB detectives look at an entire incident in totality. AA929. They view interviews of witnesses, watch all of the videos, listen to reports, read transcripts, review all evidence gathered in the criminal investigation, and do whatever follow-up deemed necessary. AA298-99, 317-18. The relevant information has generally been gathered during the criminal investigation, and there is no need to duplicate those efforts unless additional investigation is required. AA296, 314. The PSB investigation will include analysis of any policy that WPD command staff or PSB detectives reasonably believe was implicated. AA300.

[redacted] *E.g.*, SA34-217, 219-66, 268-317, 333-383, 386-437, 439-489, 491-584, 586-621, 628-658. [redacted] AA295-96; SA266, 317, 383, 435-36, 489, 575, 658. [redacted] AA126-27, 129; SA225, 577-78. [redacted] SA57-63. [redacted] SA225, 276-77, 339, 394, 446, 498-500, 579-84, 592-93, 635.

Plaintiff's expert, Scott DeFoe, acknowledged that WPD policy requires all officer-involved shootings be investigated, he knew of none that were not investigated, and he is not critical of the fact that PSB detectives identify areas of concern but any discipline comes from command staff. That arrangement is consistent with his law enforcement experience also. AA130. He affirmed that there is no recognized standard requiring independent oversight of a police department and no national standard that requires a separate investigation by PSB. AA128, 130.

DeFoe acknowledged that the WPD utilizes an early intervention system which requires review of all uses of force by an officer if a threshold is met in a set period of time, and he knew of no instances of any officer failing to file a use of force report. AA132.

Officer Rapp knew on December 28, 2017 that the WPD investigates and reviews all incidents in which an officer employs lethal force and that the DA reviews all incidents of use of lethal force by an officer to evaluate whether to file criminal charges. He understood that the WPD would impose discipline, up to and including termination, if an officer used unnecessary or excessive force. AA322-23. Rapp's split-second decision to shoot was not caused or affected by any belief that the WPD would not hold him accountable for violations of policy or training. He understood that the WPD disciplines officers who use unreasonable force. *Id.*

No evidence indicates the City ever ignored suggested improvements to officer accountability. Instead, the record indicates that in 2013, the City contracted with an attorney to review WPD's "policies, practices, training, and reporting of use of force incidents." AA851. The record indicates that as a result of the review, WPD made several policy revisions, incorporated new training, and improved the reporting of use of force incidents. AA851-53. The record further indicates that "WPD staff and the Law Department are continuing to work with [the attorney] to

revise and implement his recommendations. . . . WPD staff looks forward to final implementation of the recommended changes." AA853.

Plaintiffs cite miniscule portions of several past PSB investigations and suggest the snippets show a failure to investigate officer involved shootings. The PSB reports illustrate the opposite—that WPD comprehensively investigated and analyzed all officer involved uses of force and imposed discipline when appropriate.

[redacted] SA273-74. [redacted] SA282. [redacted] SA282-83. [redacted] SA282-83. [redacted] SA283. [redacted] SA297-98. [redacted] SA282. [redacted] SA284. [redacted]

[redacted] SA282. [redacted]

[redacted] SA280-285. [redacted]

[redacted] SA280-285. [redacted]

[redacted] SA307-09.

[redacted] SA388-90. [redacted]

[redacted] SA401. [redacted]

[redacted] SA401-02. [redacted]

SA400-02. SA395-97. SA399-426. SA429-32. *Id.* Plaintiffs' expert acknowledged that there are often discrepancies between witnesses that cannot be resolved in an investigation. AA128. SA432.

Plaintiffs complain that the investigating officer did not ask why the shooting officer chose to use deadly force, citing their expert report, AA571. The report only indicates that the investigating officer did not ask the shooting

officer for more information about why she did not transition from her patrol rifle to a taser. AA571. The criticism has nothing to do with why force was used. [redacted] SA344-45. [redacted] SA345. [redacted] SA345. [redacted] SA345-46. Plaintiffs' summary treatment of the incident fails to establish a lack of investigation.

[redacted] SA452-55. [redacted]

[redacted] SA230-32. [redacted]

[redacted]

[redacted] SA232-33. [redacted]

[redacted] SA233. [redacted]

[redacted] SA233. [redacted]

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[redacted] SA233. [redacted]

[redacted] SA233. [redacted]

[redacted] SA233. [redacted]

[redacted]

[redacted] SA237. [redacted]

[redacted] SA238-51. [redacted]

[redacted]

[redacted] SA251-58. [redacted]

[redacted]

[redacted] SA259-61. [redacted]

[redacted]

[redacted]

[redacted]

[redacted] SA654-55. [redacted] SA654-55. [redacted] SA654-55. [redacted] Plaintiffs criticize the amount of discipline imposed, but their narrative twists the context of the discipline and they provide no context as to what regulations were violated. Their expert acknowledged that officers have been disciplined for policy violations during use of force incidents, including (1) discipline in the Richards incident for the supervisors for supervision and planning and (2) termination of a shooting officer in another incident that plaintiffs do not address. AA126-27, 129. [redacted] SA623; SA330.

Smart, Lanning, and Jackson Lawsuits. None of these incidents have resulted in verdicts or settlements against the officers or the City. In *Smart*, this Court concluded factual disputes existed as to whether the officer fired the final shots after

Smart no longer posed a threat, but it noted that a jury could still find he acted reasonably. *Smart v. City of Wichita*, 951 F.3d 1161, 1175-77 (10th Cir. 2020). In *Lanning*, the officer fired when he thought Lanning was preparing to fire a gun from a bag he refused to drop as he turned towards the officer. *Herrington v. City of Wichita*, No. 14-cv-01094-JTM, 2017 WL 76930, at *3 (D. Kan. Jan. 9, 2017). The court concluded that the officer's belief was reasonable and granted summary judgment. *Id.* at *11. In *Jackson*, officers fired after Jackson stabbed herself several times with a knife and then continued approaching the officers while holding the knife in front of her. *Jackson v. City of Wichita*, 13-1376-KHV, 2017 WL 106838, at *8 (D. Kan. Jan. 11, 2017). The court noted that one officer estimated Jackson was 5-7 feet away when she fired, but construed in the light most favorable to plaintiffs on summary judgment, the Court noted Jackson could have been 15 feet away. *Id.* at *9 & n.31. The Court granted summary judgment, and no determination of unconstitutional conduct was made. *Id.* at *17. All three cases involved defense motions for summary judgment in which all factual inferences were drawn in plaintiffs' favor, and none resulted in findings of unconstitutional conduct.

Plaintiffs' expert admitted that the Finch case is unique as to the other WPD cases he reviewed as none of them involved a barricaded suspect. AA133.

SUMMARY OF THE ARGUMENT

The district court erred in denying qualified immunity to Rapp by failing to account of the nature of the split-second requirement for the decision Rapp made to use lethal force to protect other officers while responding to a potential barricaded gunman with hostages and family members already dead. Body camera video demonstrates conclusively the immediacy of the decision made as Finch lowered and then reraised his hands. Reasonableness under the Fourth Amendment accounts for these split-second decisions in tense, rapidly evolving situations, even if incorrect. The district court did not account for the urgency of the decision and instead second guessed the officer's split-second decision, requiring reversal. No clearly established law holds otherwise.

Moreover, Rapp's decision to use lethal force was objectively reasonable to prevent a potential gunman holding hostages from re-entering the house where he would present and immediate deadly threat to the occupants. No clearly established precent holds otherwise. The district court erred by focusing solely on Rapp's subjective reason for using force.

The district court's denial of summary judgment to Officer Rapp based on qualified immunity should be reversed and judgment entered for Officer Rapp.

The district court correctly granted summary judgment to the City of Wichita on plaintiffs' municipal liability claims. No evidence supports the existence of a

pattern or practice of inadequate investigations or failures of accountability. The record reflects the opposite—that WPD fully investigates each use of lethal force both criminally and administratively, with subsequent review and charging decisions made by the District Attorney. The evidence likewise fails to support the existence of a pattern or practice of unconstitutional or tortious conduct that could support deliberate indifference. When recommendations were made for policy and training improvements, the evidence indicates WPD adopted the recommendations. No evidence establishes deliberate indifference. Plaintiffs also failed to present evidence to establish that any unconstitutional policy or practice was the moving force behind a constitutional violation here. Plaintiffs also failed to produce evidence to support the existence of a custom or practice to use lethal force in the absence of a reasonably perceived threat. The district court's grant of summary judgment to the City should be affirmed.

STANDARD OF REVIEW

On plaintiffs' appeal, this Court reviews the grant of summary judgment *de novo*. *Schneider v. City of Grand Junction Police Dept.*, 717 F.3d 760, 766–67 (10th Cir. 2013). Summary judgment should be sustained if there is no genuine dispute as to a material fact. To be material, the fact must be such that under the governing law, it could affect the outcome, and a fact dispute is genuine if a rational jury could find in favor of the nonmoving party. *Id.* (quotations omitted).

ARGUMENT

I. OFFICER RAPP IS ENTITLED TO QUALIFIED IMMUNITY.

The district court erred in its application of the qualified immunity standard by failing to account for the split-second requirement for the decision Rapp made and by imposing the perceptions of others on a reasonable officer in Rapp's position. This Court reviews the legal application of qualified immunity to the facts as determined by the district court *de novo*. *E.g.*, *Halley v. Huckaby*, 902 F.3d 1136, 1143-44 (10th Cir. 2018). Accepting the district court's factual findings on appeal, Rapp used objectively reasonable force under the circumstances he faced and did not violate clearly established law.

A. OFFICER RAPP'S SPLIT-SECOND DECISION TO USE LETHAL FORCE WAS OBJECTIVELY REASONABLE.

Qualified immunity "gives government officials breathing room to make reasonable but mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law." *City and County of San Francisco, Calif. v. Sheehan*, 575 U.S. 600, 135 S. Ct. 1765, 1774 (2015) (internal quotations omitted). Accordingly, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham v. Connor*, 490 U.S. 386, 396–97 (1989).

While the district court gave lip service to this necessary consideration, it disregarded the urgency of making a split-second decision and therefore misapplied the qualified immunity standard by failing to analyze the reasonableness of Rapp's decision in context. As the Supreme Court stated in *Sheehan*,

> The Fourth Amendment standard is reasonableness, and it is reasonable for police to move quickly if delay would gravely endanger their lives or the lives of others. This is true even when, judged with the benefit of hindsight, the officers may have made some mistakes. The Constitution is not blind to the fact that police officers are often forced to make split-second judgments.

135 S. Ct. at 1775 (citations and internal quotation marks omitted).

The district court's prolonged analysis of different conclusions that could be drawn from the events that unfolded in less than ten seconds, with the critical action of Finch dropping and then raising his arm occurring in a second or less, consumes five pages. The hindsight analysis of the district court was not a luxury to Rapp. Instead, he faced a "tense, uncertain, and rapidly evolving" situation demanding a split-second decision to protect the lives of other officers. The district court misapplied qualified immunity by failing to credit the necessity of a split-second decision in the particular situation Rapp confronted. *See Smart v. City of Wichita*, 951 F.3d at 1177 ("Courts are particularly deferential to the split-second decisions police must make in situations involving deadly threats.").

Powell's body camera video irrefutably establishes the instantaneous requirement for Rapp to act. To refuse to consider this is a legal error properly

reviewed *de novo* on appeal, not a complaint about the other facts the district court determined could be supported by the record. *Estate of Valverde v. Dodge*, 967 F.3d 1049, 1060, 1062 (10th Cir. 2020).

In *Valverde*, the Court reviewed grainy video taken from a distance that did not show Valverde's right hand. 967 F.3d at 1062. Nonetheless, the court concluded that it was undisputed that Valverde pulled a gun, but disputed facts existed as to whether he was surrendering. Rejecting this "dispute," this Court noted that the critical inquiry as to reasonableness was whether the video supported the officer's belief that split-second force was necessary:

> What then matters . . . is when it should have been clear to Dodge that Valverde was no longer a threat because he had disposed of his gun and was raising his arms in surrender (in particular, not raising his arm to fire at the officers). We have already noted that the video shows that Dodge fired his first shot less than a second after Valverde pulled out his gun. It is also clear from the video that Valverde did not extend his right arm away from his body (apparently to drop the weapon) until about half a second before the first shot was fired and he did not *begin* to raise his hands toward his head until about a quarter-second before Dodge fired. The law permitted Dodge to fire as soon as he saw the gun in Valverde's hand. This is not a case where the officer had sufficient time to appreciate that the suspect was no longer a danger before the officer decided to fire.

Estate of Valverde, 967 F.3d at 1063.

Here, while ultimately Finch did not have a gun, the issue is when it would have become clear to Rapp that Finch was not raising a gun to fire at other officers but was instead raising his arms in compliance with commands. The video clearly

depicts Finch's arm parallel to the ground pointed in the direction of officers to his right at the time Rapp shot. The video also clearly shows that Rapp fired his single shot at most a second after Finch began to reraise his arm, while it was parallel to the ground, after he had initially raised his hand and then lowered it to his waistline. AA324. "This is not a case where the officer had sufficient time to appreciate that the suspect was [not] a danger before the officer decided to fire." *Valverde*, 967 F.3d at 1063.

"Viewing the video, no jury could doubt that [Rapp] made his decision to fire before he could have realized that [Finch] was surrendering." *Id.* at 1062. This split-second decision to shoot does not violate the Fourth Amendment standard of reasonableness, even if mistaken. *Id.*at 1063-64. Rather, Rapp's decision "is exactly the type of split-second judgment, made in tense, uncertain, and rapidly evolving circumstances, that [courts] do not like to second-guess using the 20/20 hindsight found in the comfort of a judge's chambers." *Id.* at 1064 (internal quotations omitted). The district court impermissibly engaged in 20/20 hindsight analysis of the situation without accounting for the necessary split-second decision.

That it was ultimately learned that Finch was unarmed does not change the analysis. The constitution accounts for reasonable mistakes in these situations. *Tenorio v. Pitzer*, 802 F.3d 1160, 1164 (10th Cir. 2015) ("The [officer's] belief need not be correct—in retrospect the force may seem unnecessary—as long as it is

reasonable."); *Lamont v. New Jersey*, 637 F.3d 177, 179, 180, 183–84 (3d Cir. 2011) (officers reasonably used deadly force against suspected car thief when the suspect suddenly pulled his hand out of his waistband as though he was drawing a gun, even though it turned out he was not); *Slattery v. Rizzo*, 939 F.2d 213, 214–17 (4th Cir. 1991) (officer justified in shooting suspect sitting in car during drug operation after initial failure to raise hands when commanded and then turning toward officer with beer bottle in hand). As these authorities, *Valverde*, and the authorities cited in defendant's opening brief make clear, an officer is not required to wait to see a firearm before using lethal force as by then, it might be too late. *Estate of Larsen v. Murr*, 511 F.3d 1255, 1260 (10th Cir. 2008) (citations, ellipsis, and internal quotation marks omitted).

The district court's focus on the perceptions of other officers located to the east of Finch and possible perceptions of Finch misinform the qualified immunity analysis. The reasonableness of Rapp's decision must be evaluated from the perspective of a reasonable officer in Rapp's position with his duties as long cover and with the information reasonably believed by and knowable to Rapp. Rapp reasonably believed Finch was the suspect in a barricaded gunman hostage situation with family members already killed. The video confirms that Finch made movements consistent with drawing a firearm towards officers to the east and that Rapp fired within a second of the movements. As in *Valverde*, this split-second

decision was objectively reasonable. 967 F.3d at 1062-63. Whether the movement could be interpreted differently by another officer in another location corrupts the analysis.

Qualified immunity requires that an officer receive the benefit of doubt unless no reasonable officer would have made the same decision. Rapp's decision to shoot had to be made instantly based on his reasonable belief that Finch was the armed suspect and his split-second reaction to Finch's arm raising from his waist toward other officers. Any delay would have been too late to protect them. The body camera video of Officer Powell blatantly contradicts any other conclusion. AA324 at 3:32-3:33. Qualified immunity allows for reasonable misjudgments in such tense, rapidly changing situations, and the district court erred in concluding otherwise.

B. OFFICER RAPP'S USE OF FORCE DID NOT VIOLATE CLEARLY-ESTABLISHED LAW.

The Supreme Court has emphasized that to overcome the second prong of qualified immunity requires prior precedent that places the constitutional question "beyond debate." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (quotation omitted). "Specificity" is critical in excessive force cases, and "police officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue." *Id.* at 1152-53 (quotation omitted). No prior precedent governs Rapp's use of force as long cover on a call involving a barricaded gunman with hostage and reported deaths, with movements such as Finch's occurring all

within a matter of seconds. Instead, as *Valverde* confirms, Rapp's split-second decision in this situation is not unconstitutional, let alone clearly established.

Plaintiffs do not cite a case with even arguably similar circumstances to those Rapp faced. This alone undermines any finding that Rapp's conduct violated a clearly established right. *See White v. Pauly*, __ U.S. __, 137 S.Ct. 548, 552 (2017). Instead, both plaintiffs and the district court framed the issue generally, not particularized to the facts in this case.

Plaintiffs rely on *Garner v. Tennessee*, 471 U.S. 1 (1985) and several cases from this court that they allege stand for the proposition that shooting an unarmed person who does not present a threat is clearly established. As the Supreme Court has emphasized, "*Garner* and *Graham* do not by themselves create clearly established law outside 'an obvious case.'" *White*, 137 S.Ct. at 552 (citations omitted). The general rule on which plaintiffs rely "cannot alone serve as the basis for concluding that an officer's particular use of excessive force was "clearly established." *Pauly v. White*, 874 F.3d 1197, 1223 (10th Cir. 2017).

Plaintiffs' reliance on *Walker v. City of Orem*, 451 F.3d 1139 (10th 2006) is misplaced. A man with a clearly visible knife making no threatening movements and only suspected of a relatively minor crime does not even arguably compare with the facts here. Likewise, *Zia Trust Co. ex rel. Causey v. Montoya*, 597 F.3d 1150, 1153-54 (10th Cir. 2010) does not squarely govern the barricaded gunman with hostages

situation that Rapp confronted. There was no indication of violence or shots fired at all, only a one-foot movement by a van with unknown occupants. Even if the unpublished decision in *King v. Hill*, 615 Fed. Appx. 470 (10th Cir. 2015) could create clearly established law, which it cannot, the underlying crime at issue and the entire exchange and reaction time presented in *King* differ significantly. The question in *Fancher v. Barrientos*, 723 F.3d 1191, 1196-97 (10th Cir. 2013) was not whether the decision to use force was appropriate but rather whether additional shots fired five to seven seconds after the officer felt safer were reasonable despite no sign that the suspect continued to present a threat.

The differences between these decisions and this case "leap from the page." *Sheehan*, 135 S.Ct. at 1776. Plaintiffs' evidence is that Finch was unarmed, had raised and lowered his hands and was reraising them, and that other officers did not see a gun and did not perceive a threat. They acknowledge the severity of the potential crime that officers responded to, and the district court agreed that it was reasonable to believe Finch might be the suspect that had already demonstrated his violent propensities by killing a family member and holding others hostage. Rapp's duty at the time as long cover required him to make a split-second decision to protect other officers in a situation potentially much more dangerous than that faced in any of the cases on which plaintiffs rely.

No cases "particularized" to the facts of this case clearly establish that the timing of events here allowed Rapp reasonable time to react to the fact that Finch did not hold a gun and did present a threat. The recent decision in *Valverde* illustrates the fact Rapp's conduct, when forced to make a split-second decision to fire to protect other officers, was not clearly established as unconstitutional.

C. IT WAS OBJECTIVELY REASONABLE TO USE LETHAL FORCE TO PREVENT A SUSPECTED MURDERER FROM RE-ENTERING THE HOUSE OCCUPIED BY TWO HOSTAGES.

Plaintiffs attempt to evade the issue raised by defendant by mischaracterizing the opinion of the district court. Defendant's argument was simple—that the use of lethal force was objectively reasonable regardless of Rapp's subjective reason for using lethal force because, as conceded by even plaintiff's law enforcement expert, a reasonable officer would use lethal force to prevent the suspect reasonably perceived to have murdered a hostage from re-entering the building where it was reasonably believed that he held two other hostages. Plaintiffs do not challenge that proposition. Instead, they argue that the district court found that a jury could conclude that a reasonable officer in Rapp's position would not have perceived Finch to be returning to the house and that this Court is precluded from reviewing a determination of what a jury could find. (Appellee's Brief at 43-44). However, the district court rejected defendant's argument because Rapp did not consciously perceive Finch to be re-entering the house. (See AA1052-53). The district court did

not conclude that a jury could find it unreasonable for an officer in Rapp's position to have perceived Finch to be re-entering the house. Plaintiffs cite AA1021 and 1053 of the district court's decision to support their new argument, but neither of those pages nor any other portion of the district court's decision contains such a finding.

Rapp's decision to use force must be objectively reasonable, without regard to his subjective reasons. *Graham*, 490 U.S. at 397. Qualified immunity depends on the "facts that were knowable to the defendant officers," not just known facts. *White v. Pauly*, 137 S. Ct. 548, 550 (2017). The district court concluded that because Rapp did not see movement indicating Finch was attempting to go back into the house, that rational could not form the basis for objective reasonableness. The district court's reliance on Rapp's subjective motivations resulted in a misapplication of qualified immunity.

When analyzing objective reasonableness, the relevant inquiry is "whether the circumstances, viewed objectively, justify the challenged action," and if so, "that action was reasonable *whatever* the subjective intent motivating the relevant officials." *Nieves v. Bartlett*, 139 S.Ct. 1715, 1725 (2019) (internal alterations and quotations omitted). Rapp's "state of mind is simply irrelevant, and it provides no basis for invalidating" his use of force. *Id.* (internal quotations omitted). The pertinent question as to Fourth Amendment objective reasonableness is whether no

reasonable officer would have concluded that the challenged conduct would be unlawful, and if reasonable officers could disagree, immunity should apply. *See Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Officer Powell, standing only a few feet beside Rapp, testified that he believed Finch reached for the doorknob and attempted to reenter the house after he lowered his hands. AA517, 1008. Powell believed Finch to be a threat to the hostages. AA519. Other officers perceived Finch to be stepping back into the house. AA1009. The district court noted that "Finch raised his hands and lowered them a second time while moving back toward the doorway threshold." AA 1006. Plainly, a reasonable officer in Rapp's position could have interpreted Finch's movements to be an attempt to re-enter the house where he would present an immediate lethal threat to hostages. It was undisputed that lethal force was appropriate to prevent re-entry and the risk of serious injury or death to hostages. The district court erred in concluding otherwise.

Based on the reasons and authorities in Appellant's Brief, Rapp is entitled to qualified immunity because it was objectively reasonable for an officer in Rapp's position to use lethal force to prevent Finch from re-entering the house. No clearly established law holds otherwise.

II. THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT TO THE CITY OF WICHITA.

Cities are not liable under § 1983 merely because an officer commits a constitutional tort. "[I]n other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." *Monell v. Dep't of Social Serv.*, 436 U.S. 658, 691 (1978). A city may only be held liable under § 1983 "for its own unconstitutional or illegal policies." *Barney v. Pulsipher*, 143 F.3d 1299, 1307 (10th Cir. 1998). Thus, "a municipality is liable only when the official policy [or unofficial custom] is the moving force behind the injury alleged." *Id.* (quoting *Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 404 (1997)). A plaintiff must identify the government's policy or custom that caused the injury and show "that the policy was enacted or maintained with deliberate indifference to an almost inevitable constitutional injury." *Schneider v. City of Grand Junction Police Dept.*, 717 F.3d 760, 769 (10th Cir. 2013). Thus, to establish liability under § 1983 against a city for the actions of its police officers, plaintiffs must prove that "(1) An officer committed a constitutional violation and (2) a municipal policy or custom was the moving force behind the constitutional deprivation that occurred." *Estate of Larson*, 511 F.3d at 1259 (citing *Jiron v. City of Lakewood*, 392 F.3d 410, 419 (10th Cir. 2004)).

Here, Rapp did not commit a constitutional violation, and the City cannot be liable because even if it had an unconstitutional policy as plaintiffs allege, there can be no municipal liability absent a constitutional violation. *E.g. Trigalet v. City of*

Tulsa, Oklahoma, 239 F.3d 1150, 1155-56 (10th Cir. 2001); *Wilson v. Meeks*, 98 F.3d 1247, 1255 (10th Cir. 1996) ("a municipality may not be held liable where there was no underlying constitutional violation by any of its officers"). Nor can plaintiffs establish the other elements necessary to support their claim

Plaintiffs allege they put forth sufficient evidence to go to a jury on two different "policies"—(1) an alleged inadequate disciplinary and accountability policy for officers who use lethal force, and (2) an alleged custom of excessive lethal force against civilians. Plaintiffs base both theories on unsubstantiated violations of policy and manufactured deficiencies in investigations of uses of force. To overcome evidentiary deficiencies, plaintiffs resort to mischaracterizations and loose treatment of the evidence. An inspection of the "evidence" they rely upon confirms the propriety of the district court's dismissal of the claim against the City.

To establish *Monell* liability based upon an alleged custom or practice of failing to investigate or condoning the use of excessive force, plaintiffs must prove: "(1) a continuing, widespread, and persistent pattern of misconduct by the state; (2) deliberate indifference to or tacit authorization of the conduct by policy-making officials after notice of the conduct; and (3) a resulting injury to the plaintiff." *Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1125 (10th Cir. 2008) (citing *Gates v. Unified School District No. 449 of Leavenworth Cty., Kan.*, 996 F.2d 1035, 1041 (10th Cir. 1993)). Even if plaintiffs could establish such a

custom or practice and deliberate indifference by the City, they must also establish that the alleged unconstitutional custom, policy or practice directly caused a Fourth Amendment violation by Rapp. *Cordova v. Aragone*, 569 F.3d 1183, 1194 (10th Cir. 2009).

A. NO EVIDENCE ESTABLISHES AN UNCONSTITUTIONAL POLICY.

The record belies plaintiffs' allegedly deficient investigations and accountability argument. WPD performs a criminal investigation of all officer-involved shootings. The KBI is involved in the investigation and provides follow-up as needed. The Sedgwick County DA responds to the scene and observes the officer interviews. The results of the investigation are presented to the DA for charging determinations, including in the Finch shooting. After the criminal investigation, PSB performs an investigation that typically involves a review of the evidence gathered in the criminal investigation with any necessary follow-up investigation. Command staff review the PSB report and make determinations on policy violations and any disciplinary decisions—both practices that plaintiffs' expert DeFoe agreed were typical. DeFoe acknowledged that several WPD officers involved in use of force situations have been disciplined, including termination.

Plaintiffs' complaint that officers were not disciplined or not disciplined severely enough for other uses of force misses the issue. The PSB reports demonstrate that WPD reviews each use of force to determine whether it complied

with policy. WPD's use of force policy mirrors Kansas and constitutional law, and plaintiffs do not claim it is unconstitutional. WPD imposed discipline, including termination, for instances that violated policy. WPD did not impose discipline in many of the incidents plaintiffs refer to because the use of force was objectively reasonable. Plaintiffs' quibbles regarding peripheral, alleged policy violations and whether PSB detectives duplicated the criminal investigation fail to establish an alleged unconstitutional policy of failing to investigate. There is no evidence of unconstitutional conduct submitted in the record. Each investigation submitted by plaintiffs indicates that force used was objectively reasonable and consistent with Kansas law and WPD regulations.

Plaintiffs' complaint that discipline imposed for policy violations was insignificant is a superficial analysis at best. The citation referenced to their expert report, AA570-71, indicates that officers were disciplined for the policy violation of failure to communicate. Plaintiffs cannot explain how failure to communicate has any relevance to use of force. Nothing indicates the discipline "maxed out." Instead, officers that violated policy received discipline, including termination. While plaintiffs allege that not a single WPD officer had been prosecuted criminally, the citation for this statement indicates two officers were currently being charged for use of force incidents. AA615. Regardless, whether officers are criminally charged is a decision by the District Attorney, not the Wichita police department or the City.

The snippets cited to by plaintiffs from prior officer involved shooting investigations fail to establish a pattern of misconduct, let alone a continuing, widespread pattern. In analyzing prior uses of force, the relevant inquiry would be whether prior uses of force were unconstitutional or in violation of WPD's use of force policy. Whether other WPD regulations might apply in the given situation is a red herring.

Plaintiffs' evidence here falls woefully short. They nitpick investigations of other uses of force, but their arguments misrepresent the facts. They allege that WPD only performed cursory investigations, but they cite only to a small portion of the record dealing specifically with PSB reviews. They ignore that every officer involved shooting is investigated criminally. When evidence collected necessitates follow-up interviews with the officers, those are done [redacted]. Plaintiffs make no complaint about these investigations. The DA is involved early in the process. The KBI is involved both in the investigation and in the subsequent presentation of the results of the investigation to the Sedgwick County DA. If the DA needs additional investigation done as he did in this case, the KBI performs additional investigation. PSB then reviews the case for potential policy violations. Typically, additional interviews of the officers and witnesses involved are not required because the officers and witnesses have already been interviewed. The PSB reports included in the supplemental appendix reveal comprehensive investigations

in which involved officers were interviewed, witnesses interviewed, other evidence reviewed such as scene photos and diagrams, ballistic reports, and video. Discrepancies are addressed, officers' disciplinary histories are reviewed, and recommendations are made. The evidence does not support the existence of an unconstitutional custom or practice of inadequate investigations, let alone a widespread custom or practice.

Plaintiffs imply that the PSB investigations must necessarily include additional interviews, but they do not explain why this matters. It does not. All officers involved in an incident are interviewed by homicide detectives and KBI investigators. PSB detectives review the interviews and analyze the evidence collected. Plaintiffs' expert acknowledged that there is no standard that requires PSB detectives duplicate the work of other detectives. Each PSB report indicates WPD conducted a comprehensive investigation into each incident. Plaintiffs' trivial criticisms fail to establish an unconstitutional policy of failing to investigate or deliberate indifference by the City.

B. THERE IS NO DELIBERATE INDIFFERENCE.

Deliberate indifference actual or constructive notice by the City "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." *Schneider v. City of Grand Junction Police Dept.*, 717 F.3d 760, 771 (10th Cir. 2013)

(quotation omitted). This generally requires a pattern of tortious or unconstitutional conduct. *Id.* Plaintiffs cite no evidence to support either notice or a conscious or deliberate disregard of a risk of harm.

The record does not support plaintiffs' allegations of notice. On pages 7-8 of their brief, plaintiffs make the unsupported assertions that WPD only nominally reviews incidents for compliance with departmental policies, that no external entity participates, and WPD has no regulations governing investigations. Each of these assertions is demonstrably false. *See supra*, pp. 1-5. They then allege that a "team of experts" called internal affairs deficiencies to the attention of WPD and recommended improvements that went unheeded. (Plaintiffs' Brief, p. 52). Contrary to their assertions, the record they cite indicates that a common theme among WPD officers who participated in a series of focus groups for the study included inconsistencies and expediency of discipline as an area for improvement. AA656. The recommendations cited were to have a better information campaign to smooth community relations after use of force incidents. AA689-90. No specific deficiencies were identified, and the recommendations had nothing to do with deficiencies of any kind. AA689-90.

The continuing, widespread, or persistent pattern of misconduct requires the misconduct be unconstitutional misconduct or a pattern of tortious conduct. *Gates v. Unified School Dist. No. 449 of Leavenworth County, Kan.*, 996 F.2d 1035, 1041

(10th 1993); *see Mettler v. Whitledge*, 165 F.3d 1197, 1204 (8th Cir. 1999). Plaintiffs allege no unconstitutional misconduct. Instead, they refer to a number of uses of force against civilians that they allege violated WPD policies or general police practices, but none of which constituted excessive force. There is no evidence of a widespread pattern of unconstitutional misconduct by WPD officers.

Plaintiffs cite several decisions they claim support their assertion that mere evidence of problems suffices for the notice requirement, but all involved actual or constructive notice of a pattern of misconduct related to the constitutional violation. In *Zuchel v. City and County of Denver, Colo.*, 997 F.2d 730, 734 (10th Cir. 1993), the court considered an appeal from denial of a motion for j.n.o.v. after a jury verdict in favor of plaintiff where the standard of review was based on the sufficiency of the evidence and reversal would require the evidence so strongly support an issue that reasonable minds could not differ. The court determined evidence of several recent shootings, recommendations from the district attorney for additional shoot-don't shoot training, and testimony by plaintiff's police training expert that the department's "shoot-don't shoot" training was "grossly inadequate" fell "far below the generally accepted police custom and practice at the time" sufficed to support the verdict. *Id.* at 740-41.

Likewise, *Burke v. Regalado*, 935 F.3d 960, 990-91 (10th Cir. 2019) involved an appeal from a denial of motion for judgment as a matter of law following a jury

verdict in favor of the plaintiff on a *Monell* claim against sheriffs. Again, the standard of review allowed reversal "only if the evidence points but one way and is susceptible to no reasonable inferences which may support the nonmoving party's position." *Id.* The court found sufficient evidence to support the deliberate indifference verdict where the sheriff had actual knowledge of deficiencies in jail medical care from four audits that highlighted specific issues, including delays in receiving medical care and understaffing of medical providers, and he repeatedly promised changes but never made any. *Id.* at 1000-01.

Neither does *Quintana v. Santa Fe County Board of Commissioners*, 973 F.3d 1022 (10th Cir. 2020) assist. On appeal from a denial of leave to amend to add a *Monell* claim, the court held that pleaded facts supporting deliberate indifference sufficed to proceed, but the court expressly did not decide the merits of the allegations. *Id.* at 1034. Finally, *J.K.J. v. Polk County*, 960 F.3d 367, 382 (7th Cir. 2020) involved municipal notice of ongoing sexual harassment or assaults of prisoners that were not remedied and that resulted in sexual assault of an inmate by a jailer.

Here, plaintiffs cite no evidence of notice that deficiencies in investigations or discipline were occurring, nor do they cite a pattern of excessive force. They attempt to fill this gap by referencing three civil cases alleging excessive force against different WPD officers, but in none of those cases has a determination been

made that the involved officers engaged in unconstitutional conduct. Whether a court declined summary judgment due to disputed factual disputes is immaterial. No jury has decided that the officers violated the constitution, and there has been no adjudication of any kind in this regard.

Plaintiffs attribute the district court's decision to an "unprecedent rule" that they allege the court applied in which *only* past jury verdicts finding constitutional violations suffices to the put the city on notice of a potential for future constitutional violations. Instead, the district court correctly concluded plaintiffs were required to produce evidence of "similar violations," a "pattern of tortious conduct" that made the Finch shooting a predictable consequence of the City's actions. AA1041. The lack of jury verdicts on excessive force claims was a factor the court considered, not a rule. Indeed, the court also reviewed the evidence plaintiffs cited but found they were pointing to evidence of potential policy violations unrelated to excessive force violations.

The district court applied the correct analysis. *See, e.g.*, *Connick v. Thompson*, 563 U.S. 51, 62-63 (2011) (stating dissimilar incidents could not put defendant on notice for municipal liability). No evidence supports a widespread pattern of excessive force violations by WPD officers. Even if the three lawsuits plaintiffs refer to did result in jury verdicts finding unconstitutional conduct, three isolated cases by different officers in varying situations would fail to establish a pattern of

constitutional violations. *Id.*; *Jones v. Town of East Haven*, 691 F.3d 72, 85 (2nd Cir. 2012) (concluding that the plaintiff "fell far short of" establishing municipal liability where the "evidence showed [only] two instances, or at the most three, over a period of several years in which a small number of" city employees committed violations). In *Calderon v. City of New York*, 138 F.Supp.3d 593, 613 (S.D.N.Y. 2015), the court analyzed an argument similar to plaintiffs' as follows:

> In [*Tieman v. City of Newburgh*, No. 13 Civ. 4178(KMK), 2015 WL 1379652 (S.D.N.Y. Mar. 26, 2015)], the Complaint alleged that the City of Newburgh "'has a policy or practice of using excessive force when effectuating arrests, and fails to train and/or discipline its employees to prevent violations of arrestee's [sic] constitutional rights.'" *Id.* at *14. It cited "an extensive history of lawsuits and other complaints," alleging that at least nine excessive-force suits were filed against the city in the preceding five years—including five that involved, as the plaintiff's case did, allegations of unnecessary dog bites. *Id.* at *15. It further alleged that the City was on notice of the excessive force problem because of comments from citizens at public forums and because of a consulting group's report on the police department's practices. *Id.* at *3. Judge Karas, however, held that these pleadings were insufficient to suggest a widespread custom or practice. *Id.* at *17. He noted that none of the lawsuits cited by the plaintiff had "result[ed] in an adjudication of liability." *Id.* (quoting *Walker v. City of New York*, No. 12 Civ. 5902(PAC), 2014 WL 1259618, at *3 (S.D.N.Y. Mar. 18, 2014)). "Simply put," Judge Karas concluded, "the fact that there were allegations of thirteen instances of excessive force during arrests over four [or five] years (none of which involved findings or admissions of culpability) during which hundreds, if not thousands, of arrests were made does not plausibly demonstrate that the use of excessive force during arrest was so frequent and pervasive to constitute a custom." *Id.*

The same analysis applies here. Of the thousands of encounters WPD officers have with civilians, allegations of three instances of excessive force over a period of

years, none of which involve admissions or adjudications of culpability, do not establish a custom or policy. Isolated incidents, even if they had been excessive, cannot place the City on notice that its policy of investigating each incident criminally and internally would result in Rapp's split-second decision here.

Plaintiffs' argument that a series of uses of force without holding officers accountable would eventually result in a constitutional violation lacks merit. The record indicates WPD disciplined and even terminated officers for inappropriate uses of force. No evidence establishes a pattern of WPD ignoring unconstitutional excessive use of lethal force by officers.

Regardless, when recommendations were made for policy improvements, WPD implemented the recommendations. Plaintiffs state that an external audit from 2013 urged revisions to administrative investigations but the recommendations went unheeded. Here, as with multiple other record citations by plaintiffs, the cited record does not support the statement. The referenced document states the opposite: "WPD staff and the Law Department are continuing to work with Attorney Daigle to revise and implement his recommendations. . . . WPD staff looks forward to final implementation of the recommended changes." AA853. Far from deliberate indifference, WPD actively worked to improve its policies and procedures and to implement additional training. AA851-53.

No evidence supports the notion that the City was on notice that additional investigation was needed in officer use of force cases or that officers were not disciplined when appropriate. No evidence supports the notion that the City consciously disregarded a known risk or that it was deliberately indifferent. The City was not deliberately indifferent.

C. NO ALLEGED POLICY CAUSED RAPP'S USE OF FORCE.

Plaintiffs fail to establish any causal relationship between the alleged policy and the shooting of Finch. No logical inference is permissible that WPD officers were emboldened by WPD's accountability practices to violate a suspect's 4th Amendment rights. "To establish the causation element, the challenged policy or practice must be 'closely related to the violation of the plaintiff's federally protected right.'" *Schneider*, 717 F.3d at 770; *see Richard v. City of Wichita*, 15-1279-EFM, 2016 WL 5341756, at *11 (D. Kan. Sept. 23, 2016) ("Even if the City had a custom of not earnestly investigating excessive force cases, there is no reason to believe that such a custom directly caused the shooting of [the plaintiff].").

No evidence suggests that officers generally, or Rapp particularly, were aware of any deficiencies in use of force investigations. Rapp confirmed that he was aware prior to December 28, 2017 that WPD investigated all uses of lethal force and that officers could be prosecuted criminally or internally, up to and including termination, for unlawful actions or violations of training or policy. Rapp's split-

second decision to shoot was not caused by any belief that the WPD would not hold him accountable for violations of policy or training, and he understood the WPD disciplines officers who use unreasonable force. AA322-23.

Plaintiffs' evidence does not show that the City's "custom was the moving force behind the constitutional deprivation" or that an unconstitutional custom "must have actually caused" the constitutional violation. *Cordova*, 569 F.3d at 1194.

D. NO EVIDENCE OF A WIDESPREAD PRACTICE TO SHOOT CIVILIANS EXISTS.

Plaintiffs allege a widespread practice of shooting civilians without regard to whether they pose a threat, relying on the same PSB investigations that fail to support their failure of accountability theory. No evidence supports such a preposterous custom. WPD's use of force regulation is not unconstitutional, and plaintiffs do not allege otherwise. The PSB reports contradict plaintiffs' allegations and establish that each incident is investigated and reviewed comprehensively. The record does not support the existence of a custom or practice to use lethal force in the absence of a reasonably perceived threat. Further, no evidence supports deliberate indifference to such a custom. Rapp knew that any use of lethal force would be investigated criminally and administratively and that he could face criminal charges or WPD discipline for unjustified uses of force. No evidence establishes a causal connection between an alleged custom and Rapp's use of force.

Plaintiffs' evidence falls far short of establishing any element of their municipal liability claim. The district court's decision granting summary judgment to the City should be affirmed.

CONCLUSION

For the reasons set forth above and in Rapp's opening brief, the decision of the district court denying summary judgment to Officer Rapp should be reversed and judgment entered for Rapp based on qualified immunity. For the reasons set forth above, the decision of the district court granting judgment to the City of Wichita should be affirmed.

Respectfully submitted,

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STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

Defendants respectfully requests oral argument because of the importance of appropriate application of standards of qualified immunity viewed from the perspective of the law enforcement officer and to assist the court with any questions unresolved by the briefs.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 9,505 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 10th Cir. R. 32(b), as calculated by the word-counting function of Microsoft Word 2016.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface—14-point Times New Roman—using Microsoft Word 2016.

CERTIFICATE OF DIGITAL SUBMISSION, VIRUS SCAN, AND PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing **COMBINED RESPONSE AND REPLY BRIEF OF DEFENDNATS**, as submitted in digital form via the court's ECF system, is an exact copy of the written document submitted to the Clerk and has been scanned for viruses with the Managed Antivirus, version 6.6.23.329, most recently updated February 5, 2021. According to the program, the document is free of viruses. All required privacy redactions have been made.

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of February, 2021p, I electronically filed the foregoing **COMBINED RESPONSE AND REPLY BRIEF OF DEFENDNATS** with the Clerk of the Tenth Circuit Court of Appeals by using the CM/ECF system. I certify that that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. I further certify that I will cause seven (7) hard copies to be delivered to the Clerk's Office within five (5) business days of entry of the minute order confirming the electronic filing is compliant.