Case No. 19-1140

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ANTHONY MARTINEZ,
Plaintiff-Appellant,

v.

THE UNITED STATES OF AMERICA,
Defendant-Appellee.

On Appeal from the United States District Court
For the District of Colorado
The Honorable Judge Richard P. Matsch
District Court Civ. Action No. 1:15-cv-01993-RPM

APPELLANT'S OPENING BRIEF

Respectfully submitted,

CIVIL RIGHTS LITIGATION GROUP, PLLC

Raymond K. Bryant
Rachel B. Maxam
Attorneys for Plaintiff-Appellant
Anthony Martinez
1543 Champa St. Ste. 400
Denver, CO 80202
raymond@rightslitigation.com
(720) 515-6165

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ORAL ARGUMENT IS REQUESTED

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STATEMENT OF PRIOR RELATED APPEALS

Pursuant to Rule 28.2(C)(1), no other appeal in or from the same civil action in the lower court was previously before this or any other appellate court under the same or a similar title. Additionally, no cases are known to counsel to be pending in this or any other court that will directly affect this Court's decision in the pending appeal.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1291. This is an appeal from a final judgment of the U.S. District Court for the District of Colorado dismissing all claims by Plaintiff-Appellant arising under the Federal Tort Claims Act ("***FTCA***") following a trial to the court. The District Court's *Findings of Fact, Conclusions of Law and Order for Judgment* ("***Order***") was entered on March 14, 2019. Aplt. App. 1322-1327. The District Court had jurisdiction over claims arising under the FTCA, 28 U.S.C. §§1346(b), and 28 U.S.C. 2671 *et seq*. The notice of appeal was timely filed in accordance with F.R.C.P. 4(b)(1) on April 15, 2019. Aplt. App. 7.

STATEMENT OF THE ISSUES

1. Whether the District Court erred in its evaluation of proximate cause and comparative negligence by failing to consider Rev. Stat. §18-1-705.

2. Whether the District Court erred in its evaluation of intervening causation by failing to identify and consider the scope of risk created by the Officers' conduct.

3. Whether the District Court erred in failing to apportion percentages of relative fault.

4. Whether the District Court erred in precluding admission of Mitchell's disciplinary records.

5. Whether the District Court made clearly erroneous findings of fact material to the court's legal conclusions.

STATEMENT OF THE CASE

This case arises out of an encounter between Plaintiff Anthony Martinez ("***Martinez***") and three police officer on December 5, 2012 at 3:30am, on a rural country road in front of the Martinez home, near the small town of Ignacio, Colorado (the "***Incident***") resulting in Martinez being shot in the back. At the time of the Incident, Officers Matthew Mitchell ("***Mitchell***"), Patrick Backer ("***Backer***"), and Cheryl Herrera ("***Herrera***") (collectively the "***Officers***") were officers with the Southern Ute Police Department ("***SUPD***"), a division of the Bureau of Indian Affairs ("***BIA***"). Aplt. App. 144; 400-401; 986. Herrera was a trainee at the time with only three months of law enforcement experience. Aplt. App. 1324. Backer was training Herrera but had only one year of law enforcement experience. *Id.*; 146-47; 403; 986. Mitchell was the most experienced officer with twice the experience of Backer. *Id.*; Aplt. App. 147.

At the time of the Incident, Martinez was living at his father's house at 189 County Road 320B near Ignacio, CO. Aplt. App. 1323. County Road 320B is a short road terminating in a dead-end (the "**Dead-end**")**.** Aplt. App. 1260-62; 1324. To get to County Road 320B, one must drive down County Road 320a and turn left at an intersection (the "**Intersection**") approximately 200 yards from the Martinez home. Aplt. App. 1260; 424-25.

There are no street lights on County Road 320B and only one other occupied house in the area which is near the Dead-end and occupied by a reclusive old man. Aplt. App. 1323. The area around the house is rural and described as "pitch black" or "really dark." Aplt. 65; 77; 174; 359. There was only one small light on the Martinez house porch. Aplt. App. 192; 1266. When on, this light did not illuminate much beyond the porch – and did not reach the street in front of the Martinez home. *Id*. The area around the house is surrounded by extended curtilage and a few empty storage trailers and vehicles. Aplt. App. 60; 1260-62.

The Officers regularly used a practice they called a "blackout approach" to stealthily sneak up on homes of suspects at night. Aplt. App. 1324-25. The tactics used in a blackout approach include turning off all the lights on patrol vehicles - including headlights; staying away from light sources; wearing additional black clothing to cover up police badges and nametags or reflective things; parking patrol vehicles away from residences; and using "noise discipline" (moving quietly and keeping quiet), including turning phones and police radios off or low so they cannot be heard by others. Aplt. App. 151-54; 291. The purpose of the blackout approach is to avoid being detected by concealing themselves from anyone who might see them. Aplt. App. 154-55; 361. One of the reasons the Officers used these tactics was to

avoid the possibility that the occupants of a home would refuse to talk to them by sneaking up and foreclosing a homeowner's opportunity to refuse. Aplt. App. 621-22. Officer Mitchell specifically acknowledged that a blackout approach is a means to otherwise accomplish talking to people who would not answer the door for them. Aplt. App. 181-82.

There are no official BIA or SUPD policies, procedures, or other guidelines regarding the blackout approach. Aplt. App. 163. Use of the blackout approach is left to officer discretion and officers believe the department permits them to use the technique whenever and as frequently as they want. Aplt. App. 163-64.

The Officers had knowledge that a stealth approach could be misinterpreted and cause the occupants to believe that they were about to be assaulted. Aplt. App. 1327-28. Mitchell described the training provided by SUPD supervisors as always including a specific warning that a homeowner could misperceive the officer as intruders; that officers approaching a home clad in all-black clothing could be viewed as someone up to no good. Aplt. App. 156-57; 159-60. Prior to the Incident, Mitchell was warned by another SUPD Sergeant that these tactics had actually resulted in officers being misperceived as burglars by a homeowner who confronted them with a firearm outside of the home because the homeowner did not realize they

were police. Aplt. App. 157-59. Mitchell had knowledge of several incidents in which officers were mistaken by homeowners as intruders because of blackout tactics. Aplt. App. 200. Accordingly, Mitchell specifically understood using the blackout approach could result in a misperception that officers were trespassers. Aplt. App. 167-69. He was also aware that a homeowner has a right to defend against potential trespassers by using force and that force can legally be used by a homeowner before someone enters the property to *prevent* a trespass. *Id.*; Aplt. App. 347 (emphasis added). Herrera was also aware from her training that if a person approaches a home in the dark, another person may not know that person is a police officer. Aplt. App. 1016. Both Mitchell and Backer knew onlookers observing officers cut their headlights could be perceived as dangerous or even gang-related activity. Aplt. App. 200; 428-430.

On the evening of the incident, December 4, 2012, Martinez was hosting a gathering at his house, attended by Andrew Rossi ("***Rossi***"), Bridgette Weaver ("***Weaver***"), Fabian Pena ("***Pena***"), and Luana Price. Aplt. App. 1323. During the evening, Pena and Rossi got into a fight. *Id.* Martinez broke up the fight and Pena, Price and Weaver left. *Id.*

Soon thereafter, Pena returned with Darien and Draven Price, the brothers of Pena's girlfriend, and several other people. Aplt. App. 69; 1323-

24. The Price brothers were affiliated with gangs and have a reputation for violence; they were known for "jumping" people, and beating them up, and were likely to seek revenge - which information was well-known among SUPD Officers. Aplt. App. 57; 169. The Price brothers pulled up to the Martinez house in a dark-colored SUV, got out of their vehicle, and walked on to the Martinez property – uninvited and without consent – to physically surrounded Rossi in an intimidating manner that communicated they intended to fight. Aplt. App. 69-70; 1324. Martinez fought to protect Rossi and his home from the trespassers. Aplt. App. 70. During the fight, Martinez yelled out that he was going to go inside to "get the bats" in order to scare away the intruders Aplt. App. 71. In response, the Price Brothers and the others ran back to their dark-colored SUV and drove off. *Id*.

At approximately 1:00am, officers were dispatched on a report of a "disturbance" pertaining to the fight. Aplt. App. 171-72; 175; 1324. Officers, including Officers Backer, Herrera, and Mitchell met the Price Brothers at the Intersection. Aplt. App. 63, 172; 1260-62; 1324. Mitchell had serious concerns about acting on information provided by the Price Brothers because they are not credible witnesses. Aplt. App. 170-71. Officers Mitchell and Hibbard went to the Martinez house to conduct a "knock and talk" to inquire about the fight. Aplt. App. 1324. They drove into the Martinez driveway in a

police vehicle with lights on. *Id.* Those at the Martinez house could see vehicles and headlights coming and going from the Intersection, because of the desolate open fields surrounding the Martinez home. Aplt. App. 182-83. The officers were wearing their gray uniform shirts and their badges were clearly visible. Aplt. App. 177-78. The officers went to the front door, knocked, and announced their presence as police officers. Aplt. App. 1324. They shined flashlights in the windows, banged on the door, and asked Martinez and Rossi to come and talk to them. Aplt. App. 71. Martinez and Rossi knew the people outside the house were officers because they saw the officers and their patrol vehicles from the house, they saw the officers' flashlights, and heard them announce that they were SUPD police. Aplt. App. 72.

Martinez and Rossi, the only present occupants, did not respond. Aplt. App. 72; 1323. Mitchell shined a flashlight through a window and saw Rossi lying on the floor. Aplt. App. 1323. Mitchell did not see Rossi acting in a threatening manner or otherwise holding someone; he did not see Weaver or anyone else there, and he did not hear anyone cry out for help, and thus, he had no reason to believe anyone else was in the residence injured or in need of help. Aplt. App. 179-80. Failing to make contact, the officers drove away at approximately 1:30am Aplt. App. 1324.

Mitchell returned to the Intersection and reported what happened to the other officers. Aplt. App. 185. He was informed that La Plata County Sheriff's Office was taking over the investigation and returned to the station. *Id*. From this communication, Backer was aware that Mitchell had seen Rossi lying on the floor of the home with no one else around so he was not harming or restraining Weaver and that no one was yelling for help. Aplt. App. 483-86. To Backer's knowledge, Rossi was not doing anything threatening and he had no reason to believe there was anything threatening going on in the Martinez house. Aplt. App. 485-86. This information was also communicated to Herrera, who understood that there were no threats to the officers or anyone else at this time. Aplt. App. 1036-37.

Through the interviews with the Price Brothers at the Intersection, Herrera learned that that the fight between Pena and Rossi started because there had supposedly been an "altercation" between romantic partners Rossi and Weaver. Aplt. App. 1023. Herrera and Backer drove to a hospital in Durango, Colorado where they spoke to other officers from La Plata County. Aplt. App. 987.

After leaving the hospital, Herrera radioed that she was going back to the station to write a report. Aplt. App. 1041. Herrera and Backer returned to Ignacio at approximately 3:30am Aplt. App. 1324. Herrera then conducted a

traffic stop or two. Aplt. Appx. 620; 1043. After that, Herrera decided she wanted to find out where Weaver was located to do a "welfare check" to make sure Weaver was ok. Aplt. App. 990-92; 1324. Herrera drove around town looking for Weaver's car and then drove to the Martinez house. Aplt. Appx. 1045-48. At this time, the only information the Officers had received was from interviewing the Price brothers, which indicated Weaver may have been struck by Rossi at the beginning of the fight, which occurred over two-and-a-half hours earlier. Aplt. App. 613-614. The Officers had no specific information that Weaver was in jeopardy. *Id*.

As Backer and Herrera approached the Martinez house, they decided to use the stealth "blackout approach." Aplt. App. 416-17; 1050-51; 1059-62. Backer told Herrera to turn off the vehicle's headlights as they turned the corner of the county road toward the Martinez home. Aplt. Appx. 410. In the darkness, they drove to the Dead-End where they turned around and parked the vehicle. Aplt. Appx. 418, 421; 1269; 1281. There are no police markers on the front of SUPD vehicle so someone looking down at the vehicle would have no reason to believe it anything but a civilian vehicle. Aplt. Appx. 421-22.

About five minutes later, Mitchell came down the road and Herrera instructed him to cut his headlights to conceal his approach. Aplt. Appx. 422-23. He turned off his headlights halfway between the Intersection and the

Martinez home. Aplt. Appx. 198-99. He drove slowly past the Martinez house with his headlights off looking at the residence. Aplt. Appx. 201. He saw two people out in the front yard observe the vehicle and quickly go back into the house in response to seeing Mitchell. Aplt. Appx. 202-03.

The Officers drove a black Ford Expedition SUVs. 1289-90. In Mitchell's words, his SUV is a "clone" of the vehicle driven by the Price Brothers. Aplt. Appx. 173; 1289-90. In dark conditions, the Price Brothers' vehicle appears to be dark like Mitchell's vehicle. Aplt. Appx. 174. The markings "Southern Ute Police" on the police vehicles are reflective, so the markings cannot be seen in the dark without a light source shining on the writing. Aplt. Appx. 189-90. There are no lights to reflect on the vehicles as drove on the road in front of the Martinez home and the writing cannot be seen. Aplt. Appx. 197.

Meanwhile, Martinez observed a dark-colored SUV turn the corner of the Intersection and cut off its headlights. Aplt. Appx. 74; 400. This conduct, combined with the appearance of the vehicle and the fight that occurred earlier, caused Martinez to believe that the vehicle was the Price Brother's coming back. Aplt. Appx. 74; 79. Backer admits that a homeowner seeing another person blackout their headlights as they were approaching the home could be perceived as a dangerous person and that the homeowner could be

afraid that it was gang activity. Aplt. Appx. 428-431. Martinez, in fact, thought those in the vehicle were preparing for gang violence. Aplt. App. 114.

At that time, Weaver arrived and parked at the Martinez home. Aplt. Appx. 74. Martinez communicated his fears to Rossi that he thought the Price brothers had come back to finish what they had started. Aplt. App. 75-76. Martinez, Rossi, Gallegos, and Weaver were all scared. Aplt. Appx. 76-77. Rossi agreed, so they both looked for something to defend themselves with. *Id*. Martinez looked found his son's tee-ball bat. Aplt. Appx. 74. Rossi found a metal pipe. Aplt. App. 110. Martinez and Rossi walked out to the bushes in the front yard together and watched the dark SUV. Aplt. App. 75-76.

Meanwhile, at the Dead-end, Mitchell met up with the other officers. Aplt. Appx. 202. Herrera was put in charge and acted as the lead decision-maker. Aplt. Appx. 204. Herrera purportedly planned to do a "welfare check" on Weaver by knocking on the Martinez door and asking if Weaver was there. Aplt. Appx. 414-15; 1324. Mitchell understood that the Officers' plan was to try to make contact with the residents using stealth because they thought they might have more success if the occupants could not see them coming. Aplt. Appx. 208-09.

Mitchell had no reason to be concerned for his safety and he knew there was no emergency. Aplt. Appx. 197-98, 377. Neither Herrera nor Backer

made any statements indicating that they were concerned about their safety. Aplt. Appx. 212-13.

Mitchell alerted Herrera and Backer that people outside of the home saw him black out his lights and quickly went into the house. Aplt. Appx. 211. However, Mitchell did not suggest a change in tactics; Mitchell was aware that he had an obligation to question the decisions of other officers if he disagreed with them, they were acting outside of training or policy, or to make sure the officers made the right decisions, but he did not ask any questions and did not suggest that the Officers reconsider their blackout approach. Aplt. App. 147-48, 204, 216-219.

Officers Herrera and Backer were dressed in all black clothing: black pants, black boots, black gloves, and black jackets that covered their uniforms and badges. Aplt. App. 204-05; 418; 1282-1288. The black jackets they used did not have badges or police identifications on the front so any person facing the officer would see only all-black clothing and nothing indicating that the persons are officers. Aplt. Appx. 207-08, 420; 1282-1288. Mitchell was wearing a grey uniform shirt but walked behind the other officers as they approached Martinez' home. Aplt. Appx. 219.

BIA policies require the officers to wear only uniforms that are immediately recognizable as those of police officers and to exhibit their

badges and credentials prior to initiating contact. Aplt. Appx. 382; 1305-1307. Mitchell acknowledges that such BIA policies concerning police identification are inconsistent with a blackout approach. Aplt. Appx. 382-84. He also acknowledged that concealment during routine encounters, including clothing that concealed police identification from the front, is inconsistent with BIA policy. Aplt. Appx. 382-84; 1307.

Outside, in the bushes of the front yard of the Martinez home, Martinez and Rossi look down the road where they saw a dark SUV at the Dead-end and observed people dressed in all black clothing get out and walk toward the house. Aplt. Appx. 75-76. The figures are like shadows; Martinez cannot see details due to the darkness. Aplt. Appx. 77. As the darkly-clad figures get closer to the home, they pass the only other residence in the area; Martinez has no reason to believe they could be going anywhere but his home. Aplt. Appx. 223; 1260-62. The Officers pointed in the direction of the Martinez home and whispered in hushed tones that carried in the empty, rural night air. Aplt. Appx. 223. Martinez believed the people were the Price Brothers because of their approach - he heard whispering, it looked like they were trying to be sneaky, they are big like the Price Brothers, they were walking toward his house, and they were pointing toward his house. Aplt. Appx. 77-78. Martinez did not think they were police coming back again because of the

sneaky, darkly-clad approach and his experience with police earlier was open and conspicuous. Aplt. App. 75-79; 1324. In his words, it "didn't look like cops" because "cops don't really do that." Aplt. Appx. 79. Contrary to Martinez's first encounter with the police, these persons did not want to be seen and appeared to be sneakily approaching. *Id.*; 416-17; 1050-51; 1059-62; 1324.

The BIA also has a policy requiring officers to identify themselves as law enforcement officers as soon as possible, if it is not evident. Aplt. Appx. 380-81; 1306. As the Officers approached the Martinez house they had numerous opportunities to identify themselves so as not to appear as trespassers, but did not. Aplt. App. 224-27; 434-39; 1062-63. As the Officers get nearer to the house, approximately 150 feet away, they heard voices and saw a person in the Martinez yard. Aplt. Appx. 224; 226. Despite knowing that people are near, the Officers did not announce police or turn on their flashlights. Aplt. Appx. 226-27. As the Officers got within 50 feet away, Backer heard a sort of "beep-beep" like someone locking a car (likely Weaver arriving) and had reason to think that someone was in the yard. Aplt. Appx. 431-32. However, the Officers did not identify themselves as police. Aplt. Appx. 434-37. As the Officers continued walking, they heard a rustling sound from the bushes/trees in front of Martinez's yard. Aplt. Appx. 438. Herrera

heard voices, tilted her head, and then heard voices again. Aplt. Appx. 1062-63. The Officers had the opportunity, yet again, to identify themselves, but did not do so. Aplt. Appx. 438-39; 1062-63.

On the street in front of the Martinez home, Herrera finally turned on her flashlight, shined in toward the bushes, and sees Martinez come out. Aplt. App. 1063. Martinez ran onto the road in front of his home with the bat in his right hand, yelling and screaming to raise attention and to try to scare off the dark figures. Aplt. Appx. 78; 230; 1064. As Martinez ran toward the darkly-clad figures, Backer moved forward toward Martinez and away from the other officers, approximately 5-6 feet. Aplt. App. 355. Backer, who is closest to Martinez at that point and most likely to be heard, yells "drop the weapon" and used profanity, but did not state he is police. Aplt. App. 235-36. Mitchell testified that he heard Backer say "drop your weapon" or "drop your bat" and was *certain* he did not hear Backer say "police." Aplt. App. 235, 241, 357. In a statement written just after the Incident, Mitchell stated that Backer said "drop your weapon." Aplt. App. 1308-09. Herrera remained silent. Aplt. App. 240; 1064. The only words Martinez heard were "drop the bat, drop the fucking bat, put the fucking bat down." Aplt. App. 81.

Martinez was blinded by the flashlight shone in his eyes, turned around, and ran back toward his home when he heard a gunshot behind him.

Aplt. App. 80. Backer fired twice and one of the shots hit Martinez in the back. Aplt. App. 448-49; 1263-65.

Backer approached Martinez and turned on a digital audio recorder. Aplt. App. 495. The audio makes clear that Martinez had no idea it was a police officer who shot him. Aplt. App. 1296; 1326. After Martinez was shot, the Officers found Rossi, Weaver, and Gallegos in front of the Martinez house and placed them in handcuffs. Aplt. App. 1079-80. Rossi, Weaver, and Gallegos were in close enough proximity to hear the Officers as they yelled and fired. Aplt. App. 1296. In that same audio recording a moment later, Rossi, Weaver, and Gallegos all made excited utterances indicating that they had no idea the darkly-clad people were police and that the Officers did not identify themselves before shooting. *Id.*

Following five years of litigation, a six-day bench trial was ultimately held on the Plaintiff's claims for negligence and negligent infliction of emotional distress. Aplt. App. 6. The District Court, as the trier of fact, entered judgment in favor of the Defendant. *Id*. In a short six-page Order the District Court held that the Officers could not have foreseen that Mr. Martinez would react the way he did in response to the Officers' conduct and that Plaintiff's intervening conduct broke the chain of causation. Aplt. App. 1328. It thus concluded that the Officers' "stealth approach was not the

proximate cause of injury to Martinez." *Id*. The District Court also ruled that Mr. Martinez was negligent and that the "lack of reasonable care for his own safety" "contributed more to his injury than the stealth approach by the officers." *Id*.

SUMMARY OF THE ARGUMENT

The Officers were negligent in using stealth "blackout" tactics to conceal their approach to the Martinez home under cover of darkness in a dark, rural, part of town in the middle of the night to conduct a purported "knock and talk" welfare check regarding a fight that had occurred hours earlier, without any emergency or urgent law enforcement need. The Officers foreseeably risked a violent, confused confrontation by concealing their presence and identity at a time and location that the blackout could be viewed as dangerous by home dwellers; parking and huddling at the Dead-end; failing to reconsider the blackout approach when they knew they had been seen cutting out their headlights; cladding themselves in all-black clothing that covered the Officers' badges and uniforms; sneakily approaching the Martinez home with their flashlights off; pointing and whispering in reference to Plaintiff's home as they walked close to it; and failing to identify themselves as police officers when they were aware people – who had reason to be on high alert – were nearby.

As a result of these tactics and decisions, Martinez believed the darkly-clad figures approaching his home were violent, gang-affiliated assailants who had earlier trespassed onto his property to cause physical harm, returning to finish off what they had started. Martinez watched and waited

in the bushes of his front yard until the darkly-clad figures were immediately in front of his home before running toward them, yelling with a t-ball bat raised above his head, in an effort to defend his property and scare off the intruders. One of the three officers responded by shooting Martinez. This tragic misunderstanding – involving a face-off between two sets of persons who each perceived the other to be assailants – would not have occurred but-for the Officers' use of the blackout tactics in the unique circumstances of the evening which caused Martinez to mistake them for intruders.

After a six-day bench trial, the District Court issued a very short six-page Order finding for the Defendants. Aplt. App. 1323-28. Ultimately, the District Court erred in its legal analysis and testing related to the assessment of negligence of the parties.

First, the District Court legally erred in failing to consider the rights afforded to Martinez by Colorado's defense of property statute, which led to a flawed legal analysis of the applicable proximate cause and comparative negligence issues. Colorado negligence principles require that courts considering proximate cause evaluate whether persons acted pursuant to Colorado law in a way that is foreseeable precisely because of the existence of a law that affords plaintiffs a right. *See Banyai v. Arruda*, 799 P.2d 441, 443 (Colo. App. 1990). Here, Colo. Rev. Stat. § 18-1-705 permitted Plaintiff

to use or threaten the use of physical force to prevent a perceived attempt to trespass onto his property. Moreover, the fact that Martinez availed himself of the right to threaten force to protect his property should be considered in assessing the relative negligence of Martinez' acts. The District Court's complete failure to consider the existence of this statute – and the rights thereby afforded to Martinez under the circumstances – demonstrates that the District Court failed to appropriately test the foreseeability of Martinez' defensive conduct in response to the Officer's clandestine approach and the reasonableness of Martinez's conduct relative to the Officers' conduct.

Second, the District Court erroneously abstained from identifying or considering the scope of risks associated with the Officers' conduct, which resulted in a fundamentally flawed legal analysis of intervening force and intervening causation. Whether the original negligence induced another actor to act is a critical consideration in a negligence analysis. *See* 799 P.2d at 443. The District Court was required to identify and consider the scope of the risk created by the Officers' conduct in order to evaluate whether the Officers' acts were a proximate cause of Mr. Martinez's injuries, despite intervening forces. *Webb v. Dessert Seed Co., Inc.*, 718 P. 2d 1057, 1063 (Colo. 1986). By failing to consider the scope of risk involved in the Officers' conduct, including evidence of the risks that a homeowner would likely

mistake an officer using a blackout approach for an assailant – and respond with protective force – the District Court erroneously determined that the Officers had "no reason" to believe Martinez could threaten them with a bat. Thus, the District Court concluded that the intervening force used by Martinez was automatically an intervening cause that necessarily broke the chain of causation. As a result, the District Court's failure to apply these important fundamental negligence principles resulted in an erroneous legal determination.

Third, the District Court erred in failing to apportion fault among the parties which resulted in a flawed and unreliable determination of comparative negligence between and among those involved, and an unreliable determination that Martinez was more negligent than the Officers. The requirement that a court evaluating contributory negligence apportion fault amongst the various parties is clearly and conclusively established by statute. The District Court's failure to identify the relative negligence of the parties raises serious questions about whether the Court properly considered numerous key considerations unmentioned in the Order and makes its other errors and omissions irreconcilable with its determination that Martinez was more negligent than the Officers.

Fourth, the District Court erred in denying admission of disciplinary documents that indicated Mitchell had been disciplined and re-trained before the Incident concerning his responsibility to "double-check" and "cross-check" poor decisions of fellow officers in the field when approaching suspects' homes. Such evidence should have been admitted, pursuant to F.R.E. 402, 404(b) and F.R.E. 613. The information is relevant to prove his duty to override the decisions of less experienced officers such as Herrera, whose inexperience and poor decision-making created the dangerous circumstances leading to the confrontation between Martinez and the Officers and likely contributed to the erroneous conclusion of the Court.

Fifth, the District Court made clearly erroneous findings of fact fundamental to a negligence analysis which represent a fundamental misperception of the case that contributed to a flawed legal determination.

For these reasons, the judgment must be overturned and the case remanded for a new trial.

STANDARD OF REVIEW

Appellant challenges the District Court's legal conclusions based on state law in Sections I-III. These matters are reviewed by this Court *de novo*. *Ayala v. United States*, 49 F.3d 607, 611 (10th Cir. 1995). The FTCA requires that Colorado state-law negligence standards govern. 28 U.S.C. §1346(b)(1)

(outlining liability "in accordance with the law of the place where the act or omission occurred"). Whether a trial court applied the correct legal test to assess Colorado negligence issues is a question of law. *Reigel v. SavaSeniorCare, LLC*, 292 P.3d 977, 985 (Colo. App. 2011). Whether a trial court properly applied Colorado's statutory standards is a legal question reviewed *de novo*. *Reid v. Berkowitz*, 315 P.3d 185, 189, 190 (Colo. App. 2013) ("We review *de novo* the trial court's application of the governing statutory standards…questions of law, and statutory interpretation").

Appellant also challenges the District Court's decision to exclude evidence in Section IV, which decision is reviewed under an abuse of discretion standard. *Pascouau v. Martin Marietta Corp.*, 185 F.3d 874 (10th Cir. 1999).

Finally, Appellant challenges the District Court's determinations of certain facts in Section V. This Court will not disturb a district court's findings of fact on appeal unless they are clearly erroneous." *United States v. Estate of St. Clair*, 819 F.3d 1254, 1264 (10th Cir. 2016) (citing *Sweeten v. U.S. Dep't of Agric. Forest Serv.*, 684 F.2d 679, 681 (10th Cir.1982) (citing Fed.R.Civ.P. 52(a)). "A finding is clearly erroneous when the reviewing court has a definite and firm conviction that it is mistaken, even though there may

be some evidence to support it." *Id.* (citing *Ryan v. Am. Nat. Energy Corp.*, 557 F.3d 1152, 1157 (10th Cir.2009)).

Rulings and Objections Below

Issues relating to the legal standards applicable to Mr. Martinez's claims were raised in Mr. Martinez's *Trial Brief*. Aplt. App. 1313-1322, as well as argued in opening and closing statements during trial. Aplt. App. 26-39; 1196-1235. Additionally, the District Court refused to admit records concerning discipline of Mitchell. Aplt. App. 147-50; 1320-22. Relevant rulings are contained in the District Court's Order. Aplt. App. 1323-1328.

ARGUMENT

I. THE DISTRICT COURT ERRED IN TESTING PROXIMATE CAUSE AND COMPARATIVE NEGLIGENCE BY OMITTING CONSIDERATION OF RIGHTS UNDER C.R.S. § 18-1-705.

During the course of trial, Plaintiff raised the applicability of Colorado's very strong property-protection laws several times to bear on reasonability assessments of the conduct of the parties. In particular, Plaintiff called on the District Court to consider in its analysis of the parties' negligence Colo. Rev. Stat. § 18-1-705. In relevant part, the law states:

> A person in possession or control of any building, realty, or other premises, or a person who is licensed or privileged to be thereon, is justified in using reasonable and appropriate physical force upon another person when and to the extent that it is reasonably necessary to prevent or terminate what he reasonably believes to be the

> commission or attempted commission of an unlawful trespass by the other person in or upon the building, realty, or premises.

Id.

This statute is materially relevant in this circumstance because Martinez exercised his right to threaten force in response to darkly-clad figures approaching his home in the middle of the night. However, in its Order, the District Court completely failed to consider the statute or apply any effect of the rights afforded when evaluating the culpability of Plaintiff or the Officers' conduct. *See* Order. As a result, the District Court erred in its legal analysis involving fundamental aspects of the negligence questions posed by the case., including the foreseeability that the Officers' stealth approach could cause Plaintiff to respond with a threat of force and the comparative negligence of Plaintiff's conduct in so responding.

A. The District Court erred by failing to consider Plaintiff's legal right to threaten force to defend his property in its test of foreseeability.

The District Court erred by failing to consider Plaintiff's legal right to threaten force to defend his property in its test of foreseeability, which resulted in a faulty proximate cause analysis. To determine "whether [a] defendant's negligence was a 'cause' of injury to the plaintiff, one should consider "whether the injury to a person in the plaintiff's situation was a reasonably foreseeable consequence of the defendant's negligence."

Metropolitan Gas Repair Service, Inc. v. Kulik, 621 P.2d 317 (Colo. 1981). In assessing whether an actor should recognize that his conduct involves a foreseeable risk of harm, it is presumed that the actor knows "the common law, legislative enactments, and general customs in so far as they are likely to affect the conduct of the other or third persons." *Restatement (Second) of Torts* §290 (1965). All persons are "presumed . . . [to] kn[o]w" that a property dweller "c[an] employ lawful force" under the parameters of this law. *People v. Hayward*, 55 P.3d 803, 806 (Colo. App. 2002).

Colorado law privileges a person in control of a home to use or threaten physical force upon another person when and to the extent that it is reasonably necessary to prevent or terminate what the homeowner reasonably believes to be the commission or attempted commission of an unlawful trespass by the other person on his property. Colo. Rev. Stat. §18-1-705. This right applies equally even where police officers are the individuals attempting entry onto the property. *People v. Lutz,* 762 P.2d 715, 717 (Colo. App. 1988). Colorado does not recognize the common law "duty to retreat" requiring the victim to retreat before using force. *See e.g. People v. Garcia*, 28 P.3d 340, 347 (Colo. 2001) (holding it was reversible error to not give a "no duty to retreat" jury instruction) (citing *People v. Toler*, 9 P.3d 341, 348 (Colo. 2000) ("we adopted the 'no duty to retreat' doctrine as the general

rule for this state"). The law broadly authorizes any lawful property dweller to "prevent" even the "attempted commission of an unlawful trespass" through use of physical force, and by its terms has no requirement that property dweller stay within the property to do so. Colo. Rev. Stat. §18-1-705; *See also* 9 P.3d at 351 (declining to read additional limitations into similar make-my-day statute where the statute "contains no reference" to such limitations).

Colorado courts consistently find that it is foreseeable that a defendant's negligence may induce another to respond pursuant to a legal right or duty. *Banyai*, 799 P.2d at 443 (foreseeable that safety responders would respond to the scene of a car accident and act within scope of Colo. Rev. Stat. §42-4-1403); *Rhea v. Green*, 476 P.2d 760, 761 (Colo. App. 1970) (it was "clearly foreseeable" that police would break traffic laws in pursuit of fleeing suspect as they had a legal "right" to do); *Clausen v. Hightower*, 527 P.2d 922, 923 (Colo. App. 1974) (same). Courts have considered the legal rights and duties of the parties under a variety of related negligence questions. *E.g., Stahl v. Cooper*, 190 P.2d 891, 894 (Colo. 1948) (considering pedestrians' legal right of way as a factor relevant to contributory negligence); *Dare v. Souble*, 674 P.2d 960, 962-63 (1984) (holding that motorcyclists' legal right to decline to wear a helmet relevant to duty of

reasonable care). Thus, whether a plaintiff acts pursuant to a legal right or duty is an important consideration necessitated by the underlying purposes of the foreseeability inquiry. *See Banyai*, 799 P.2d at 443*; See also Philbin v. Denver City Tramway Co.,* 85 P. 630, 631, 632 (Colo. 1906)(contributory negligence dependent upon rights and duties of traveler and railway operator); *Molnar By and Through Molnar v. Law,* 776 P.2d 1156, 1157 (Colo. App. 1989) (jury consideration of Colo. Rev. Stat. 13-80-119 appropriate in evaluating reasonableness of a weapons discharge because the legislative intent was to permit a just and reasonable result when reasonable force was used by a homeowner).[1]

Where a party's reaction to another's negligence is "reasonably foreseeable" the reaction cannot serve to relieve the negligent actor of liability. *Bradford v. Bendix-Westinghouse Auto. Air Brake Co.*, 517 P. 2d 406, 413 (Colo App. 1973). Accordingly, the fact that Martinez responded to the Officers' blackout approach by threatening force, as he was authorized by Colorado law to do, is an essential consideration in the case. It is undisputed that Martinez threatened a group, who he reasonably believed were potential intruders, with force in an attempt to scare them away from his property.

[1] The conclusions of the *Molnar* court and C.R.S. 13-80-119 lend further support to buttress Plaintiff's argument that the Colorado General Assembly intended to privilege force used by a home dweller under a reasonable belief that force was necessary to prevent a perceived injury to himself, or to prevent the perceived commission of a felony. Although the statute protects those who use such force from suit, Defendant's argument that Plaintiff is contributorily negligence is essentially a claim of liability against Plaintiff, after he filed suit.

Aplt. App. 1325. It is presumed under law that the Officers were aware of the statute. 55 P.3d at 806. Moreover, Mitchell testified as to be aware of the statute and that there have been specific instances of the blackout approach giving rising to confrontations between police and a homeowner, who perceived the officers as trespassers. Aplt. App. 156-60; 167-69; 200; 347. Yet, the District Court concluded that the Officers "had no reason to believe" that Mr. Martinez would threaten physical force. Aplt. App. 1328. The District Court erroneously excluded any consideration of the statute in its findings, despite the fact that it was relevant to consider the fact that Martinez exercised a legal right. Accordingly, the District Court erred in assessing the Officers' negligence without considering a key factor of foreseeability - that Martinez would act pursuant to his legal rights. The District Court's ruling infirmly relies on an inaccurate test of foreseeability and must be reversed.

B. The District Court erred by failing to consider Plaintiff's legal right to threaten force to defend his property in its contributory negligence analysis.

The District Court erred by failing to consider Plaintiff's legal right to threaten force to defend his property in its contributory negligence analysis. In its ruling on Martinez's contributory negligence, the District Court simply concludes that "Martinez himself was negligent in going out of his house and

confronting what he assumed were the Price brothers on the county road" and "that was a lack of reasonable care for his own safety…" Aplt. App. 1328. This conclusion reflects a disregard for Colorado law.

As with questions of foreseeability, when a plaintiff is acting in accordance with his rights under the law this factor must be considered to assess whether the plaintiff was negligent and whether that negligence may relieve a defendant of liability. *Dare*, 674 P.2d at 962-63. The proper test of contributory negligence in this matter requires consideration of the standard of care derived from the right of property dwellers in Colorado to use or threaten force to prevent unlawful trespasses onto their properties. *Id.*; Colo. Rev. Stat. § 18-1-705.

A plaintiff is not negligent in a series of events, put into motion by a negligent actor, when responding as "an ordinarily prudent person [would] have done under the circumstances as they appeared to exist." *Powell v. City of Ouray*, 507 P.2d 1101, 1105 (Colo. App. 1973) (quoting *Matt Skorey Packard Co. v. Canino*, 350 P.2d 1069, 1071 (Colo. 1960)). Plaintiffs are required only to avoid placing themselves in an "undue risk of harm" as the circumstances then appeared to exist. *Id.* This is not a requirement that a plaintiff exercise all possible precautions. *Dare*, 674 P.2d at 962-63

(motorcyclists are not negligent when failing to wear a helmet where there is no law requiring use of a helmet).

Instead, a plaintiff's exercise of a legal right is a relevant consideration that tends to establish a plaintiff is not negligent. *Stahl*, 190 P.2d at 475-76 (finding that it was relevant to consider that plaintiffs were exercising their legal right-of-way as pedestrians in a crosswalk). The standard of care under which a plaintiff is required to act "may derive from a legislative enactment". *Dare*, 674 P.2d at 963. Courts must first consult the "standard of conduct" installed through legislative judgment. *Id.* Courts do not lightly impose a higher standard of conduct through tort law which may undermine relevant statutory rights. *Id.*; *See Stahl*, 190 P.2d at 475-76 (court declined to impose a greater burden under which pedestrians safely using their legal right-of-way in a crosswalk must "continually look[ ] and listen[ ] to see if automobiles are approaching); *See also Powell*, 507 P.2d at 1105 (where motorcycle passenger was sitting on "legally parked motorcycle" court declined to impose an additional "duty to watch" for other vehicles).

As previously noted, the statute affords a broad right to property dwellers to use force to prevent an unlawful trespass from occurring. Colo. Rev. Stat. § 18-1-705*; See Sect. II. A supra*. The Colorado legislature has not imposed a standard of conduct under which property dwellers must wait

within their homes for incoming trespassers in order to exercise reasonable care. *See* Colo. Rev. Stat. § 18-1-705; *See Toler*, 9 P.3d at 348-49, 351 (the court declined to read a "duty to retreat" into another provision of the make-my-day statutes where the statute itself did not explicitly state that duty; the court also compared the Colorado law to similar statutes that impose a duty to retreat and noted that historically Colorado law has never included such a duty).

Here, the relevant standard of care is derived from the statute. Yet, without any consideration of Mr. Martinez's right to "prevent" what appeared to him to be an "attempted commission of an unlawful trespass" (Colo. Rev. Stat. § 18-1-705), the District Court ruled that Martinez was "negligent in going out of his house and confronting what he assumed were the Price brothers on the county road". Aplt. App. 1328. This finding completely ignores clearly established Colorado law providing that a homeowner has a right to defend his property against a potential trespass and that he has no duty to retreat. Thus, the District Court, by finding that Martinez was negligent in going out of his home, imposed a greater standard of care on Martinez than set by the Colorado General Assembly and incorrectly applied Colorado negligence standards. *Compare Dare*, 674 P.2d at 962-63.

This error undermines both the District Court's ruling that Martinez was negligent and that Martinez' negligence was greater than that of the Officers'. Thus, those rulings must be reversed.

II. THE DISTRICT COURT ERRED REGARDING INTERVENING CAUSATION BY OMITTING CONSIDERATION OF THE SCOPE OF RISK.

The District Court held that the Officers' conduct was not the proximate cause of injury to Martinez because Martinez's actions were an intervening cause of his injury and the chain of causation was broken. Aplt. App. 1328. However, "the mere fact that other forces have intervened between defendant's negligence and the plaintiff's injury does not absolve the defendant where the injury was the natural and probable consequence of the original wrong and might reasonably have been foreseen." *Johnson v. Regional Transp. Dist.,* 916 P.2d 618, 622 (Colo. App. 1995). In order to determine if the Officers' blacked-out approach was a proximate cause of Martinez's injuries, the District Court was required to assess whether the Officers' negligent actions set in motion a course of events that could foreseeably result in the type of harm Mr. Martinez suffered, despite intervening acts. *Groh v. Westin Operator, LLC*, 352 P.3d 472, 482 (Colo. App. 2013); *see also Webb v. Dessert Seed Co., Inc.*, 718 P. 2d 1057, 1063

(Colo. 1986). If the intervening force was "reasonably foreseeable", its occurrence does not break the chain of causation. *Groh*, 352 P.3d at 482.

Multiple acts may simultaneously proximately cause an injury. *Brown v. Silvern*, 45 P.3d 749, 751 (Colo. App. 2002); *See also Starks v. Smith*, 475 P.2d 707, 708 (Colo. App. 1970) (holding that where one negligent act is a proximate cause of an injury, this does not prevent another negligent act from also proximately causing the same injury). A negligent act is a proximate cause when it was a "substantial factor" in bringing about the injury. *Groh*, 352 P.3d at 482. The existence of proximate cause does not depend on whether a "tortfeasor [is] able to foresee . . . the precise manner in which the injuries occur". *HealthONE v. Rodriguez ex rel. Rodriguez*, 50 P.3d 879, 889 (Colo. 2002); *Accord Groh*, 352 P.3d at 482. Instead, "[p]roximate cause may be found where the negligent actor sets in motion a course of events." *Groh*, 352 P.3d at 482. If, during that course of events, the injury in question is "brought about through the intervention of another force" this does not break the chain of causation from the original act if the injury is "within the scope of the risk created by" the original negligent act. *Webb*, 718 P. 2d at 1063 (*quoting Restatement (Second) of Torts* §442B (1965)). Only "highly extraordinary" instances result in an intervening force that breaks the chain of causation. *Walcott v. Total Petroleum, Inc.*, 964 P.2d

609, 612 (Colo. App. 1998) (*citing Restatement (Second) of Torts* §435 comment c (1965)); *See also Scharrel v. Wal-Mart Stores, Inc.*, 949 P.2d 89, 94 (Colo. App. 1997).

"In many situations, the foreseeable risk that renders the defendant's conduct negligent is the risk that potential victims will act in ways that unreasonably imperil their own safety." Restatement (Third) of Torts: Phys. & Emot. Harm § 1, comment b (2010). "The conduct of a defendant can lack reasonable care insofar as it can foreseeably combine with or bring about the improper conduct of the plaintiff or a third part." Restatement (Third) of Torts: Phys. & Emot. Harm § 19 (2010). "Under the definition of negligence in § 3, whether a defendant's conduct lacks reasonable care and is therefore negligent often depends on the foreseeable likelihood of the actions of other persons. Frequently, these actions—though they may contribute to danger—are themselves normal and proper. Even when the actions are themselves improper, so long as they are foreseeable they remain relevant to the defendant's possible negligence." Restatement (Third) of Torts: Phys. & Emot. Harm § 1, comment a (2010).

A negligent actor is responsible for the universe of risks and related harms that she puts into motion. *Groh*, 352 P.3d at 482. If a negligent act launches a series of events, that act proximately causes all "harm [that] was

within the scope of the risk created" by the original negligence. *Webb*, 718 P.2d at 1063. This is true even if the original negligent act combines with unexpected forces to result in a foreseeable harm. *Id.* Colorado courts recognize that a final harm may come about through a circuitous, even unpredictable, route. *Id.* "[E]ven where the actor did not and could not foresee the precise manner in which the injury would come about", an actor is responsible for harms that are foreseeable because they are the type of harm expected to result from the negligent act. *Groh*, 352 P.3d at 482; *See also Heinrich v. Master Craft Engineering, Inc.,* 131 F.Supp.3d 1137, 1150 (D. Colo. 2015) (discussing foreseeability of intervening forces that do not comprise intervening causes).

For example, in a case where a seed importer sold onion seeds for use as a substitute for commercially-rated seeds, which had not been rated for commercial use, the Colorado Supreme Court concluded that the importer could face liability for third-party resale of its seeds because it could foresee that someone down the supply chain could be harmed by crop failure by using the substitute seeds. *Webb*, 718 P.3d at 1963. Even where the seed importer could not foresee that an intermediary wholesaler would relabel the relevant packaging, this intervening force did not break the chain of

causation because the final harm was within the scope of risks created by the seed importer's original acts. *Id.* at 1062-63.

Also, where construction workers negligently left small embers burning from a rubbish fire, the Colorado Court of Appeals consulted the scope of risks created by that negligent conduct to conclude that unknown volunteer firefighters who later sustained injury fighting the fire were within the scope of risk. *See Estate of Newton By and Through Newton on Behalf of Newton v. McNew*, 698 P.2d 835, 836-37 (Colo. App. 1984). Intervening events, including children playing with and spreading embers that start a fire, which led the ultimately injured party to volunteer to help in putting out the fire, did not break the chain of causation for an injury from smoke inhalation. *Id.*

Similarly, where a large retailer negligently placed a heavy item on a high shelf and the item fell onto a person after a ladder collapsed, the Colorado Court of Appeals found that a jury instruction on intervening causation regarding the ladder breaking was improper. *Scharrel*, 949 P.2d at 93-94. "[A]n inability reasonably to foresee the particular intervening force" involving the ladder breaking while an employee attempted to use it to access the heavy item, did not break the chain of causation created by the

original negligence because the injuries were within the scope of risks created. *See Id.*

Accordingly, testing proximate cause must include consideration of the scope of risks created by the events put into motion by a defendant's negligence. *See Id.* Even if the finder of fact was to find that the Officers in the case at bar did not foresee the precise way in which Mr. Martinez would act to protect himself or his property, the Officers' approach to the home still risked a threatening confrontation with a homeowner, which resulted in precisely the type of harm that would foreseeably come from a clandestine approach under these circumstances. As a result, the Officers' actions are still a legal proximate cause of injuries that result from the scope of risks originally created by their negligent conduct. *See Groh*, 352 P.3d at 482.

The District Court failed to identify or consult that scope of risk, despite overwhelming evidence – from BIA policies, SUPD training, explicit warnings, supervisor storytelling, and the Officers' own admissions of their knowledge – that blackout approaches risk home occupants mistaking an officer's identity and responding by defending themselves and their property with force. Aplt. App. 156-60; 167-69; 200; 1328.

Foreseeability is based on common sense perceptions of the risks created by various conditions and circumstances. *Taco Bell v. Lannon,* 744

P.2d 43, 48 (Colo. 1987). Accordingly, courts have regularly held that officers who fail to announce their presence, or approach suspects in a manner that may result in identity confusion, cause injuries through the risk that a suspect will respond with protective force. *See*, *e.g*. *Pauly v*. *White*, 874 F.3d 1197, 1206, 1211 (10th Cir. 2017) (stating that "a reasonable jury could find" that officers who used a stealth approach late at night, in a dark, rural area, while knowing that the residents had reason to fear potential intruders, could risk "the occupants of the house . . . defend[ing] themselves and their property"; also holding that this "reckless or deliberate conduct unreasonably created the need" for an officer to shoot one of the occupants); *Attocknie v*. *Smith*, 798 F.3d 1252, 1258 (10th Cir. 2015) (concluding that "a reasonable jury could determine that [the officer's] unlawful entry [into Plaintiff's garage] was the proximate cause" of the fatal shooting that followed, despite allegations that the officers shot only after seeing a man with a knife); *Greggo v*. *City of Albany*, 58 A.D.2d 678, 678-79 (N. Y. App. Div. 1977) (finding that officers negligently created a dangerous situation by using an unmarked vehicle and approaching a suspect without identifying themselves, and that injuries from a resulting altercation between the suspect and officers were "within the scope of the risk created by the officers' negligent acts"); *Mendez v*. *Cty*. *of Los Angeles*, 897 F.3d 1067, 1074 (9th Cir.

2018) (finding that officers' negligent failure to announce their presence led to a suspect attempting to protect himself using a BB gun and that an "injury [that] followed" was in the "normal course" of the series of events put into action by the method of police approach).

Entirely absent from the District Court's analysis is any consideration that Mr. Martinez's injuries are exactly the type of harm expected to result from a negligent use of a blacked-out approach to someone else's home – particularly where the home occupants might be worried about gang-affiliated assailants in a similar-looking vehicle who had earlier been involved in a trespass and confrontation. Aplt. App. 57; 167-69; 200; 428-430; 1324; 1328. By first failing to identify the relevant scope of risk created by the Officers' conduct, and failing to assess whether Mr. Martinez's injury fell within that scope, the District Court employed an erroneous test for proximate cause that overlooked the scope of risk analysis and assumed any action by Martinez would break the chain of causation. Its ruling must be reversed.

III. THE DISTRICT COURT ERRED BY FAILING TO APPORTION FAULT.

The District Court erred by failing to apportion fault. The requirement that a court evaluating contributory negligence apportion fault amongst the

various parties is clearly and conclusively established by Colo. Rev. Stat. § 13-21-111, which reads, in relevant part:

> (1) Contributory negligence shall not bar recovery in any action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought[.]
> . . .
>
> (2) In any action to which subsection (1) of this section applies, the court, in a nonjury trial, shall make findings of fact or, in a jury trial, the jury shall return a special verdict which shall state:
> . . .
> (a) The degree of negligence of each party, expressed as a percentage.

Colo. Rev. Stat. § 13-21-111 (West).

Pursuant to Colorado's combined comparison rule, a plaintiff can only be barred from recovery if his negligence is greater than all other contributing persons' negligence, combined. *Inland/Riggle Oil Co. v. Painter,* 925 P.2d 1083, 1085-87 (Colo. 1996) ("any person or entity whose negligence causes in part injuries sustained by a plaintiff must be deemed a 'person against whom recovery is sought' for purposes of section 13–21–111(1)").

Here, the District Court did not allocate a percentage of fault or degree of negligence for any party or person involved. *See* Order, generally. Instead, the District Court merely wrote, "Martinez's claim is barred by his own

negligence if the police officers were negligent in creating a dangerous circumstance because his negligence was greater than that of the officers." *Martinez* at 6. Thus, the District Court erred in failing to complete its fact-finding duty.

This is not the first time Judge Matsch, as a factfinder in a bench trial, has failed to apportion fault among negligent actors, nor the first time this Court has reversed and remanded an opinion by Judge Matsch with instructions to correct the error by apportioning fault. *See Bethel v. U.S.,* 456 Fed. Appx. 771, 783-784 (10th Cir. 2012). As the *Bethel* Court stated firmly, the court "is obliged to apportion fault." *Id.* "While the passage of time can certainly [cause memories to fade and] complicate the truth-seeking process, it does not excuse the duty of the trier of fact." *Id.* at fn. 20.

The failure of the District Court to apportion percentages of fault among negligent persons involved raises serious doubts as to whether it adequately considered the relative culpability of the differently situated Officers, and the relative culpability of all of the Officers vis-à-vis Plaintiff. This is particularly of concern where Plaintiff presented evidence and argument about differing culpability against each of the Officers, depending on their relative knowledge of the risks associated with the blackout approach; their rank, authority, and experience; their role during the

approach; and the individualized conduct of each officer under the circumstance as the encounter grew more foreseeably dangerous.

For example, Backer was arguably more culpable than Herrera because, as Herrera's training officer, he placed (and left) an inexperienced trainee in charge of the operation, without reining in Herrera's decisions regarding the blackout approach. 146-47; 403; 986. Backer was also arguably more culpable for his conduct in running *toward* Martinez 5-6 feet at a time when he was supposedly "startled… with little time to react" (Aplt. App. 1328) immediately before shooting Martinez, or when Backer yelled profanities instead of identifying himself as a police officer at the most crucial time during the encounter. Aplt. App. 235-36; 241. Backer was physically closest to Martinez during the confrontation, after he ran toward Martinez, and had the greatest and most crucial opportunity to identify himself. Aplt. App. 355. Given his proximity to Martinez, it is no surprise that Backer was the only person Martinez apparently heard yell out, anything; specifically, "drop the bat, drop the fucking bat," which response only reinforced Martinez' belief that he was dealing with the Price brothers, not police officers. Aplt. App. 81.

Additionally, there is significant evidence that Mitchell possessed greater knowledge of the dangerous nature of the stealth approach, including

having been exposed to training, express warnings, understandings about BIA policy, and having been told stories involving *actual, potentially lethal, confrontations* resulting from use of the blackout tactics at issue. Aplt. App. 156-60; 200. A defendant's knowledge of prior similar occurrences are relevant in determining duty and the foreseeability of harm. *Taco Bell,* 744 P. 2d at 48. Mitchell also had more experience, knowledge, and supervisory direction regarding his responsibility to provide oversight regarding officer approaches to homes.[2] Yet, Mitchell, who had seen someone observe him blackout his headlights in a vehicle that he knew would appear in the dark to be a virtual "clone" of the Price brothers' SUV, failed to suggest a change in tactics when he met with the officers at the Dead-end and knew a blacked-out encounter could lead to a dangerous confrontation. Aplt. App. 147-48 173; 204; 216-219; 1289-90.

The District Court's omissions of important evidentiary issues bearing on the contributory negligence of all of the Officers are particularly troubling. For example, the Order is silent with regard to the numerous opportunities all of the Officers had to identify themselves before Martinez ran toward them with the bat overhead, but indisputably did not. Aplt. Appx. 226-27; 431-439; 1062-63. The Order does not mention that the Officers met and

[2] See also Aplt. App. 1310-12 discussed in Section IV., *Infra.*

briefly discussed their stealth approach at the Dead-end after occupants of the home had seen Mitchell's vehicle black out its headlights, but before reaching Martinez on the street in front of his home, and thus, that all of the Officers had a last-minute opportunity to abort or change tactics before getting close to Martinez's front yard. Aplt. Appx. 202; 208-11; 414-15. The Order does not mention that BIA policies prohibited the Officers from attempting to force contact with Martinez and Rossi, in contradiction of their clear exercise of Fourth Amendment rights not engage with Officers. Aplt. Appx. 381; 1306. The Order does not mention BIA policies that indisputably required the Officers to wear clothing, badges, and uniforms or to otherwise conduct themselves in a manner that clearly identified them as police officers and the Officers here acted in a manner inconsistent with this policy. Aplt. Appx. 382-84; 1305-1307.

When confronted with questions about the purpose of the Officers' use of the blackout tactics involved in this encounter, Backer and Mitchell admitted that they hoped to circumvent Rossi and Martinez' refusal to speak with them when Mitchell had earlier knocked on the door, by getting a different result than Mitchell's earlier 1:00am contact. Aplt. Appx. 161; 181-82; 208-11. When confronted with the BIA policies regarding an officers' obligation to display badges and to otherwise identify themselves as officers,

Mitchell admitted that use of the blackout approach was inconsistent with these policies. Aplt. App. 381-84. The Order's omission of these admissions, alone, should call into question the District Court's assessment of the relative negligence of the actors involved, and to properly assess the Officers' negligence relative to Martinez – who did not have the benefit of pre-planning or consultation and was forced to act in emergency fight-or-flight circumstances.

The District Court erroneously failed to apportion fault as required by the statute and left the parties and this Court in the dark about the degree to which it considered the relative degree of negligence of the persons involved and how other errors may impact the relative fault of the parties. Given these concerns and the other issues regarding the elements of negligence (Section I-II, *supra*) raised in this appeal, the District Court's decision is irreconcilable with its determination that Plaintiff was more negligent than the Officers. Upon remand, there are no firm findings of fact with regard to how these facts impact the relative negligence of the parties, nor how the errors noted in this appeal should change the percentage of fault attributable to each party. A new trial will likely be required to properly assess the relative fault of the parties.

IV. THE DISTRICT COURT ERRED IN REJECTING ADMISSION OF MITCHELL'S DISCIPLINARY RECORDS.

The District Court erred in precluding admission of Mitchell's disciplinary records that indicated Mitchell had been disciplined and re-trained before the Incident concerning his responsibility to "double-check" and "cross-check" decisions of fellow officers in the field when approaching suspects' homes. These records describe that Mitchell previously failed to adequately "cross-check" and "double-check" important decisions implicating Fourth Amendment rights and the "vital concerns" of other officers on two separate occasions. This information is relevant to prove his duty to override the decisions of less experienced officers such as Herrera, whose inexperience and poor decision-making created the dangerous circumstances leading to the confrontation between Martinez and the Officers.

The District Court precluded admission of this information when Plaintiff attempted to enter it as substantive evidence of Mitchell's knowledge and as evidence of impeachment when Mitchell denied that he had ever been disciplined and/or trained to "cross-check" or "double-check" the decisions of other officers in the field. Aplt. App. 147-50. The District Court abused its discretion in failing to admit competent evidence that bolstered the degree of Mitchell's fault for not questioning the decisions of younger and inexperienced officers in deciding to conduct and continue with

a blackout approach to the Martinez house at 3:30am Such evidence was directly relevant and should have been admitted, pursuant to F.R.E. 402, 404(b) and F.R.E. 613. Consequently, the District Court abused its discretion in refusing to admit the evidence.

V. THE DISTRICT COURT MADE CLEARLY ERRONEOUS FINDINGS OF FACT.

a. There is no Evidence the Officers' had Reason to Believe Rossi Would Likely React Violently.

The District Court found that "[the Officers] had reason to believe that Rossi might react violently if they went directly to the house in the same manner used by Mitchell [on the first approach]." Aplt. App. 1327-28. The Order does not reflect any facts in support of this conclusion. The relevant facts in the Order and in the record demonstrate that the Officers were not, and had no reason to be, any more concerned with officer safety on the 3:30am approach than the 1:00am approach.

For example, when Officers Mitchell and Hibbard approached the Martinez house at 1:00am, they had information that a fight had occurred and had made contact with the officers interviewing the parties who had been injured in the fight. Aplt. App. 171-72; 1324. They drove from the Intersection into the Martinez driveway in a police vehicle with flashing lights where they could be seen coming by someone at the Martinez house. Aplt. App. 182-83;

Aplt. App. 1324. Wearing their grey uniform shirts with their badges clear visible, they go to the front door, knock, and announce they are police. Aplt. App. 177-78; 1324. Martinez and Rossi, the only present occupants, did not respond, so Mitchell goes to the side of the house, shines a flashlight through a window and sees Rossi lying on the floor. Aplt. App. 72; 1324. Mitchell did not see Rossi acting in a threatening manner or holding someone, he did not see Weaver or anyone else there, and he did not hear anyone cry out for help so he had no reason to believe anyone else was in the residence or that someone was hurt. Aplt. App. 179-80. Failing to make contact the officers drive away at approximately 1:30am and report what they saw to Backer and Herrera. Aplt. App. 185; Aplt. App. 1324. Backer knew that Rossi was not doing anything threatening and he had no reason to believe there was anything threatening going on in the Martinez house. Aplt. App. 485-486. Herrera also understood that there were no threats to the officers or anyone else at this time. Aplt. App. 1036-37.

Also, around 1:30am, officers learned that not only had there been a probable assault involving the Price brothers, but an altercation between Rossi and Weaver may have started the fight. By the time the Officers went to the Martinez house at 3:30am, they had received no additional information other than what they knew at 1:30am that Weaver may have

been struck by Rossi two hours earlier. Aplt. App. 613-614. They had no specific information that Weaver was in jeopardy. Aplt. App. 614.

Backer and Herrera testified that their purpose in going to the Martinez house at 3:30am was to conduct a "welfare check." Aplt. Appx. 415, 661; 1324. Mitchell understood from communications that they were doing a follow-up on the prior assault investigation. Aplt. Appx. 197-98, 377. The purpose of their visit was not to arrest Rossi. Aplt. App. 622; 995-96. They wanted to knock on the door to see if Weaver was at the Martinez house. Aplt. Appx. 415, 661; 1324. The Officers had no reason to believe that they would make contact with Rossi, particularly given that he had previously hidden in the house from police. There are no facts to support that the Officers had reason to believe that Rossi might react violently on the second approach at 3:30am and thus, that they may have needed to approach the house in a different manner than was done at 1:00am.

An assault is not de facto more or less serious because it begins with an assault occurring between intimate partners. The Officers had no reason to treat a "welfare check" to see if someone was injured in a possible assault between intimate partners any differently than the investigation of a probable assault between non-intimate partners resulting in injuries. If anything, the officers approaching the home at 1:00am had more reason to

take safety precautions because they were aware that some manner of assault had, in fact, occurred because there were injuries. Increasing the safety precautions – at the expense of the risk associated with the stealth approach did not make sense and was not reasonable later.

The record reflects that the Officers did not have any additional safety concerns with their 3:30am approach, much less reason to believe that Rossi might react violently. Mitchell was not concerned about his safety because he thought they were just going to try another knock and talk to follow up on the assault claim from earlier that night at 1:00am Aplt. Appx. 211. Herrera and Backer do not make any statements that they were concerned about their safety. Aplt. Appx. 212-13. The record does not support that "[the Officers] had reason to believe that Rossi might react violently if they went directly to the house in the same manner used by Mitchell [on the first approach]." Aplt. App. 1327-28. Accordingly, this finding by the District Court is clearly erroneous.

b. The District Court Confused the Difference Between a Domestic Violence Call and a Welfare Check.

The District Court cited that "many witnesses testified that [a domestic violence call] is the second most dangerous police call" and the "police tactic is referred to as a 'black out' approach designed to protect police officers from a possible shooting from inside the house." Aplt. App. 1325; 1327. These

findings reflect a misunderstanding that the Officers responded at 3:30am to a domestic violence call instead of independently seeking a welfare check.

There is a fundamental difference between responding to a domestic violence call and engaging in a welfare check Aplt. App. 1017. As the trial testimony demonstrated, a domestic violence call typically involves an emergency call to the police/911 to report a crime of domestic violence and police respond with information that there is some sort of ongoing violence. Aplt. App. 1017-18. A welfare check involves an officer making contact during a voluntary consensual encounter to make sure that someone is ok. Aplt. App. 1018. At the time of the Incident, the Officers were conducting an informal and voluntary inquiry about someone's welfare. Aplt. App. 1017.

At 1:00am, the Officers responded to the report of a "disturbance" and received information that a fight between Martinez, Rossi, Pena, and the Price brothers, had concluded. Aplt. App. 171-72; 1023; 1324. Although the Officers discovered during those interviews that the fight had started as a result of some sort physical altercation between Rossi and his girlfriend Weaver (*Id.*), they received this information from the Price brothers, who are not credible witnesses, and not Weaver. Aplt. App. 613-614; 170-71. Weaver had not made any call to police and never reported that she was in danger. Mitchell had actually seen Rossi in the window of the Martinez home and

that Weaver was not there. For the next two hours after the Price brothers' interview, Backer and Herrera further investigated the fight between Martinez, Rossi, Pena, and the Price brothers by driving to the hospital in Durango, while Mitchell went about other business. Aplt. App. 185, 987; 1324. Backer and Herrera then conducted a traffic stop or two before driving around to look for Weaver's car before deciding to conduct a "welfare check" by going to the Martinez house to see if she is there. Aplt. App. 620, 990-92, 1043; 1324. The Officers receive no additional information and have no specific information that Weaver was in jeopardy. Aplt. App. 614.

These facts are a far cry from the situations constituting a domestic violence call, where for example, a victim calls 911 because her husband is hitting her or a neighbor hears screaming and crying that evidences an ongoing violent incident. Aplt. App. 1017-18; 1011-12. In a domestic violence call, the police have good reason to believe that the violence is, or could be, ongoing. *Id.*

Officers testified that they may use certain more dangerous tactics in situations where they have reason to believe that someone in the home has a firearm and might shoot at them, which might occur on a domestic violence call or in other situations. Aplt. App. 285-299. But, again, in this case, the Officers were conducting a "welfare check" and were not on a domestic

violence call. Indeed, Mitchell is unequivocally clear in his testimony that he does not think he was called to join a domestic violence call or that there was an emergency. Aplt. Appx. 197-98; 377. He understood from his meeting and communications with Backer and Herrera was that they were just going to do an ordinary and voluntary "knock and talk" to try to gather more information about the earlier brawl. Aplt. Appx. 197-98; 377. Accordingly, the hypothetical assertion that blackout tactics might reasonably be used on different types of calls is not relevant to whether or not they were appropriate, here, on a "welfare check," two hours after the Officers received second-hand information that Weaver might have been assaulted. Quite the contrary, the Officers' assertion that such an attenuated connection to a "domestic violence" call that was known to be concluded over two hours before the Officers approached the Martinez home blacked out, tends to show that the Officers were not reasonable in choosing such dangerous tactics.

Accordingly, the District Court's findings that the 3:30 attempt at contact was a response to a "domestic violence call" and that such a call could render a blackout approach less unreasonable, is clearly erroneous.

c. The Officers Did Not Use the Blackout Approach to Circumvent Plaintiff's Fourth Amendment Rights; not for Safety.

The District Court Order appears to conclude that Backer and Herrera used the blackout approach consistent with the purported design of protecting the officers from a possible shooting inside the house. Aplt. App. 1325. However, as Sections V(a) and (b), *supra* demonstrate, there was factually no reason to be concerned about any threat from Rossi, nor any type of domestic violence that might be ongoing. Through questioning, all three Officers eventually revealed the true reason the Officers chose to use the blackout approach to the Martinez home that night – to circumvent the occupants' refusal to speak with them. Mitchell acknowledged that if there was an officer safety risk, Backer and Herrera would have expressed it when the Officers met to discuss the plan for the stealth approach. Aplt. App. 211-12. He admitted that there was an understanding between him and the other officers that since he had not gotten a response using an open and conspicuous approach to the home earlier at 1:00am, the Officers would use stealth tactics to try to get to the residence during the Incident at 3:30am Aplt. App. 212-13. Even though Mitchell knew the risks of the stealth encounter at the time and knew there was no officer safety risk otherwise, Mitchell did not initiate any conversation about the appropriateness of approaching in stealth; he went along with the stealth approach instead of criticizing the need or appropriateness of the dangerous tactics. Aplt. App.

213-14. Backer admitted that he used a concealed approach to Martinez' home in hopes that the people inside wouldn't have the choice of avoiding contact through exercise their Fourth Amendment right not to talk. Aplt. App. 488-89; 621-23.

In the face of these admissions, it was erroneous for the District Court to conclude that the Officers used the blackout tactics during the 3:30am encounter for officer safety reasons. The Officers used them for improper reasons that should increase – not decrease – their culpability in a comparative negligence analysis. The Officers clearly used the stealth approach in reckless disregard for the rights and safety of those to whom they would come into contact. This conduct was not indicative of an exercise of reasonable care; it was inapposite.

d. These Erroneous Findings Represent a Significant Misperception of the Case Material.

These erroneous findings of fact represent a significant misperception of the case resulting in a flawed negligence determination. None of the facts cited in Section V(a)-(c) support that the Officers were either on a domestic violence call nor that there was some sort of dangerous emergency. The scope of an officer's duty to choose a reasonably safe approach that avoids unnecessary danger can be inferred from the common-sense duty to avoid foreseeable harm. *Stroik v. Ponseti,* 699 So. 2d 1072, 1076-77 (La. 1997).

Thus, the conduct of the Officers in using the dangerous blackout tactics during the type of police contact at issue should have been interpreted to impute greater, not lesser, negligence upon the Officers under the circumstances, because there was no legitimate law enforcement justification for the obvious, common-sense risks involved.

After extensive questioning, the Officers revealed their true purpose in using these dangerous tactics to circumvent Martinez and Rossi's Fourth Amendment rights to avoid contact with them. The Officers clearly used the stealth approach in reckless disregard for the rights and safety of those to whom they would come into contact. This obviously should weigh against the Officers in the Court's reasonableness analysis.

These factual matters are fundamental to assessing the negligence of the parties. This case bears primarily on one basic question: Did the Officer's use of a blackout approach in these particular circumstances create an unreasonable risk of harm resulting in injury to Martinez? *See Leake v. Cain,* 720 P.2d 152, 160 (Colo. 1986). Accordingly, factual matters related to whether and the extent to which the Officers' conduct was reasonable under the circumstances, or whether by purpose or execution their use of the tactics became unreasonable under the circumstances, are key. A reasonable fact-finder getting these facts right would conclude that Martinez conduct was

foreseeable and that the Officers conduct – in risking harm to themselves or others in order to circumvent Plaintiff's rights – makes them more negligent than Martinez. In such circumstances, the risks created by those who had the greatest opportunity to plan and to choose to set in motion the series of events that caused the inevitable confrontation, and those who failed to reconsider or reassess the faulty plan, should be found to bear the greatest culpability; particularly when compared against someone forced to make a split-second judgment in the heat of a fight-or-flight moment.

The District Court found erroneous facts contradicted by the record that underly its conclusion that Martinez more negligent than the Officers. Accordingly, it is appropriate for this Court to reverse the erroneous findings to the District Court and remand for a new trial.

CONCLUSION

For the reasons stated above, Mr. Martinez respectfully requests that this Court reverse the judgment and remand this matter for a new trial.

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellant Martinez respectfully requests oral argument in this matter.

Dated: September 19, 2019.

Respectfully submitted,

Civil Rights Litigation Group, PLLC

By: /s *Raymond K. Bryant*

Raymond K. Bryant
Rachel B. Maxam
for Plaintiff-Appellant
Anthony Martinez
1543 Champa St. Ste. 400
Denver, CO 80202
raymond@rightslitigation.com
(720) 515-6165

CERTIFICATE OF COMPLIANCE

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,997 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as indicated by Microsoft Word's word-count function.

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I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

Dated: September 19, 2019.

By: *s/ Raymond K. Bryant*

Raymond K. Bryant
for Plaintiff-Appellant
Anthony Martinez
Civil Rights Litigation Group, PLLC
1543 Champa St. Ste. 400
Denver, CO 80202
raymond@rightslitigation.com
(720) 515-6165

CERTIFICATES OF DIGITAL SUBMISSION

(1) I hereby certify that a copy of the foregoing **APPELLANT'S OPENING BRIEF**, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk.

(2) I further certify that it has been scanned for viruses with the AVG Antivirus software and, according to the program, is free of viruses.

(3) In addition, I certify all required privacy redactions have been made.

Dated: September 19, 2019.

By: */s Raymond Bryant*

Raymond K. Bryant
for Plaintiff-Appellant
Anthony Martinez
Civil Rights Litigation Group, PLLC
1543 Champa St. Ste. 400
Denver, CO 80202
raymond@rightslitigation.com
(720) 515-6165

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **APPELLANT'S OPENING BRIEF** was furnished through (ECF) electronic service to the following on this 19th day of September, 2019.

Counsel for Defendant

By: */s Raymond Bryant*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 15-cv-01993-RPM

ANTHONY MARTINEZ,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT

Anthony Martinez ("Martinez") brought this action for damages claiming that he was injured as a result of the negligent conduct of three Southern Ute Tribal Police Officers for which the United States of America ("Government") is liable pursuant to the Federal Tort Claims Act, 28 U.S.C. § § 2671, *et seq.* After trial the following narrative constitutes this court's finding of facts and conclusions of law as required by Fed. R. Civ. P. 52.

The events giving rise to this case occurred on the evening of December 4 and the early morning hours of December 5, 2012. At that time, Martinez was 24 years old living at his father's house at 189 County Rd. 320B near Ignacio, Colorado, within the Southern Ute Indian Reservation and LaPlata County, Colorado.

Martinez was hosting a party at the house attended by Andrew Rossi, Bridgette Weaver, Fabian Pena and his girlfriend Luana Price. During the evening, Pena and Rossi got into a fight. Martinez told them to take it outside which they did. Martinez broke up the fight and told Pena to leave. He did with Price. Weaver also left. Soon

thereafter Pena returned with Darien and Draven Price, brothers of Pena's girlfriend. When the Price brothers surrounded Rossi, Martinez started fighting to protect him, which turned violent with injuries. When Martinez yelled "let's get the bats" and ran to the house, Pena and the Price brothers drove off in a dark colored SUV.

One of the Price brothers called 911 to report the fight. Dispatch from the LaPlata County Sheriff's office notified the SUPD at about 1:00 a.m. on December 5. Officers Herrera, Backer and Mitchell met the Price brothers at the intersection of County Roads 320 and320B. Herrera took statements and with Backer drove two injured men to a hospital in Durango, Colorado.

Officers Mitchell and Hibbard went to the Martinez house to conduct a "knock and talk." County Road 320B is a short road resulting in a dead end. There are no street lights on it and only one other occupied house which is at the dead end and occupied by a reclusive old man who was not a witness to any of the relevant events.

Mitchell and Hibbard drove into the Martinez driveway in a police car with flashing lights. They went to the front door, knocked and announced their presence as police officers. There was no response. Mitchell went to the side of the house, shined a flashlight through a window and saw Rossi lying on the floor. Failing to make contact the officers drove away at about 1:30 a.m.

After returning from Durango at about 3:30 a.m., Herrera decided that the officers should go to the Martinez house to conduct a welfare check for Bridgett Weaver because the Price brothers had said that Rossi struck her during the fighting and that she was a member of the Tribe. At that time Herrera was still in training as a new officer and Backer was her Field Training Officer. He had been with the SUPD for a year. Mitchell had been a patrol officer for 2 ½ years.

Although still in training with only months as an officer, Herrera was given command. She decided to approach the house in her police SUV with lights off in a stealth approach and park at the dead end. Backer was with her as they drove to the dead end and turned around. This police tactic is referred to as a "black out" approach designed to protect police officers from a possible shooting from inside the house.

Mitchell was driving down Road 230B when Herrera instructed him to turn off the lights on his SUV. Mitchell did that about half way down the road. He had seen people in the yard and knew they had seen him turn off the lights. Martinez had observed it from inside the house. The street was very dark and the only light was a small porch light in front of the house illuminating only a small part of the front yard. Bridgette Weaver had driven into the driveway with a friend named Lopez a short time earlier. Martinez asked if she had turned off her headlights and got a negative answer.

Martinez and Rossi were alarmed thinking that the Price brothers had come back to renew the fight, possibly with weapons. That would be consistent with their reputation for violence. The three officers started walking up the road toward the Martinez house. The weather was cold. Herrera and Backer wore dark coats over their uniforms with dark pants. Mitchell was in uniform but was walking behind the dark clad officers. Peeking from behind a clump of bushes in his yard, Martinez saw these dark figures walking toward him which reinforced his belief that they were the Price brothers coming to do him and Rossi harm. He had taken his son's T-Ball metal bat from the house. As the officers approached Martinez jumped out from behind the bushes and ran toward the officers waving the bat in his right hand above his head and yelling in an attempt to scare the intruders as he had done previously by his reference to go get the bats. The officers were startled and shined their flashlights on Martinez. Both Mitchell

and Backer drew their weapons which were .40 caliber Glock pistols. Herrera also drew her weapon but had difficulty getting it ready to fire because of her gloves.

What happened next is much disputed. Martinez testified that he was blinded by the lights, turned and started running toward his house. He then heard a gun shot and then felt pain in his leg, fell to the ground and felt that his legs were paralyzed. Backer testified that he fired two shots directed at the center mass of Martinez' body and that he fell backward onto the road still holding the bat in his right hand. The distance between Backer and Martinez when shots were fired was estimated differently by the testimony of the officers at trial ranging between five feet and twenty feet. There were differences as well in their prior statements in the investigations done by LaPlata County, the Colorado Bureau of Investigation, and the Bureau of Indian Affairs as well as at the two criminal trials of charges against Martinez. He was acquitted of assaults on the police officers.

This was a highly charged emotional event over six years ago in less than three minutes time. It would be unlikely that the witnesses would have a clear memory of what happened as well as their perceptions of what actually happened in this dark, isolated area. These differences are understandable and do not impeach the credibility of the officers.

As may be relevant there is different testimony as to what was said just before the shots were fired. Martinez said that he heard shouts of "drop the bat - drop the fucking bat" but no identification that these were police officers. Mitchell said he yelled "police."

What is relevant is that Martinez had no knowledge that a police officer had shot him. That is clear from his conversation with Backer who recorded it when standing over Martinez after he was shot.

Martinez' perceptions and conduct were affected by alcoholic intoxication. A blood test taken at the hospital more than an hour after the shooting showed a level 2½ times that for impaired driving.

The plaintiff's testimony that he was shot in the back while running toward his house is disproven by the trajectory of the bullet that hit him. The entry wound was on the right side of his back. The hollow point bullet shattered when it hit vertebrae and fragments went out on the left side. Some fragments remain in his body. Dr. Robert Bux gave persuasive testimony that Martinez must had been starting to turn away from the shooter when he was hit by the second shot.

Conclusions of Law

The plaintiff's claim is that the officers were negligent in using the black out approach concealing both their presence and identity causing him to attempt to defend himself from expected injury from assailants known to be dangerous. The evidence does not support a finding that such an approach is, in itself, an unreasonable method of an approach to the unknown risks involved in the investigation of domestic violence. As many witnesses testified that is the second most dangerous police call. The decision to make a welfare check two hours after Mitchell and Hibbard had been to a quiet house and saw Rossi lying on the floor by himself is questionable judgment. There was no reason to suspect that there was any ongoing violence. Herrera was concerned that Weaver may have been injured and needed assistance. That decision may have been imprudent but it is not a basis for finding a lack of reasonable care for the safety of a resident. When the officers were at the intersection talking to the Price brothers, a deputy sheriff told them that he would take over the investigation and that he was going to get an arrest warrant for Rossi. They had reason to believe that Rossi

might react violently if they went directly to the house in the same manner used by Mitchell.

The officers are charged with knowledge that a stealth approach could be misinterpreted and cause the occupants to believe that they were about to be assaulted but they had no reason to believe that Martinez would run at them on the county road threatening them with a bat with little time to react.

That lack of forseeability breaks the chain of causation. Martinez charged at them which is an intervening cause of his injury. The stealth approach was not the proximate cause of injury to Martinez.

Under Colorado law a plaintiff may not recover damages for negligent conduct if his own negligence was greater than that of a defendant. Martinez was himself negligent in going out of his house and confronting what he assumed were the Price brothers on the county road. That was a lack of reasonable care for his own safety and contributed more to his injury than the stealth approach by the officers. The claim for negligent infliction of emotional harm fails for the same reasons as the claim for negligent injury. In short, Martinez' claim is barred by his own negligence if the police officers were negligent in creating a dangerous circumstance because his negligence was greater than that of the officers.

It is ORDERED that judgment shall enter for the defendant, The United States of America, dismissing this civil action with an award of costs.

DATED: March 14, 2019

BY THE COURT:

s/Richard P. Matsch

_____

Richard P. Matsch, Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Judge Richard P. Matsch

Civil Action No. 15-cv-01993-RPM

ANTHONY MARTINEZ,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant

FINAL JUDGMENT

Pursuant to the Findings of Fact, Conclusions of Law and Order for Judgment entered by Senior Judge Richard P. Matsch on March 14, 2019, it is

ORDERED AND ADJUDGED that this civil action is dismissed. Defendant is awarded costs upon the filing of a bill of costs within 14 days.

DATED: March 14, 2019

FOR THE COURT:

JEFFREY P. COLWELL, Clerk

s/M. V. Wentz

By_____
Deputy