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 REPLY BRIEF

Respectfully submitted,

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ORAL ARGUMENT IS REQUESTED

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ARGUMENT

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

A. Defendant Relies on the Incorrect Legal Standard.

Defendant argues that questions regarding foreseeability and contributory negligence always involve findings of fact and are reviewed only for clear error. However, Defendant overlooks that a factfinder must first begin with appropriate and applicable law that constrains the scope of factual questions. While questions internal to a negligence and proximate cause analysis typically involve evaluations of fact by a factfinder, properly selected standards of law govern the legal scope of those factual inquiries. *See Groh v. Westin Operator,* LLC, 352 P.3d 472, 479-80 (Colo. App. 2013). This appellate court reviews a district court's determinations of state law *de novo Ayala v. United States*, 49 F.3d 607, 611 (10th Cir. 1995). Whether a district court applies the "correct test" in assessing negligence questions, such as proximate cause, involves questions of law. *Reigel v. Savaseniorcare LLC,* 292 P.3d 977, 985 (Colo. App. 2011); *Boulders at Escalante LLC v. Otten Johnson Robinson Neff and Ragonetti PC,* 412 P.3d 751, 762 (Colo. App. 2015). Such questions should be reviewed *de novo. Id.*; *Reid v. Berkowitz,*

315 P.3d 185, 189, 190 (Colo. App. 2013) (governing statutory standards, statutory interpretation and questions of law are reviewed *de novo*).

Here, Martinez contends that the District Court did not apply the correct legal test by failing to consider C.R.S. § 18-1-705, resulting in a faulty proximate cause and contributory negligence analysis. By failing to acknowledge the statute, the District Court failed to consider the necessary legal backdrop for its fact-finding assessment of foreseeability and proximate cause. Colorado law regarding Martinez's right to use force to prevent a perceived trespass should obviously inform the scope of the factual analysis relating to whether an officer should reasonably foresee that using a stealth approach to a suspect's home might be dangerous – particularly because the existence of the statute informs all involved parties that a homeowner could exercise this right in response. Likewise, the existence of the statutory right also has obvious legal implications for a factfinder assessing the reasonableness of Martinez's conduct in threatening force to prevent darkly-clad officers from entering his property in a contributory negligence analysis. Without accepting and applying this law, a factfinder considering only Martinez's conduct necessarily applies an improper legal test when assessing the relevance of facts relating to whether and to what extent his conduct was reasonable under the circumstances. This is akin to the District Court

erroneously rejecting applicable jury instruction or instructing a jury with erroneous law. As such, whether the District Court erred in failing to consider the statute in its testing of negligence is a question of law to be reviewed *de novo*. *Reigel*, 292 P.3d at 985.

B. Defendant Addresses the Wrong Question Regarding Proximate Cause and Ignore the Legal and Factual Import of C.R.S. § 18-1-705.

Defendant argues that the District Court did not factually err in its findings that Martinez's actions were not reasonably foreseeable. But this argument misses the point: that the District Court erred in applying the wrong legal test for foreseeability in determining proximate cause by failing to consider C.R.S. § 18-1-705. The legal question at issue is whether the District Court erred by failing to consider a statute that would make it *foreseeable that Martinez could mistake the Officers for trespassers and act pursuant to the legal right to react with force to prevent a trespass*.

The question is not just limited, as Defendant argues, to whether the Officers could "reasonably expect" Martinez's specific behavior (which Defendant improperly characterizes as an "ambush[1]") or that one officer had not experienced a homeowner threat in response to his stealth tactics before

[1] Defendant alleges Plaintiff's expert opined that Martinez's actions that night constituted "an ambush." However, this highly-charged characterization was used by defense counsel during cross-examination. *Id*. at 893:16. Plaintiff's expert only agreed to the characterization in the sense that Plaintiff jumped out of a bush in his front yard *before running and yelling toward the officers*. Further testimony during re-direct made clear that Plaintiff's expert did not assert Plaintiff engaged in a concealed assault. Only the officers used a concealed approach. *See* Aplt. App. 904-905.

in his one year of experience as a patrol officer. These facts are not determinative of whether the statute should have been considered by the District Court because the rights afforded to Plaintiff provides an independent basis for the Officers to reasonably foresee that Martinez could use force to prevent a perceived attempt to trespass by those he may perceive as hostile due to their "blackout" approach.

Colorado law is clear that the rights afforded by the statute apply even where police officers are the individuals attempting entry onto the property. *People v. Lutz*, 762 P.2d 715, 717 (Colo. App. 1988). 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). Presumably, police officers have a general knowledge of criminal law, but at least Officer Mitchell had specific knowledge of the statute, which informed him that force could be used before someone enters the property to prevent a trespass. Aplt. App. 347.

Moreover, Mitchell testified that he had knowledge of specific instances of officers using the blackout approach that caused confrontations between police and homeowners, who perceived officers using these tactics as trespassers, which caused at least one homeowner to threaten the use of force against other officers outside his home. Aplt. App. 156-60; 167-69; 200;

347. Accordingly, it is disingenuous for Defendant to argue that recognition of C.R.S. § 18-1-705 would not contribute to the foreseeability of his conduct or that it was not factually foreseeable to the Officers that Martinez would act pursuant to his rights under the statute to use force to prevent a trespass, even before the trespass actually occurred. Thus, while Defendant has missed the legal question regarding whether the statute should have been considered by the District Court in its legal analysis, even if this Court considered the matter under Defendant's standard of review, these facts elucidate that the District Court committed clear error in finding that the Officers could not foresee that Martinez would act in a manner consistent with the statute.

C. Defendant Addresses the Wrong Legal Question With Regard to Contributory Negligence and Ignores the Legal and Factual Import of C.R.S. § 18-1-705.

Defendant argues that there is ample factual support for the District Court's findings that Martinez's actions were not reasonable and thus, he was contributorily negligent. Again, this argument misses the point: that the District Court erred in applying the wrong legal test for foreseeability in determining contributory negligence by failing to consider C.R.S. § 18-1-705.

Defendant's argument that Martinez "could have" waited in his home for intruders to attack him is at odds with the legal question at issue.

Martinez has a legal right under law to defend his property and had no duty to retreat. In examining contributory negligence, the court is required to examine Mr. Martinez's exercise of his legal rights in order to determine if he exercised the required standard of care. *Dare v. Souble*, 674 P.2d 960, 962-63 (1984). Defendant, like the District Court, failed to consider that Martinez was exercising a legal right when he chose to defend property with a threat of force to prevent an anticipated trespass.

Moreover, the law does not provide that Martinez had a duty to retreat and/or hide in his home as Defendant suggests. Instead, Colorado Courts considering the statute have applied Colorado's "no duty to retreat" rule that arises under common law. *People v. Toler*, 9 P.3d 341, 346 (Colo. 2000). Thus, Defendant's suggestion that Martinez was negligent by not retreating is completely contrary to Colorado's "historically followed" "no duty to retreat" rule at common law. *Id*. at 347-48. If the legislature wishes to abrogate rights that would otherwise be available under the common law, it must manifest its intent expressly or by clear implication. *Bayer v. Crested Butte Mountain Resort, Inc.*, 960 P.2d 70, 74–75 (Colo. 1998), *as modified on denial of reh'g* (June 22, 1998). The Colorado legislature has created no such abrogation of the common law "no duty to retreat" rule. Thus, even if the District Court relied on Martinez's purported choice not to retreat,

instead of using force to prevent the perceived trespass of darkly-clad intruders, as Defendant suggests, in concluding Martinez was unreasonable, that reliance only highlights additional error by the District Court in ignoring Colorado law regarding conduct by Martinez.

Martinez's intoxication is also irrelevant to considerations of contributory negligence. Unlike the Officers, who had the ability to choose the course and plan of conduct without immediate time constraints, or emergency pressures, Martinez did not expect any intruders at 3:30am on the night of the incident, let alone, those who approached his home in blackout fashion. Before that time, he exercised his legal right to drink alcohol within the safety of his home. Long-standing Colorado precedent indicates that "the bare fact that at the moment of suffering the injured [party] was intoxicated" is not sufficient to impute negligence, and that "when contributory negligence is one of the issues . . . it must appear that the plaintiff did not exercise ordinary care . . . without reference to his inebriety." *Denver Tramway Co. v. Reid*, 4 Colo. App. 53, 58 (1893). Therefore, it is inappropriate to consider Plaintiff's level of intoxication in examining contributory negligence. To the extent that Defendant raises that the District Court relied on Plaintiff's intoxication in finding him negligent, Defendant, again, only highlights further error by the District Court who ignored

Colorado law in yet another area of its legal assessment relating to comparative negligence.

D. C.R.S. § 18-1-705 Provides a Legal Right to Use Force and Applies to Civil Assessments of Reasonableness in this Case.

Defendant argues that C.R.S. § 18-1-705 only applies to criminal matters. This argument ignores the legal principle in Colorado that statutory rights are relevant to an analysis of the standard of care. A plaintiff's exercise of a legal right is a relevant consideration that tends to establish a plaintiff is not negligent. *Stahl v. Cooper*, 190 P.2d 891, 894 (Colo. 1948) (finding that it was relevant to consider that plaintiffs were exercising their legal right-of-way as pedestrians in a crosswalk). The premise upon which negligence rests is that a tortfeasor has a legally imposed duty or a standard of conduct to which he must adhere and that any corresponding departure from this standard of care may be considered to weigh on his degree of negligence. *Dare*, 674 P.2d at 963. The duty may derive from a legislative enactment of the standard of conduct or from a judicially imposed standard. *Id*. Courts must first consult the "standard of conduct" installed through legislative judgment. *Id*.

Colorado law provides that a person may use force to defend against trespassers. C.R.S. § 18-1-705. The statute does not state that this right is limited to an affirmative defense in criminal cases only or that Martinez must

retreat, as Defendant suggests. In fact, it broadly states that a person "***is justified*** in using reasonable and appropriate physical force" to prevent a trespass. *Id*. (emphasis added). The statute broadly authorizes any lawful property dweller to "prevent" even the "attempted commission of an unlawful trespass" through use of physical force, without any further limitation. C.R.S. § 18-1-705; *see also Toler*, 9 P.3d at 351 (declining to read additional limitations into similar make-my-day statute where statute "contains no reference" to such limitations). The statute does not impose the limitation that someone is only "justified" in using force if they end up later charged with a crime. Accordingly, the applicability of the statute is not limited to just an affirmative defense in a criminal case but provides for an affirmative legal right to use force where "justified." *See Comcast of California/Colorado, L.L.C. v. Express Concrete, Inc.*, 196 P.3d 269, 272–73 (Colo. App. 2007) (When a court construes a statute, it should read and consider the statute as a whole and interpret it in a manner giving consistent, harmonious, and sensible effect to all its parts and should not interpret the statute so as to render any part of it either meaningless or absurd).

Defendant argues that because C.R.S. § 18-1-705 does not provide for immunity from civil liability as other statutes do, it has no applicability to this case or civil cases at all. However, simple immunity from liability is not

the issue here. C.R.S. §18-1-705 sets a standard of care of reasonableness for defense of property. It does not impose or negate liability. Where there is use of force in defense of person or to stop a felony, a separate statute, C.R.S. § 13-80-119, provides for immunity from civil liability related to injuries caused by the reasonable use of force. C.R.S. § 18-1-704.5 (the "make my day" statute) likewise specifically provides for immunity from civil liability for use of force against an intruder into a home. The legislature chose to add a specific provision for immunity in the context of defense of person/defense of a dwelling. This fact does not negate that all of the statutes, including C.R.S. § 18-1-705, first inform the standard of care.

Defendant argues that the legislature's provisions for immunity from civil liability in other contexts are indicative of its intent that C.R.S. § 18-1-705 not apply to civil cases at all. However, this statute was effectuated by the repeal, amendment, and reenactment of the 1963 statutes in 1971. S.B.262, § 1 (1971). On the other hand, C.R.S. § 18-704.5 and C.R.S. § 13-80-119 were enacted in 1985 and 1987, respectively. H.B.1361, § 1 (1985); S.B.75, § 7 (1987). Accordingly, a provision for immunity from civil liability in statutes added in 1985 and 1987 cannot possibly be reflective of the legislature's intent of the scope of the reasonableness standard set when it passed C.R.S. § 18-1-705 – more than a decade prior.

Defendant's interpretation of C.R.S. § 18-1-705 as having very limited applicability runs counter to the absolute language of the statute and common law. The statute unequivocally provides for a legal right to defend one's property. But Defendant's seek to eradicate the effect of that legal right, without any authority and imply that this legal right simply disappears in civil cases. Thus, Defendant argues that instead of there being a standard of reasonableness for defense of property informed by the statute, there should instead be higher standard in the civil context where there is, purportedly, no legal right to defend one's property from trespass and there is a duty to retreat. In short, it argues that civil parties are held to a different and higher standard of reasonableness than criminal defendants. But this interpretation is not supported by any case law or legislative history and is contrary to common law. 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 v. City of Ouray, 507 P.2d 1101, 1105 (Colo. App. 1973)* (where motorcycle passenger was sitting on "legally parked motorcycle" court declined to impose an additional "duty to watch" for other vehicles).

Colorado law has long held that self-defense and defense of property are not only affirmative defenses in criminal matters, but are also affirmative defenses in civil matters. *See* CJI-Civ. 20:12; 20:15 (CLE ed. 2016) (noting that these instructions are "based on the general laws as set out in [Prosser and Keeton and the Restatement (Second) of Torts § 21 (5th ed. 1984)]"); Restatement (Second) of Torts § 77 (1965) ("An actor is privileged to use reasonable force, not intended or likely to cause death or serious bodily harm, to prevent or terminate another's intrusion upon the actor's land...")); *Bayer*, 960 P.2d at 73 (Although content of Colorado Jury Instruction is not legally definitive, its long and common usage is persuasive on being a correct summary of the law). Criminal statutes that afford a right should be considered by a factfinder when assessing the reasonableness of conduct in the civil context. *See, e.g. Valdez v. City & Cty. of Denver*, 764 P.2d 393, 396 (Colo. App. 1988) (holding that a jury should be provided an opportunity to consider a plaintiff's right of self-defense under C.R.S. 18-1-704(1) for purposes of assessing reasonableness of plaintiff and defendant's conduct in assault, battery, and negligence claims against defendant officers during an unlawful arrest); *See also Brown v. Robishaw*, 922 A.2d 1086, 1090–94 (Conn. 2007) (holding that it was proper to instruct the jury about self-defense in a negligence case); *Hargress v. City of Montgomery*, 479 So. 2d

1137, 1139–41 (Ala. 1985) (holding that the jury was properly instructed that self-defense should be considered "as part of the standard of care" in negligence case); *Gunderson v. Brewster*, 466 P.2d 589 (Mont. 1970) (instructions on self-defense in action based on wanton negligence case where defendant struck plaintiff with pick-ax handle were properly given); *Wegman v. Pratt*, 579 N.E.2d 1035, 1043–44 (Ill. App. Ct. 1991) (discussing that when negligence is alleged a person acting in self-defense has a duty "to only use so much force as a reasonably prudent person would in that situation"); *Blackburn v. Johnson*, 543 N.E.2d 583, 585–86 (Ill. App. Ct. 1989) (holding that denial of judgment n.o.v. was proper because evidence justified finding that father's decision to use deadly force against his son because he struck his mother was negligent); *Duplechain v. Turner*, 444 So. 2d 1322, 1326–27 (La. Ct. App. 1984), writ denied, 448 So. 2d 114 (La. 1984) (holding defendant was not negligent and did not violate the duty of care when he acted in defense of self and others). The same should hold true for C.R.S. § 18-1-705 in this case.

E. Consideration of C.R.S. § 18-1-705 Would Have Fundamentally Altered the District Court's Analysis and Its Conclusions.

Defendant argues that if the statute had been applied, it would not have made a difference because Martinez did not act "reasonably" as required by

the statute. However, first, as argued, *supra*., C.R.S. 18-1-705 provides an independent basis for the officers to foresee that a homeowner could reasonably react with a threat of force in response to their stealth approach to his home in the middle of the night – particularly under the circumstance at issue in this case. Thus, the statute is *prima facie* evidence that his conduct was consistent with Colorado law. Second, in attempting to argue that the statute would have made no difference to the District Court's analysis, Defendant has inadvertently helped to demonstrate how an analysis informed by the statute would have differed from the one made by the District Court.

Defendant notes that the plain language of the statute sets out, not one, but three requirements of reasonableness. It states a person is justified in using "reasonable force" "to the extent reasonably necessary" to prevent what he "reasonably believes" to be an unlawful trespass. *Id*. When these factors are compared against Martinez conduct, they demonstrate that Martinez's conduct was *very* reasonable under the circumstances. First, there is no dispute that Martinez did not hit, kick, or otherwise make physical contact with any of the Officers during the incident. Instead, the amount of force Martinez used was limited to a physical threat with a baseball bat and yelling in an effort to scare away the darkly-clad figures sneaking up on his home in

the middle of the night, whom he reasonably perceived to be the gang-affiliated thugs who had earlier trespassed onto his front yard to start a fight earlier that evening. Second, Martinez had turned around to retreat to his home before Backer shot him in the back.[2] Aplt. App. 80; 448-49; 1263-65. Thus, Martinez's force was limited to an (albeit) failed attempt to scare the intruders away ending in Martinez retreating. Third, Martinez waited as the darkly clad figures approached and only acted when an unlawful trespass onto his property was imminent as the intruders were about to enter his front yard. Aplt. App. 75-78; 1262; 1269. These facts all support that Martinez's conduct was reasonable under the statute.

The Defendant and the District Court claim that Martinez was negligent in showing a lack of care for his own safety, by merely "going out of his house and confronting what he assumed were the Price brothers on the county road." Aplt. App. 1328. However, the statute does not contain a limitation that a homeowner remains on his property to stop a trespass, and expressly permits reasonable force to "prevent" a trespass, in addition to permitting the use of force to terminate a trespass. This added language suggests that the legislature intended to allow the use of force outside the property if the homeowner reasonably believed it was necessary to stop an

[2] Defendant repeatedly misrepresents that Martinez was shot "in his side." However, the forensic is not open to interpretation. Martinez was shot in the back. *See* Aplt. App. 1263-64.

unlawful trespass that was about to occur. By failing to consider the statute the District Court failed to consider these important issues in light of applicable legal standards and made a determination that faults Plaintiff for *all* conduct consistent with his right of property defense under the statute. Accordingly, the District Court Order should be reversed and remanded.

II. THE DISTRICT COURT FAILED TO CONSIDER THE SCOPE OF RISK AND ERRONEOUSLY CONCLUDED MARTINEZ' CONDUCT WAS AN INTERVENING CAUSE.

Defendant argues that Martinez's actions were not reasonably foreseeable and that his actions were an intervening cause that broke the chain of causation between the Officers' conduct and Martinez's injuries. Aplt. App. 1328. However, Defendant's argument again stops short of addressing the merits of Plaintiff's legal challenge: that the District Court erred by failing to consider the scope of the risk created by the Officers' blackout approach. As discussed *supra* in Section I(A), this is a legal issue subject to *de novo* review.

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 intervening causation that overlooked the scope of risk analysis and assumed any action by Martinez would break the chain of causation.

Colorado law on this matter is clear: a negligence analysis does not end just because there is an intervening force. *Johnson v. Regional Transp. Dist*., 916 P.2d 618, 622 (Colo. App. 1995) ("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"); *Webb*, 718 P. 2d at 1063 (if 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); *See, also* CJI 9:20.

If the District Court had considered such risk analysis, it would have referenced the type of harms that could predictably come from a late-night stealth approach by officers concealing their identity in a "blackout" fashion; most importantly, the inherent risk of a violent, mistaken confrontation where officers and/or homeowners use force against each other. From that, the District Court would have been forced to conclude that the harms that befell plaintiff (extreme fright and a gunshot wound during such a confrontation) are squarely within the ambit of that risk of harm, and, thus, that Martinez' conduct could not constitute an intervening cause. In conducting this analysis, the foreseeability inquiry is based on the ultimate

injury, not the means of that injury; thus, details regarding how Martinez and the officers inevitably confronted each other or whether Martinez stepped into the street as opposed to staying in his front yard, do not matter to the intervening cause analysis. Colorado law states that the means of harm can come about through a circuitous, even unpredictable route. Webb 718 P.2d at 1063. Foreseeability regarding the precise manner in which an injury may occur is not necessary; only foreseeability regarding the type of harms that may result. *Groh*, 352 p.3d at 482.

Several courts have analogously discussed that violent confrontation is a foreseeable risk for officers that fail to announce their presence or approach suspects/homes in a manner that may result in identity confusion. *See, e.g. Pauly v. White*, 874 F.3d 1197, 1206, 1211 (10th Cir. 2017); *Attocknie v. Smith*, 798 F.3d 1252, 1258 (10th Cir. 2015); *Greggo v. City of Albany*, 58 A.D.2d 678, 678-79 (N. Y. App. Div. 1977); *Mendez v. Cty. of Los Angeles*, 897 F.3d 1067, 1074 (9th Cir. 2018). *Pauly v. White*, is particularly instructive on this point, because it involved assessment of whether officers *recklessly* precipitated a homeowner threat against them, which caused officers to shoot the homeowner, because of the manner in which they approached a home: surreptitiously, late at night, without adequately

identifying themselves, which caused the plaintiffs to believe they were facing intruders. *White*, 874 F.3d 1197, 1206.

The conclusions of these cases are consistent with testimony provided by Plaintiff's expert during trial. Officers should always approach a home in an open and conspicuous manner that makes them clearly identifiable as police - unless they are executing no-knock warrants where the officers have a vital need for protection from the occupants preparing a defense and/or to prevent evidence from being destroyed. Aplt. App. 835-38; 853-54. Here, there was no need for the Officers to use concealment strategy because there is no legitimate purpose for an officer to conceal himself when doing a welfare check. Aplt. App. 848; 874,867. Further, officers are trained that Colorado law permits homeowners to use force to prevent a trespass. Aplt. 856-59. Thus, the Officers here should have considered that Martinez may not have recognized them as police officers, that he could think they were the Price Brothers, and that he could respond with a threat of force to protect himself and his property. Aplt. App. 857; 873. The Officers were aware of this risk through BIA policies, SUPD training, explicit warnings, supervisor storytelling, and the Officers' own admissions of knowledge. Aplt. App. 156-60; 167-69; 200; 1328. Moreover, the Officers here had knowledge that only a few hours earlier gang-affiliated assailants had trespassed on Martinez's

property driving a similar-looking vehicle as the Officers with the intent of causing him harm. Aplt. App. 57; 167-69; 200; 428-430; 1324; 1328.

All of this suggests that there was clear error in the District Court's determination that Martinez's conduct was an unforeseeable intervening cause that bars recovery. Moreover, this determination is inconsistent with Colorado law, C.R.S. 18-1-705, that should have been applied with regard to the District Court's foreseeability determinations. Thus the Trial Court Order must be reversed.

III. THE DISTRICT COURT ERRED BY FAILING TO APPORTION FAULT, WHICH LENDS FURTHER CONFUSION AND DOUBT AS TO THE RELIABILITY OF THE COMPARATIVE FAULT OF THE PARTIES.

The Tenth Circuit's position that there is a requirement to apportion fault is clear: the court "is obliged to apportion fault." *See Bethel v. U.S.*, 456 Fed. Appx. 771, 783-784 (10th Cir. 2012). This Court has previously reversed and remanded an opinion by the same District Court for its failure to apportion fault as was done here.

Defendant does not dispute that the failure to apportion fault constitutes legal error. Instead, Defendant argues that the District Court's failure to assign percentages is harmless based on the clarity of intent of the Order. However, contrary to Defendant's assertions, the Order is far from clear, and the lack of apportionment lends confusion and doubt as to the

reliability of the conclusion that Martinez was genuinely more negligent than all of the other officers, combined.

While the District Court's Order can be read to conclude that it intended to find Martinez' negligence was greater than the officers, such a conclusion must be read from the Order's language that "Martinez was himself negligent in gong out of his house and confronting what he assumed were the Price brothers on the county road..." and that this "lack of reasonable care for his own safety contributed more to his injury than the stealth approach by the officers." This language is concerning because it implies that the only type of negligence compared by the District Court was limited to (a) Plaintiff's conduct in "going out of his house" and "confronting what he assumed were the Price brothers" on the road and (b) the Officers' conduct in using "stealth tactics' during the approach to Martinez home. These concerns cast significant doubt on the reliability of the underlying comparative negligence determination made by the District Court, because there are obviously other factors the District Court failed to properly take into account that should have been weighed in determining whether Plaintiff or Defendant was more at fault.

Even if the failure to apportion fault could be considered harmless error, the failure to assign numerical apportionment means that this Court

cannot reasonably presume that the District Court intended to find Martinez' fault to be greater than 50.1%. This means that any single error committed by the District Court that could bear on the relative fault of the parties could tip the proverbial balance of contributory negligence against Defendants, instead of against Martinez. As argued in Section I, *supra*, any reasonable consideration of C.R.S. § 18-1-70 would likely obviate the degree of negligence attributable to Martinez, and, increase the culpable knowledge of danger risked by the officers in their stealth approach, which obviously impacts the relative culpability of parties. Finally, the errors identified in Sections IV. and V., *infra* also have implications for the relative culpability of the parties. The District Court's error in failing to apportion fault cannot be harmless because any one error casts doubt on the reliability of the comparative negligence determination requiring and reversal and remand.

IV. THE DISTRICT COURT ERRED IN REJECTING ADMISSION OF MITCHELL'S DISCIPLINARY RECORDS WHICH WOULD HAVE SUPPORTED ADDITIONAL NEGLIGENCE UNACCOUNTED FOR IN THE COURT ORDER.

Defendant argues that the District Court did not err by excluding evidence of Mitchell's disciplinary records because it is cumulative of the testimony he provided at trial and not relevant. However, Mitchell's trial testimony demonstrates that when on the stand, Mitchell would not admit to information in the performance evaluations that would have established that

he had a duty do "cross-check" and/or "double-check" other officers' decisions in the field without admission of such records. Aplt. App. 147-150. Contrary to Mitchell's testimony, the disciplinary documents unambiguously identified a responsibility to "cross-check" and "double-check" decisions of other officers in the field imposed on him by the Police Department. Aplt. App. 1312. Further explication of this information, combined with Plaintiff's expert testimony that Mitchell failed in his duty to take charge of the two younger officers and change course from the recklessly dangerous stealth plan, suggests that if the documents would have been admitted, Plaintiff would have been able to prove an independent basis of supervisor liability against Mitchell. Aplt. App. 853-54, 872-73.

Despite the fact that the documents were relevant to establish an additional, higher duty of care upon Mitchell than the lesser-experienced officers, and that the document would obviously have been admissible due to its relevancy and for purposes of impeachment, the District Court repeatedly rejected Plaintiff's counsel's attempt to admit or otherwise use the exhibit to elicit relevant testimony. *Id*.; Aplt. App. 149-150. This stopped Plaintiff from establishing that Mitchell violated the standard of care regarding his duty to override the decisions of younger officers regarding their choice of the stealth approach, which he knew risked a dangerous

homeowner confrontation. Aplt. App. 168-69, 200. *Compare* Aplt. App. 1322. Thus, the Court abused its discretion.

This additional supervisory theory of liability was not accounted for in the Court's Final Order. *See* Aplt. App. 1328. As such, it represents, yet, another error, that affected the comparative negligence of the parties, and which could have tipped the balance of the outcome of the case. As such, it constitutes reversable error.

Appellee argues that admission of this evidence would have made no difference because Mitchell did not have anything to cross-check or double check with regard to the decisions of the two younger officers. However, Mitchell had good reason to cross-check the other officers because he knew that 1) the occupants of the home had run away when they saw him "blackout" his vehicle lights, before driving slowly by Martinez home; 2) there was no illumination in the area that would have reflected off of his vehicle's police lettering to identify him as driving a police vehicle; and 3) his vehicle looked like a "clone" of the Price Brothers vehicle in the darkness. Aplt. App. 174; 201-202; 359-60. He let the less experience officers go forward with a stealth approach by wearing all black clothing that covered their uniform and badges and concealed their police identity, despite knowledge that blackout approaches risk a dangerous confrontation with

homeowners who mistake them for trespassers. Aplt. App. 168-69; 200; 204-07. Thus, these facts, along with expert testimony, would have established that Mitchell's culpability was increased and greater than the other officers because he failed to question decisions he knew were dangerous or voice that the stealth approach should be called-off and the tactics changed. This constitutes reversable error.

V. THE DISTRICT COURT MADE CLEARLY ERRONEOUS FINDINGS OF FACT THAT LIKELY INFLUENCED ITS DETERMINATION OF COMPARATIVE FAULT.

A. There is no Evidence the Officers' Had Reason to Believe Rossi Would React Violently.

The Defendant argues that because Rossi had been in fights with others, this supports that the Officers' believed he would reacted violently against the Officers. However, there is no evidence to support that they had reason to believe, on the night in question, that Rossi would react violently if the Officers used the same approach that was used two hours earlier. The 1:00 am approach directly to the front door of the Martinez home by officers did not prompt a violent reaction from Rossi and the Officers understood there to be no threats to them at this time. Aplt. App. 72, 177-78, 182-83; 185-86; 1036-37; 1324. Next, there was testimony that the Officers were not concerned about safety and had no reason to be any more concerned with officer safety on the 3:30am approach than the 1:00am approach. Aplt. App.

72, 177-78, 182-86; 211-13; 1036-37; 1324. Most importantly, the District Court cited to no facts that would support this finding. Accordingly, this finding by the District Court is clearly erroneous.

B. It is Relevant that the Officers Were Doing a "Welfare Check" and Not on a Domestic Violence Call.

Defendant argues that it is irrelevant whether the Officers' contact at 3:30am is labeled a "welfare check" or a "domestic violence" call because the Officers were "investigating" an incident of domestic violence. However, first, Defendant greatly exaggerates the evidence and thus the Officers' actions in response, that Rossi had "struck" or was "hitting" his girlfriend. Answer, pgs. 3, 5, 43. At 1:30am the Officers discovered during their interviews with the Price Brothers, who are not credible witnesses, that the fight had purportedly started as a result of some sort physical altercation between Rossi and his girlfriend Weaver. Aplt. App. 69-71; 171-72; 1023; 1324.

There is an important, fundamental difference between responding to a domestic violence call that could reasonably require officer intervention in an active violent encounter and engaging in a voluntary welfare check to see if someone is ok, which bears on the culpability of the Officers in this case. Aplt App. 850-53; 1017. At the time of the Incident, the Officers were conducting an informal and voluntary inquiry about someone's welfare. *Id*.

They were not engaged in a "dangerous" domestic violence call, which might justify the use of sneaky or risky tactics necessary to protect oneself from "a possible shooting from inside the house," as the District Court suggested. Aplt. App. 1325, 1327. The District Court relied on the erroneous supposition that a domestic violence investigation, not a welfare check, supports the use of the stealth tactics used by the Officers. *Id.*

C. The Officers Used the Blackout Approach to Circumvent Plaintiff's Fourth Amendment Rights; Not for Safety.

The Officers admitted at trial that they were motivated by their desire to circumvent Martinez and Rossi's Fourth Amendment right to refuse to speak with them at the Martinez home on the night of the incident, which inevitably, and unnecessary resulted in the stealth approach and homeowner confrontation core to this case. Defendant does not dispute this fact. Instead, Defendant argues that Officers' subjective motives are irrelevant to the reasonableness concerns of this case. However, the case cited for this premise has no application here because it concerns the long-standing rule that a search or seizure under the Fourth must be objectively reasonable (as opposed to being based on the officer's subjective intent). *Fernandez v. California*, 571 U.S. 292, 302 (2014). What does matter that the Officers acted unreasonably in risking harm to Martinez without a reasonable

justification because it weighs on their relative culpability in a comparative negligence case like this one.

D. The District Court's Errors are Not Harmless.

The District Court's findings here are not harmless error. These findings reflect a fundamental misunderstanding of the facts, the nature of Officers' actions, and the dangers involved. The District Court mistakenly held that the Officers had a reason for conducting the more dangerous stealth approach when in fact, there was no legitimate reason to do so, which supports that the Officers' conduct was unreasonable. Further, the facts actually support that the Officers actually increased, and not decreased, safety risks. All this supports a finding of greater culpability on the part of the Officers which should have been weighed against them in assessing which party was more negligent. Without a numerical apportionment of fault, there is no way to assess how these errors tipped the contributory negligence scale in the Officers' favor. Accordingly, this Court should reverse and remand.

CONCLUSION

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

Dated: January 10, 2020.

Respectfully submitted,

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Dated: January 10, 2020.

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I hereby certify that a copy of the foregoing **APPELLANT'S REPLY BRIEF** was furnished through (ECF) electronic service to the following on this 10th day of January, 2020.

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