No. 19-

IN THE

Supreme Court of the United States

H.B. A MINOR, INDIVIDUALLY, AND AS SUCCESSOR IN INTEREST TO MICHELLE LEE SHIRLEY, BY AND THROUGH HIS GUARDIAN AD LITEM, RONNIE SHIRLEY,

Petitioner,

v.

CITY OF TORRANCE, DUSTY GARVER, JASON SENA, SCOTT NAKAYAMA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

CYNTHIA GOODMAN, ESQ.
(SBN 105693)
Counsel of Record
BORIS TREYZON, ESQ.
(SBN 188893)
ABIR COHEN TREYZON SALO, LLP
16001 Ventura Blvd. Suite 200
Encino, California 91436
(424) 288-4367
cgoodman@actslaw.com

Counsel for Petitioner

295850

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

In *Scott v. Harris*, 550 U.S. 372, 127 S.Ct 1769, 167 L.Ed. 2d, 686, (2007) the Supreme Court reversed the Eleventh Circuit Court of Appeal's affirmation of the district court's summary judgment order permitting a Fourth Amendment claim to proceed against a deputy. *Scott* acknowledged that on summary judgment, facts must be viewed in the light most favorable to the nonmoving party. It found, however, that a video taken of the events capturing an excessive force claim blatantly contradicted plaintiff's version of the facts. Based upon the video and evidence of a high-speed chase preceding the shooting, it held that the deputy's use of lethal force was objectively justified. Since *Scott*, decisions out of the Ninth and Tenth Circuits have used *Scott* as precedent for granting summary judgments in excessive force cases based upon their own interpretation of videos, even where plausible, alternative interpretations result in material disputes concerning the objective reasonableness of the officer's conduct.

Other circuits, including the Sixth, Seventh and Eighth have issued decisions suggesting that summary judgment should be denied unless videos blatantly contradict plaintiff's version of the facts. Review should be granted to address these issues and clarify the Supreme Court's holding in *Scott*.

One question is presented:

In a 42 USC § 1983 action where videos capturing the claimed use of excessive force are open to multiple interpretations as to whether the use of lethal force was

objectively reasonable because of an "actual or imminent" threat to officers or third parties, does *Scott v. Harris*, 550 U.S. 372, 127 S.Ct 1769, 167 L.Ed. 2d 686 permit the court to decide the excessive force issue on summary judgment?

LIST OF PARTIES

The parties below are listed in the caption.

CORPORATE DISCLOSURE STATEMENT

Appellants are individuals.

STATEMENT OF RELATED CASES

H.B., a minor, individually, and as successor in interest to Michelle Lee Shirley, by and through his Guardian Ad Litem, RONNIE SHIRLEY vs. CITY OF TORRANCE, a California municipal entity; TORRANCE POLICE DEPARTMENT, a California municipal entity; MARK MATSUDA, an individual, Case No.: 2:17-cv02373 SJO-GJS, U.S. District Court for the Central District of California, Western Division; Order Denying Summary Judgment Entered August 14, 2018, Judgment entered on April 13, 2020

H.B., a minor, individually, and as successor in interest to Michelle Lee Shirley, by and through his Guardian Ad Litem, RONNIE SHIRLEY vs. CITY OF TORRANCE, a California municipal entity; TORRANCE POLICE DEPARTMENT, a California municipal entity; MARK MATSUDA, an individual, Case No. 18-56180, Ninth Circuit Court of Appeal; Order Reversing Summary Judgment entered on December 23, 2019, Order Denying Petition for Rehearing on January 30, 2020

H.B., a minor, individually, and as successor in interest to Michelle Lee Shirley, by and through his Guardian Ad Litem, RONNIE SHIRLEY vs. CITY OF TORRANCE, a California municipal entity; TORRANCE POLICE DEPARTMENT, a California municipal entity; MARK MATSUDA, an individual, Case No. BC655480, Los Angeles Superior Court of the State of California, Pending.

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The December 23, 2019 unpublished opinion of the United States Court of Appeals for the Ninth Circuit is found at 790 Fed. Appx. 60. That decision reversed the August 14, 2018 denial of summary judgment by the United States District Court for the Central District of California. Appellant's Petition for Panel Rehearing and Rehearing En Banc was denied on January 30, 2020.

STATEMENT OF JURISDICTION

On December 23, 2019, the Ninth Circuit Court of Appeals issued its order reversing the denial of summary judgment and ordered the district court to dismiss petitioner's federal claims. On January 30, 2020, the Ninth Circuit denied Petitioner's Petition for Rehearing. On March 19, 2020, the United States Supreme Court issued Order 589 extending the time to file this petition to 150 days from the date of the lower court judgment, order denying discretionary review or order denying a timely petition for rehearing as a result of health concerns relating to COVID-19. On April 13, 2020, the district court entered judgment against Petitioner.

This Court's jurisdiction is invoked under 28 U.S.C § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 which provides, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of

Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

1. Petitioner is the minor child of Michelle Shirley ("Shirley" or "the decedent"). Petitioner's evidence showed that prior to the incident, Shirley had been traveling at an average of 27 miles per hour. There was no evidence that Shirley had hit a person or property; there was a radio call reporting erratic driving. In response to the radio call, respondent officers, Dusty Garver, Jason Sena and Scott Nakayama (collectively referenced as "respondents") followed Shirley in what can be described as a slow "chase." Eventually, her car was stopped by a pit maneuver. There was no evidence that Shirley had committed a felony either before, or after, the pit maneuver. By the time Shirley had been "pitted", the airbag of Shirley's Ford Focus had deployed, her car was semi-disabled, and her radio was blaring. Officers observed her "thousand mile" stare and a "blank, unfocused gaze" as she laughed at them and gave them the finger. There was no evidence she had any guns and both hands had been observed by the officers. Plainly, Shirley was suffering from a mental breakdown.

After the pit maneuver, Shirley's vehicle was surrounded on three sides by patrol cars. Multiple videos captured the next sequence of events. During a 50 second period after the pit maneuver, Shirley's car is stationary. Some officers are seen laughing, although some officers have their guns are drawn. There is no attempt to evacuate the adjacent gas station or blockade adjacent streets. Officers do not take cover behind their vehicles and Shirley's avenue of escape is not completely cut-off. After the 50 second interlude, Shirley's vehicle slowly lurches forward; almost immediately the officers unload their guns onto Shirley, firing over 30 shots *in two sequences*, killing her.

Respondents sought summary judgment based upon the affirmative defense of qualified immunity. The district court found that, viewing the videos in the light most favorable to petitioner, *the videos could be interpreted to show that Shirley was slowly attempting to escape and avoid the officers in her path and that some or all of the officers' movements objectively confirmed that the officers interpreted Shirley's movements as non-threatening.*

On appeal, the Ninth Circuit, viewing the same videos, reached a different conclusion, finding that Shirley "accelerated outward in the direction of at least one of the officers, toward a lane for oncoming traffic and a nearby gas station." (Appendix A; 3a) The panel concluded, without consideration of whether each officers' use of lethal force was objectively reasonable, that a reasonable officer would perceive Shirley's actions as an imminent threat to the other officers or the public.

2. On March 27, 2017, Petitioner filed his initial complaint which included a claim for Violation of Federal Civil Rights, 42 U.S.C. §1983,1985,1986, 1988 arising from the death of his mother, Shirley. The district court entered its order on August 14, 2018. On December 23, 2019, the Ninth Circuit Court of Appeal issued its opinion reversing the district court's order and remanding it to the district court to consider the state court claims arising from the same incident. On January 6, 2020 petitioner filed his petition for panel rehearing and rehearing *en banc* which was denied on January 30, 2020. Following remand, on April 13, 2020, the district court dismissed the federal claims in the Second Amended Complaint and dismissed the state claims without prejudice to re-filing in state court.

REASONS FOR ALLOWANCE OF THE WRIT

It is well established that a police officer may not seize an unarmed, nondangerous suspect by shooting him dead." *Tennessee v. Garner* (1985) 471 U.S. 1, 11, 105 S. Ct. 1694, 85 L. Ed. 1 (1985). Defendants must establish that there was no genuine issue of material fact and that the affirmative defense of qualified immunity was established as a matter of law. *Crawford-El v. Britton* 523 U.S. 574, 118 S.Ct. 1584, 140 L. Ed. 2d. 759 (1998)

Scott v. Harris, 550 U.S. 372, 127 S.Ct 1769, 167 L.Ed. 2d 686 (2007) and *Plumhoff v. Rickard* 572 U.S. 765, 134 S.Ct. 2012, 188 L. Ed 2d 1056 (2014), both involved the use of lethal force by officers where the plaintiff had led them on *high speed* chases. In *Scott*, with the benefit of a video which "blatantly contradicted" plaintiff's version of the facts, the Supreme Court held that the officers'

use of lethal force was objectively justified and thus the officers were entitled to qualified immunity. Likewise, in *Plumhoff*, it was undisputed that the plaintiff had engaged in a high speed chase and almost hit an officer as he was maneuvering to continue the chase. The Supreme Court held that summary judgment was warranted and that the officers were entitled to qualified immunity. Each of these cases involved undisputed evidence that the plaintiff constituted an actual and imminent threat to the officers and the public based both on the high speed chase preceding the incident and the circumstances of the incident itself.

In the cases cited, the Ninth and Tenth circuits reversed denials of summary judgment based upon their independent interpretation of the videos and other factors which differed from the lower court's interpretations. Other circuits, including the Sixth, Seventh and Eighth concluded summary judgment or interlocutory appeal inappropriate because videos were open to interpretation on the issue of the objective reasonableness of an officer's use of force. Each of these cases purported to be guided by the principles set forth in *Scott* and *Plumhoff.*

Under *Graham v. Conner* 490 U.S 386, 396, 109 S. Ct. 1865, 1872, 104 L.Ed. 2d 443 (1989), a claim of excessive force requires balancing the "nature and quality of the intrusion" on a person's liberty with the "countervailing governmental interests at stake" to determine whether the use of force was objectively reasonable under the circumstances.

Review is necessary to clarify the court's role in deciding the *Graham* factors on summary judgment based upon a review of videos subject to multiple interpretations.

Review Should be Granted to Resolve Conflicting Decisions Between the Circuits Addressing *Scott* and *Plumhoff* and the Court's Role Interpreting Videos Which Do Not Blatantly Conflict the Plaintiff's Version of the Facts

In *Scott v. Harris* 550 U.S. 372, 127 S. Ct. 1769, 167 L. Ed. 2d 686, (2007), an officer used deadly force to terminate a high-speed chase. The Supreme Court held that where a video "blatantly contradicted" plaintiff's version of events, the court should review the facts in the light depicted by videotape that captured the events of the excessive force claim. The court stated, "When opposing parties tell two different stories, *one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment*." (emphasis added). *Scott* at 550 U.S. 372, 380. The Supreme Court concluded that based upon facts depicted in the videotape, summary judgment should be granted in favor of the officer.

Later, in *Plumhoff v. Rickard* 572 U.S. 765, 134 S.Ct. 2012, 188 L. Ed 2d 1056 (2014) the Supreme Court held that officers did not violate the Fourth Amendment when they shot into the decedent's car where the decedent had led them on a high-speed chase and was driving away, almost hitting an officer in the process.

The case at bar involved a slow-speed chase; the decedent's vehicle's air bags had been deployed and her car was semi-disabled. Shirley was blasting loud music and exhibiting signs of mental illness. After a pit maneuver, and following a brief movement of Shirley's vehicle, videos

showed officers shooting over 30 shots in two sequences. Respondents claimed that they shot Shirley because of an imminent threat to themselves and the public at large. The district court found a genuine dispute based upon its review of the videos and thus whether the officers had probable cause to believe that Shirley was an immediate threat to themselves or others. The district court opinion noted that in the video Shirley, "appears to be turning left as she accelerates forward, giving a reasonable impression that she is slowly attempting to escape and avoid the officers in her path…The officers choose to shoot Shirley rather than overt or dodge the vehicle, which could indicate that they knew that they were not in her path and were instead only attempting to prevent her escape. ….The officers continued shooting after it could or should have been apparent that there was no person in immediate danger from Shirley's vehicle, instead creating the danger of shooting a bystander or gas canister." (Appendix B; 16a)

On appeal, and viewing the same video and same factors, the Ninth Circuit decided that the videos showed that, "the decedent, having been boxed in by the police officers, accelerated outward in the direction of at least one of the officers, toward a lane for oncoming traffic and a nearby gas station." (Appendix A; 3a) Based upon this interpretation of the video, the Ninth Circuit reversed the district court and found that, "Because the decedent accelerated toward the officers from only a few feet away, a reasonable officer under these circumstances would have perceived the decedent's actions to constitute a significant and immediate threat to the officers in the path of her vehicle and to other members of the public who were in the vicinity See *Plumhoff*, 572 U.S. at 775-77." (Appendix A; 3a)

In *Thomas v. Durastanti*, 607 F. 3d 655, 607 (10th Cir. 2010), the Tenth Circuit reversed the district court's denial of summary judgment in which officers asserted the qualified immunity defense. In *Thomas*, a significant part, but not all, of a confrontation between AFT officers and plaintiffs was caught on a gas station video. Based upon the video, the district court determined there were disputed facts as to the speed of plaintiff's car and the position of the agent when the agent fired shots at the plaintiff's car. The Tenth Circuit reversed, finding that even if the video did not conclusively establish the speed, and even if the agent was mistaken (on the trajectory of the vehicle), "An officer may be found to have acted reasonably even if he has a mistaken belief as to the facts establishing the existence of exigent circumstances." (p. 665)

Other circuits have interpreted the import of videos which do not "blatantly contradict" other evidence differently. In *Thompson v. Monticello, Arkansas, City of*, 894 F. 3d 993 (2018) the Eighth Circuit affirmed the denial of a summary judgment based upon qualified immunity, finding that a video did not "conclusively disapprove" the plaintiff's version of events leading to the 1983 claim. In *Thompson*, plaintiff was walking home late at night. Officer Singleton suspected him of a minor crime. Thompson ignored Singleton's order to stop and Singleton used his taser equipped with a video cam. The Eight Circuit described its rationale for affirming the denial of the summary judgment as follows, "Singleton and Thompson each believe the video supports his version of how the incident transpired. They also disagree as to whether Thompson's behavior can be characterized as aggressive and confrontational such that a reasonable officer in Singleton's shoes would have believed he posed

an immediate threat. Having reviewed the video, we note that it captures only part of the incident, and that it does not clearly show where Thompson's other hand was positioned when he turned to point at his house. But the video does not conclusively disprove Thompson's view of the incident. Singleton simply disagrees with 'the district court's conclusions regarding evidence sufficiency and the genuineness of factual disputes—conclusions that we have no jurisdiction to review…"(p. 999)

In *Gant v. Hartman* 924 F. 3d 445 (7th Cir. 2019), the Seventh Circuit affirmed the denial of a summary judgment based upon qualified immunity, finding that a video of the incident giving rise to the 1983 claim did not "utterly discredit" the plaintiff's version of the facts." (p. 450) In *Gant*, officers responded to a robbery at a Dollar store. One of the officers fired and shot the plaintiff, hitting his abdomen. The video recordings could be interpreted as showing plaintiff in the process of surrendering or, as claimed by the officer, supporting his concern that the plaintiff was holding a handgun and preparing to shoot. The Seventh Circuit found that since issues of disputed fact were presented, interlocutory appeal was not available.

Latits v. Phillips 878 F.3d 541 (6th Cir. 2016), involved a chase at speeds up to 60 miles an hour precipitated by an initial routine traffic stop and caught on several video cams. Ultimately, one officer shot and killed the plaintiff's decedent. The district court granted summary judgment for the officer. The Sixth Circuit reversed acknowledging issues of fact, but found that qualified immunity applied because the controlling law had not been clearly established. With respect to the court's role interpreting

videos, the court explained, "To the extent that videos in the record show facts so clearly that a reasonable jury could view those facts in only one way, those facts should be viewed in the light depicted by the videos. *See Harris*, 550 U.S. at 380, 127 S.Ct. 1769. To the extent that facts shown in videos can be interpreted in multiple ways or if videos do not show all relevant facts, such facts should be viewed in the light most favorable to the non-moving party. *See Godawa*, 798 F.3d at 463. Summary judgment is appropriate if the materials in the record show that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. *Id.* at 462." (p. 547)

While these decisions claim to be guided by *Scott* and *Plumoff*, courts of appeal have treated videos which do not blatantly contradict plaintiff's version of facts differently despite recognized standards of review for summary judgment motions. "….Courts are required to view the facts and draw reasonable inferences 'in the light most favorable to the party opposing the [summary judgment] motion.' *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962) *(per curiam); Saucier, supra,* at 201, 121 S.Ct. 2151. In qualified immunity cases, this usually means adopting (as the Court of Appeals did here) the plaintiff's version of the facts." *Scott v. Harris* 550 U.S. 372, 378

Scott found that because the videotape clearly refuted plaintiff's factual contentions, the court should not adopt a version of facts contrary to what was represented in the videotape. However, *Scott* did not hold that where the videotape is subject to multiple interpretations, the courts should ignore contrary interpretations. In ruling

on a motion for summary judgment, the evidence of the nonmovant is to be believed, and all justiciable inferences are to be drawn in his favor. *Fed.Rules Civ. Proc.Rule* 56; *Tolan v. Cotton,* 572 U.S. 650, 124 S.Ct. 1861, 188 L.Ed. 2d 895 (2014) Summary judgment is appropriate only if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.

CONCLUSION

Based upon the foregoing, petitioners respectfully request that the Supreme Court grant review in this matter.

April 30, 2020

Respectfully Submitted,

Cynthia Goodman, Esq.
(SBN 105693)
Counsel of Record
Boris Treyzon, Esq.
(SBN 188893)
Abir Cohen Treyzon Salo, LLP
16001 Ventura Blvd. Suite 200
Encino, California 91436
(424) 288-4367
cgoodman@actslaw.com

Counsel for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED DECEMBER 23, 2019

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

November 8, 2019, Argued and
Submitted, Pasadena, California;
December 23, 2019, Filed

No. 18-56180

H.B., A MINOR, INDIVIDUALLY, AND AS SUCCESSOR IN INTEREST TO MICHELLE LEE SHIRLEY, BY AND THROUGH HIS GUARDIAN AD LITEM, RONNIE SHIRLEY,

Plaintiff-Appellee,

v.

CITY OF TORRANCE, A CALIFORNIA MUNICIPAL ENTITY; MARK MATSUDA, POLICE CHIEF; DUSTY GARVER, AKA DOE 1; JASON SENA, AKA DOE 2; SCOTT NAKAYAMA, AKA DOE 3,

Defendants-Appellants,

and

TORRANCE POLICE DEPARTMENT, A CALIFORNIA MUNICIPAL ENTITY; DOES, 1-100, INCLUSIVE,

Defendants.

Appendix A

Appeal from the United States District Court
for the Central District of California
S. James Otero, District Judge, Presiding

Argued and Submitted November 8, 2019
Pasadena, California

MEMORANDUM[*]

Before: SCHROEDER and FRIEDLAND, Circuit Judges, and SILVER,[**] District Judge.

Defendants-Appellants City of Torrance police officers Jason Sena, Dusty Garver, and Scott Nakayama appeal the district court's denial of qualified immunity. We have jurisdiction over the officers' interlocutory appeal under 28 U.S.C. § 1291. *See Plumhoff v. Rickard*, 572 U.S. 765, 771-73, 134 S. Ct. 2012, 188 L. Ed. 2d 1056 (2014). We review the district court's conclusions regarding qualified immunity de novo. *Isayeva v. Sacramento Sheriff's Dep't*, 872 F.3d 938, 946 (9th Cir. 2017). We reverse.

Defendants are not entitled to qualified immunity if (1) their conduct violated a constitutional right, and (2) if that right was "clearly established" at the time of the violation. *Lal v. California*, 746 F.3d 1112, 1116 (9th Cir. 2014). Defendants are therefore entitled to summary judgment

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Roslyn O. Silver, United States District Judge for the District of Arizona, sitting by designation.

if, viewing the facts in the light most favorable to Plaintiff H.B., their conduct did not violate a constitutional right. In this case, Plaintiff claims that Defendants violated the Fourth Amendment by the use of excessive force when they shot Plaintiff's decedent. In evaluating a Fourth Amendment excessive force claim, the most important factor is whether the decedent posed a significant and immediate threat of death or serious bodily injury to the officers, or others in the area. *Longoria v. Pinal County*, 873 F.3d 699, 705 (9th Cir. 2017).

The parties do not dispute that the situation confronting the officers is accurately depicted by several videos in the record. The videos show that the decedent drove in an erratic manner, including by swerving repeatedly into oncoming traffic, that posed a danger to members of the public in a busy metropolitan area. The videos also show that the decedent, having been boxed in by the police officers, accelerated outward in the direction of at least one of the officers, toward a lane for oncoming traffic and a nearby gas station. Because the decedent accelerated toward the officers from only a few feet away, a reasonable officer under these circumstances would have perceived the decedent's actions to constitute a significant and immediate threat to the officers in the path of her vehicle and to other members of the public who were in the vicinity. *See Plumhoff*, 572 U.S. at 775-77.

Plaintiff asserts that the decedent was in an impaired mental state that should have been obvious to the officers and should have caused them to perceive less need to use deadly force. *See Longoria*, 873 F.3d at 708. Yet

even assuming Defendants should have known that the decedent was mentally impaired, that would not have rendered their conduct less reasonable in this case, because the decedent posed a significant and immediate threat, leaving Defendants with no opportunity to attempt to de-escalate the situation.

Because we hold that the officers' use of deadly force was objectively reasonable at the time of the shooting, we reverse the district court's denial of qualified immunity. Plaintiff can not establish a violation of the Fourth Amendment.

In order to prevail on the state law battery and Bane Act claims, Plaintiff must demonstrate that the officers' use of force was not reasonable at the time of the shooting. *See Cameron v. Craig*, 713 F.3d 1012, 1022 (9th Cir. 2013) ("[T]he elements of the excessive force claim under [the Bane Act] are the same as under § 1983."); *Bowoto v. Chevron Corp.*, 621 F.3d 1116, 1129 (9th Cir. 2010) ("Under California law, a plaintiff bringing a battery claim against a law enforcement official has the burden of proving the officer used unreasonable force."). Our determination that the officers' use of force was objectively reasonable "necessarily resolves" those claims. *Cunningham v. Gates*, 229 F.3d 1271, 1285 (9th Cir. 2000). We therefore also hold that the district court should have dismissed them.

Plaintiffs also have state law negligence and wrongful death claims. Such claims may be premised on a broader set of conduct than conduct amounting to excessive force

under federal law. *See Hayes v. County of San Diego*, 57 Cal. 4th 622, 160 Cal. Rptr. 3d 684, 305 P.3d 252, 263 (Cal. 2013) (holding that "state negligence law, which considers the totality of the circumstances surrounding any use of deadly force, is broader than federal Fourth Amendment law, which tends to focus more narrowly on the moment when deadly force is used" (citation omitted)); *Lopez v. City of Los Angeles*, 196 Cal. App. 4th 675, 126 Cal. Rptr. 3d 706, 714 (Ct. App. 2011) ("The elements of a cause of action for wrongful death are a tort, such as negligence, and resulting death."). A negligence claim thus could be based on negligent conduct preceding the use of force. The record in this case contains evidence that the officers may have been negligent in positioning themselves and their vehicles so openly. The complaint alleges that the officers acted unlawfully "prior to and at the time they shot at Ms. Shirley and her vehicle." The district court did not consider these allegations. We remand for it to do so.

REVERSED AND REMANDED.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, DATED AUGUST 14, 2018

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

CASE NO.: CV 2:17-02373 SJO (GJSX)

DATE: August 14, 2018

PRESENT: THE HONORABLE S. JAMES OTERO, UNITED STATES DISTRICT JUDGE

Victor Paul Cruz	Not Present
Courtroom Clerk	Court Reporter

PROCEEDINGS (in chambers): ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [Docket No. 93]

This matter is before the Court on Defendants City of Torrance ("City"), Mark Matsuda ("Matsuda"), Dusty Garver ("Garver"), Jason Sena ("Sena"), and Scott Nakayama's ("Nakayama") (collectively, "Defendants") Motion for Summary Judgment ("Motion"), filed July 9, 2018. Plaintiff H.B, a minor by and through his guardian *ad litem* Ronnie Shirley ("H.B." or "Plaintiff"), opposed the Motion ("Opposition") on July 23, 2018. Defendants filed their reply ("Reply") on July 30, 2018. The Court found the matter suitable for disposition without oral

argument and vacated the hearing set for August 13, 2018. *See* Fed. R. Civ. P. 78(b). For the following reasons, the Court **GRANTS IN PART** and **DENIES IN PART** Defendants' Motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Procedural Background

On March 27, 2017, Plaintiff filed this civil rights action on behalf of Michelle Lee Shirley ("Shirley" or "Decedent"), Plaintiff's deceased mother. (*See generally* Compl., ECF No. 1.) Plaintiff filed a First Amended Complaint ("FAC") on May 26, 2017, alleging eight causes of action. (FAC, ECF No. 23.) On June 23, 2017, Defendants moved to dismiss Plaintiff's third cause of action for negligent hiring, Plaintiff's fifth cause of action for violation of the Ralph Civil Rights Act, and Plaintiff's seventh cause of action for liability under *Monell*. (*See generally* Mot. to Dismiss, ECF No. 28.) The Court granted Defendants' motion with leave to amend. (Order Granting Defs.' Mot. to Dismiss, ECF No. 36.) On August 28, 2017, Plaintiff filed a Second Amended Complaint ("SAC"), alleging the following causes of action:

(1) Wrongful Death
(2) Negligence
(3) Violation of the Bane Civil Rights Act, California Civil Code § 52.1 ("Bane")
(4) Violation of the Ralph Civil Rights Act, California Civil Code § 51.7 ("Ralph")
(5) Violation of Federal Civil Rights, 42 U.S.C. §§ 1983,

1985, 1986, 1988 ("1983")
(6) Violation of Federal Civil Rights: Monell Claim, 42 U.S.C. §§ 1983, 1985, 1986, 1988 ("Monell")
(7) Battery

(*See generally* SAC, ECF No. 37.) Defendants move for summary judgment on all seven of Plaintiff's claims, as well as Plaintiff's claim for punitive damages.

B. Statement of Undisputed Facts

The following facts are not reasonably in dispute or are construed in favor of Plaintiff, the nonmoving party. On October 31, 2016, Shirley was shot and killed by Torrance Police Department ("TPD") officers on the northwest corner of Cabrillo Avenue and Sepulveda Boulevard, near a Chevron gas station.[1] (Pl's Statement of Genuine Disputes ("PSGD") ¶ 1, ECF No. 116.) The TPD officers involved in or present at the shooting were Defendants Sena, Garver, and Nakayama, as well as Michael Guell ("Guell"), Edward LaLonde ("LaLonde"), Juhn Lee ("Lee"), and Brian Okazaki ("Okazaki"). (PSGD ¶ 2.) On that date, Sena was working uniformed traffic enforcement on a marked police motorcycle and Nakayama and Garver were working uniformed patrol in marked police vehicles. (PSGD ¶¶ 2-4.) All three were armed with Department-issued Glock handguns. (PSGD ¶¶ 2-4.)

1. The parties assert a number of evidentiary objections in their various filings. To the extent that the Court relies on any evidence that has been objected to, the Court will address the objections *infra*.

Appendix B

At approximately 2:30 p.m. on October 31, Sena received a call from Dispatch regarding a possible DUI driver in downtown Torrance, later determined to be Shirley. (PSGD ¶ 5; Decl. Derek Chaiken in Supp. Opp'n ("Chaiken Decl.") Ex. A ("Dispatch") 00:24-33, ECF No. 118.) The broadcast, which was also heard by Nakayama and Garver, reported that the driver was operating a gray Ford erratically, honking, and that her air bag had been deployed. (PSGD ¶ 6, Dispatch 00:36-1:24.) Sena identified the vehicle as it was driving on Post Avenue towards Carson Street, and observed that there was major passenger side traffic collision damage on the vehicle and that the horn was activating on its own. (PSGD ¶ 7.) As Shirley drove past Sena, she raised her middle finger and looked directly at him. (PSGD ¶ 7.)

Shirley continued to drive erratically and Sena informed Dispatch of his pursuit and the direction they were heading. (PSGD ¶ 8.) In particular, Sena notified Dispatch that Shirley was driving into oncoming traffic and that a couple of units would be needed to perform Precision Intervention Technique ("PIT") on her car. (PSGD ¶ 9.) PIT is a maneuver designed to push a vehicle into a spin, intended to stop a vehicle without causing injury or significant damage. (PSGD ¶ 9.) Shirley continued to drive erratically in the downtown area toward Torrance High School. (PSGD ¶¶ 10-11.)

Sena was joined by Officers Guell, Okazaki, and Nakayama. (PSGD ¶¶ 12-13.) The officers observed Shirley's erratic driving and eventually were able to perform a PIT maneuver. (PSGD ¶¶ 14-15.) After Shirley's

car stopped spinning, Nakayama positioned his car so that its front bumper was nearly touching the front bumper of Shirley's car, then took cover behind his driver's side door. (PSGD ¶ 16.) Guell and Sena stopped their motorcycles and took cover behind Nakayama's passenger side door. (PSGD ¶ 16.) Garver arrived, positioned his vehicle on the driver's side of Nakayama's vehicle, exited and stood behind his door. (PSGD ¶ 16.) Lee arrived several seconds after Garver, positioned his vehicle on the passenger's side of Nakayama's vehicle, and stood outside his driver's door. (PSGD ¶ 16.) Okazaki pulled onto Sepulveda Boulevard and exited his vehicle to stop traffic in the intersection. (PSGD ¶ 16.) Sena and Nakayama drew their guns, while Guell drew a non-lethal taser. (PSGD ¶ 16.)

Shirley's car was still running, playing the radio loudly, and honking, and she remained seated inside her car. (PSGD ¶ 17.) The officers' view of the interior of the car was obscured by the passenger side airbags. (PSGD ¶ 17.) The officers commanded Shirley to keep her hands up; Shirley raised her middle fingers towards the officers and smiled. (PSGD ¶ 18, Pl's Statement of Additional Material Facts ("PSAMF") ¶ 80.) Shirley had a blank, unfocused gaze. (PSGD ¶ 18; PSAMF ¶ 81.) Garver called for a unit to block Shirley in. (PSGD ¶ 18.)

LaLonde drove his vehicle around to the back of Shirley's vehicle and attempted to box her in. (PSGD ¶ 19.) While LaLonde was driving to the back of Shirley's vehicle, Shirley's right hand came down and, with her left middle finger still raised and still smiling, Shirley's vehicle slowly rolled forward and bumped into Nakayama's car.

(PSGD ¶ 2; Chaiken Decl. Ex. A-1 ("Folsom Video") 00:01-02.) Shirley then reversed her vehicle and collided with LaLonde's front bumper as he continued to drive towards her. (PSGD ¶ 21; Folsom Video 00:23-35.) LaLonde jumped out of his vehicle and ran towards Lee's car. (PSGD ¶ 22; Folsom Video 00:26-30.) After a brief pause, Shirley's vehicle accelerated forwards toward the parked cars in front of her and Officers Sena, Nakayama, Guell, and Garver, sharply turning left to avoid collision. (PSGD ¶¶ 23-24; PSAMF ¶ 82; Folsom Video 00:30-35.) Officers Sena, Garver, and Nakayama opened fire on Shirley's car, firing a combined total of up to thirty-five (35) bullets. (PSGD ¶¶ 23, 28, 36; PSAMF ¶ 1, Folsom Video 00:30-39.)

While this was occurring, Lee jumped back into his car and attempted to pull forward to block Shirley from escaping. (PSGD ¶ 24.) Shirley collided with Lee's car and then crossed over the sidewalk, through a hedge, into a concrete pole in an adjacent gas station. (PSGD ¶¶ 24-25.) The officers did not stop firing their weapons at the vehicle until after Shirley's car came to a complete stop. (PSGD ¶¶ 24-25; Folsom Video 00:39.) After taking some time to ensure that Shirley would not continue to operate her vehicle and did not have a weapon, Shirley was pulled out of her car and several officers administered CPR until an ambulance arrived. (PSGD ¶¶ 25, 31-33, 38.) There were several bystanders at the gas station and in the neighborhood who witnessed the incident, and some recorded videos of the incident with their mobile phones. (PSGD ¶¶ 40, 51, 54, 63, 65.)

II. LEGAL STANDARD

Federal Rule of Civil Procedure 56(a) mandates that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party, Defendants, bear the initial burden of establishing the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial." *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted).

Once the moving party meets its initial burden, the "party asserting that a fact cannot be or is genuinely disputed must support the assertion." Fed. R. Civ. P. 56(c)(1). "The mere existence of a scintilla of evidence in support of the [nonmoving party]'s position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *accord Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) ("[O]pponent must do more than simply show that there is some metaphysical doubt as to the material facts."). Further, "[o]nly disputes over facts that might affect the outcome of the suit . . . will properly preclude the entry of summary judgment [and f]actual disputes that are irrelevant or unnecessary will not be counted."

Anderson, 477 U.S. at 248. A court is required to draw all inferences in a light most favorable to the nonmoving party. *Matsushita*, 475 U.S. at 587.

III. DISCUSSION

A. Excessive Force and Substantive Due Process (Fifth Cause of Action)

Plaintiff alleges that Defendants: (1) violated Decedent's Fourth Amendment right to be free from excessive force; and (2) deprived Decedent's right of life and liberty in violation of the Fourteenth Amendment. (*See* SAC ¶¶ 65-80.) Plaintiff grounds these claims on Section 1983 of the Civil Rights Act. That section provides, in relevant part, that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage. . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

Title 42 U.S.C. § 1983. To succeed on a claim under Section 1983, a plaintiff must show: (1) the deprivation of "a right secured by the Constitution or laws of the United States;" and (2) "that the alleged deprivation was committed under

color of state law." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49-50 (1999). Defendants argue that they are entitled to summary judgment on these claims because: (1) the officers' use of force was objectively reasonable; and (2) the officers are entitled to qualified immunity. (Mot. 2-3.) The Court addresses each argument in turn.

1. Use of Excessive Force – Fourth Amendment

The standard for analysis of the claim for excessive force is the Fourth Amendment test of objective reasonableness. *Graham v. Connor*, 490 U.S. 386, 388 (1989); *Jackson v. City of Bremerton*, 268 F.3d 646, 651 (9th Cir. 2001). The determination as to whether a particular use of force was objectively reasonable under the circumstances requires application of a balancing test in which the interest of the individual is weighed against the interest of the government and the public. *Graham*, 490 U.S. at 397. Notably, the use of force must be judged from the perspective of a reasonable officer on the scene, not clouded with the bias of hindsight. *Id.* (citation omitted). Three factors are weighed in a reasonableness analysis: (1) severity of the crime at issue; (2) nature of immediate threat posed to officers or others by the suspect; and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight. *Id.* The "most important" of the *Graham* factors is whether the decedent posed an immediate threat to the safety of the officers or others. *Smith v. City of Hemet*, 394 F.3d 689, 702 (9th Cir. 2005). "[S]ummary judgment should be granted sparingly in excessive force cases." *Gonzalez v. City of Anaheim*, 747 F.3d 789, 795 (9th Cir. 2014) (en banc)

(citation omitted); *Glenn v. Washington Cty.*, 673 F.3d 864, 871 (9th Cir. 2011) ("Because [the excessive force inquiry] nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom, we have held on many occasions that summary judgment or judgment as a matter of law in excessive force cases should be granted sparingly.") (citation omitted).

The primary issue before the Court is whether a reasonable jury would necessarily conclude that Officers Sena, Garver, and Nakayama perceived an immediate threat of death or serious physical injury at the time they shot Shirley. Sena declares that at the time Shirley accelerated forward, he believed that she was going to run over and kill either himself or Guell. (PSGD ¶ 23.) Garver declares that at that same time, he saw her sharply turn left and was afraid she was going to run over and kill LaLonde, who was running towards Lee's car at the time. (PSGD ¶ 27.) Nakayama declares that he was also afraid that Shirley was going to run over and kill Sena when he opened fire. (PSGD ¶ 36.)

Many of the undisputed facts would support a finding that the officers reasonably believed that Shirley posed an immediate threat to themselves or others. Shirley had been driving erratically for some time prior to the use of deadly force, plausibly putting others at risk of collision, injury or death. (PSGD ¶ 5-11.) Shirley's erratic driving was in the middle of the afternoon in a busy downtown area with at least some pedestrians present during the subject incident. (PSGD ¶¶ 40, 51, 54, 63, 65.) Shirley openly defied the officers by raising her middle fingers

at them. (PSGD ¶ 80.) Shirley continued operating her vehicle even after reversing and crashing into LaLonde's car. (PSGD ¶ 21; Folsom Video 00:23-35.) The officers' belief that at least some of them were in Shirley's path when she accelerated forward is likewise plausible. (*See* Folsom Video 00:30-35.)

Much of the disputed evidence, however, would also support a finding that the use of deadly force was objectively unreasonable. In the video, Shirley appears to be turning left as she accelerates forward, giving a reasonable impression that she is slowly attempting to escape and avoid the officers in her path. (*See* Folsom Video 00:30-35.) The officers choose to shoot Shirley rather than move or dodge the vehicle, which could indicate that they knew they were not in her path and were instead only attempting to prevent her escape. (*See* Folsom Video 00:30-35.) The officers continue shooting after it could or should have been apparent that there was no person in immediate danger from Shirley's vehicle, instead creating the danger of shooting a bystander or gas canister. (*See* Folsom Video 00:39; PSGD ¶ 51 [a pedestrian bystander was fearful that he was going to be "in the line of fire"].) And there was some evidence that Shirley was either physically or mentally impaired during the subject incident, including her irregular driving, her operation of the vehicle despite the persistence of the horn and radio, and her "blank, unfocused gaze." (PSGD ¶¶ 5-11, 17-18.)

The severity of the crime at issue is also in dispute. When Sena received the dispatch, the crime at issue was a possible DUI. (PSGD ¶ 5.) There is no evidence that

Shirley had physically harmed anyone at any time before or during the subsequent pursuit, and the video evidence of her driving indicates that she is purposely swerving to try to avoid collision into people or objects. (*See* Notice of Lodging Ex. G ("Bystander Videos").) The speed at which Shirley is driving at various times is also in dispute; according to the officers, she reached up to seventy (70) miles per hour during the pursuit, while the video evidence tends to show her driving at much slower speeds. (PSGD ¶¶ 12-13; Folsom Video; Bystander Videos.) While Defendants characterize Shirley's crime as "attempted murder," the video also plausibly shows that Shirley was attempting to avoid hitting the officers and escape, rather than run them over. (*See* Mot. 16; Folsom Video 00:30-35.)

Finally, while the evidence demonstrates that Shirley was in fact attempting to evade arrest by flight, it is well established that "a police officer may not use deadly force unless it is necessary to prevent escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Smith v. City of Hemet*, 394 F.3d 689, 704 (9th Cir. 2005) (citing *Tennessee v. Garner*, 471 U.S. 1 (1985)). As described above, there is a genuine dispute as to whether the officers had probable cause to believe that Shirley was an immediate threat to themselves or others, or whether the use of deadly force was necessary to prevent this threat from occurring. While Defendants cite to *Plumhoff v. Rickard,* 134 S. Ct. 2012 (2014), in support of their contention that the use of deadly force was objectively reasonable, this case is readily distinguishable. In *Plumhoff*, the officers had engaged with the decedent in

a dangerous high-speed chase, in excess of 100 miles per hour and lasting over five minutes, in which the suspect passed more than 24 vehicles at high speeds and forced them to alter course. *Id.* at 2021. After the decedent collided with a police car, he immediately attempted to reverse and accelerate toward escape. *Id.* Here, Shirley is operating at much slower speeds and with many pauses, and while her driving is clearly erratic, there is a genuine dispute as to the extent of the danger her erratic driving was imposing on others and whether she was being intentionally reckless or was instead physically or mentally impaired. Given these disputes, summary judgment is inappropriate, and the Court **DENIES** the Motion on Plaintiff's excessive force claim.

2. Substantive Due Process - Fourteenth Amendment

Plaintiff also alleges that Defendants' conduct violated other constitutional rights, including substantive due process rights under the Fourteenth Amendment. The Supreme Court has made it clear, however, that "*all* claims that law enforcement officers have used excessive force . . . should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach. Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." *Graham v. Connor*, 490 U.S. 386, 395 (U.S. 1989) (emphasis in

original). As all of Plaintiff's section 1983 claims in the SAC are grounded in the officers' use of deadly force against Shirley, the only applicable constitutional violation is Plaintiff's Fourth Amendment claim.

3. Qualified Immunity

"Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). The Supreme Court has set forth a two-part analysis for considering the issue of qualified immunity. First, a district court must ask, "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier v. Katz*, 533 U.S. 194, 201 (2001). If this threshold question is answered affirmatively, then the court must ask "whether the right was clearly established." *Id.* A right is "clearly established" if, "in light of the specific context of the case," it would be "clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 201–02. "If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate." *Id.* at 202.

Here, Plaintiff has put forth a theory of the case that alleges the following: (1) Shirley had a mental or physical impairment at the time of the incident that caused her to drive erratically; (2) despite the impairment, Shirley was attempting to drive slowly, carefully, and avoid obstacles;

(3) Shirley's impairment caused her to be non-responsive and antagonistic towards the officers, but not violent; (4) when Shirley slowly pulled away from the officers' vehicles in an attempt to escape, she was not a danger to them or to any of the few pedestrians in the vicinity; (5) the officers had less deadly means to stop her vehicle; (6) the officers either knew or should have known that Shirley did not pose an immediate threat to anyone and thus deadly force was inappropriate; and (7) the officer's conduct was unreasonable because, rather than mitigate the harm to the public, they opened fire near many pedestrians and gas tanks. (*See generally* Opp'n.) Construed in the light most favorable to Plaintiff, the evidence plausibly supports these allegations.

It is unequivocal that unless the threat to others posed by Shirley was immediate and substantial, the use of deadly force is a violation of the Fourth Amendment. *Smith*, 394 F.3d at 704. Thus, if it was objectively unreasonable for the officers to believe that they or others were in immediate danger of death or serious physical injury, shooting Shirley to prevent her escape is clearly unconstitutional. Unreasonable excessive force that results in the deprivation of life is the most egregious of Fourth Amendment violations, and, as such, is "clearly established" under the law. As there is a genuine dispute on whether the officers' conduct was reasonable, the Court cannot determine whether qualified immunity applies at this stage.

Appendix B

B. *Monell* Liability (Sixth Cause of Action)

Defendants next move for summary judgment on Plaintiff's claim for municipal liability under *Monell v. Dep't of Social Services of City of New York*, 436 U.S. 658 (1978). *Monell* makes it clear that a municipality cannot be found liable under 42 U.S.C. § 1983 for merely employing a tortfeasor. *Id.* at 690-91. However, a municipality will be liable for constitutional violations that, "implement[ ] or execute[ ] a policy statement, ordinance, regulation, or decision officially adopted or promulgated by the body's officers." *Id.* at 690. In other words, a municipality is liable for acts arising from an "official policy or custom." *Id.* at 691. "Customs" or "usages" are covered by Section 1983 because they "could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law." *Id.* (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-68 (1970)).

There are three established scenarios in which a municipality may be liable for constitutional violations under § 1983. "First, a local government may be held liable 'when implementation of its official policies or established customs inflicts the constitutional injury.'" *Clouthier v. County of Contra Costa*, 591 F.3d 1232, 1249 (9th Cir. 2010) (quoting *Monell*, 436 U.S. at 708). Second, Plaintiffs can prevail on a Secton 1983 claim against a city by identifying acts of omission, such as a pervasive failure to train its employees, "when such omissions amount to the local government's own official policy." *Id.* Finally, Defendants "may be held liable under Section 1983 when 'the individual who committed the constitutional tort was

an official with final policy-making authority' or such an official 'ratified a subordinate's unconstitutional decision or action and the basis for it.'" *Id.* at 1250 (quoting *Gillette v. Delmore*, 979 F.2d 1342, 1346–47 (9th Cir. 1992) (internal quotation marks and citations omitted)).

In the opposition, Plaintiff generally argues that the *Monell* allegations against the City "are based on the policy of it failing to properly train its officers" that deadly force "should never be used against a moving vehicle unless there is an individual about to be run over and there is no opportunity to get out of the way." (Opp'n 21-22.) Plaintiff cites to no legal authority for this proposition, and it is directly contrary to established law. The use of deadly force is reasonable where "the officer has probably cause to believe that the suspect poses a threat of serious physical harm, either to the office or to others[.]" *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). If the driver is behaving recklessly and creating a serious risk of deadly collision, deadly force can be reasonable even if there is no person in the immediate path of the vehicle. *See Scott v. Harris*, 550 U.S. 372, 380 (2007); *Plumhoff*, 134 S. Ct. at 2012. Moreover, while Plaintiff cites to various City policies signed by Chief Matsuda that he claims are inadequate, he does not explain **why** or **how** these policies are responsible for Shirley's constitutional injury.

Plaintiff finally argues that summary judgment should be denied because, at the time of the opposition, the deposition of Chief Matsuda had not yet occurred. (Opp'n 22.) Plaintiff does not state what kind of evidence is expected from the deposition of Chief Matsuda, or how

this evidence could plausibly support a claim for liability under *Monell*. As Plaintiff has failed to supply a plausible legal basis for a *Monell* claim in its opposition, further discovery will be of little benefit, and the Court **GRANTS** Defendants' motion as to Plaintiff's *Monell* claim and **DISMISSES** Plaintiff's sixth cause of action.

C. Ralph Civil Rights Act (Fourth Cause of Action)

Defendants next move for summary judgment on Plaintiff's fourth cause of action for violation of the Ralph Civil Rights Act. California Civil Code § 51.7 creates the right for all persons "to be free from any violence, or intimidation by threat of violence, committed against their persons or property" on account of their "sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status." Cal. Civ. Code §§ 50(b), 51.7. The "elements of a claim brought under section 51.7 are: (1) the defendant threatened or committed violent acts against the plaintiff; (2) the defendant was motivated by his perception of plaintiff's race; (3) the plaintiff was harmed; and (4) the defendant's conduct was a substantial factor in causing the plaintiff's harm." *Knapps v. City of Oakland*, 647 F.Supp.2d 1129, 1167 (N.D. Cal. 2009).

To adequately plead a claim under section 51.7, Plaintiff "must allege facts to support a reasonable inference that the plaintiff's race was a motivating factor." *Boarman v. County of Sacramento*, No. 2:11-cv-02825, 2013 WL 38941767 at *2 (E.D. Cal. 2013); *see also Winarto*

v. Toshiba Am. Elecs. Components, Inc., 274 F.3d 1276, 1290 (9th Cir. 2001) ("[Plaintiff] may not rely on the sole conclusory allegation that [defendants'] conduct was 'because of [plaintiff's] race.'") Additionally, "a plaintiff's own speculation that racial animus motivated defendant's action is not sufficient to establish that race was actually a motivating factor." *Id.*; *see also Knapps*, 647 F.Supp.2d at 1167 (holding that allegations that plaintiff's race was different than the race of the defendant officers who arrested him without justification was insufficient to show by preponderance of the evidence that the officers' conduct was motivated by plaintiff's race).

In support of the Ralph claim, Plaintiff points to a 2017 news article that states that Chief Matsuda was "suspended over allegations that he made remarks against women, blacks, gays, and Muslims." (Chaiken Decl. Ex. M., ECF No. 121-11.) As an initial matter, newspaper articles are generally considered "inadmissible hearsay as to their content." *Larez v. City of Los Angeles*, 946 F.2d 630, 642 (9th Cir. 1991). Even taken as true, Chief Matsuda was not present at the incident in question, and Plaintiff presents no evidence connecting his alleged conduct with the events that took place that led to Shirley's death. Thus, Plaintiff has not presented sufficient evidence to sustain a claim for violation of the Ralph Civil Rights Act. While Plaintiff again moves to delay summary judgment to allow for the inclusion of evidence from the deposition of Chief Matsuda, Plaintiff has not plausibly asserted that the deposition testimony would provide any evidence that would sustain such a claim. The Court therefore **GRANTS** summary judgment as to Plaintiff's fourth cause of action.

D. Remaining State Law Claims (First, Second, Third, and Seventh Causes of Action)

Defendants argue that Plaintiff's remaining state law claims for wrongful death, negligence, the Bane Act, and battery fail because "the force used by the defendants was objectively reasonable under the circumstances." (Mot. 23-24.) As described above, Defendants have failed to prove that the force was objectively reasonable as a matter of law. Summary judgment is therefore **DENIED** as to Plaintiff's first, second, third, and seventh causes of action.

E. Punitive Damages

Defendants finally argue that even if a constitutional violation has occurred, Plaintiff is not entitled to punitive damages. A jury "may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983). To merit punitive damages, the defendant's conduct must be "the sort that calls for deterrence and punishment over and above that provided by compensatory awards." *Id.* at 54.

Here, Plaintiff has created a triable issue of fact as to whether opening fire on a mentally impaired individual who was not creating an immediate danger to others, as Plaintiff alleges, was objectively unreasonable. A jury who finds it to be so may also find that these actions involved "reckless or callous indifference" to Shirley's constitutional

rights. As such, the issue of punitive damages cannot be resolved at the summary judgment stage.

III. RULING

For the foregoing reasons, the Court **GRANTS IN PART** and **DENIES IN PART** Defendants' Motion for Summary Judgment.

IT IS SO ORDERED.

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, DATED JANUARY 30, 2020

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-56180
D.C. No. 2:17-cv-02373-SJO-GJS
Central District of California, Los Angeles

H.B., A MINOR, INDIVIDUALLY, AND AS SUCCESSOR IN INTEREST TO MICHELLE LEE SHIRLEY, BY AND THROUGH HIS GUARDIAN AD LITEM, RONNIE SHIRLEY,

Plaintiff-Appellee,

v.

CITY OF TORRANCE, A CALIFORNIA MUNICIPAL ENTITY; MARK MATSUDA, POLICE CHIEF; DUSTY GARVER, AKA DOE 1; JASON SENA, AKA DOE 2; SCOTT NAKAYAMA, AKA DOE 3,

Defendants-Appellants,

and

TORRANCE POLICE DEPARTMENT, A CALIFORNIA MUNICIPAL ENTITY; DOES, 1-100, INCLUSIVE,

Defendants.

Appendix C

ORDER

Before: SCHROEDER and FRIEDLAND, Circuit Judges, and SILVER,* District Judge.

The panel has voted to deny the petition for panel rehearing. Judge Friedland has voted to deny the petition for rehearing *en banc*, and Judges Schroeder and Silver have so recommended.

The full court has been advised of the petition for rehearing *en banc* and no judge has requested a vote on whether to rehear the matter *en banc*. Fed. R. App. P. 35.

The petition for panel rehearing and rehearing *en banc* are **DENIED.**

*. The Honorable Roslyn O. Silver, United States District Judge for the District of Arizona, sitting by designation.