

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CALEB SMITH, INDIVIDUALLY AND AS CO-SUCCESSOR-IN-INTEREST TO DECEDENT CALEB SMITH JR.; TAMOSHIA MASON, INDIVIDUALLY AND AS CO-SUCCESSOR-IN-INTEREST TO DECEDENT CALEB SMITH JR.; AND K.S. INDIVIDUALLY AND AS CO-SUCCESSOR-IN-INTEREST TO DECEDENT CALEB SMITH BY AND THROUGH HIS GUARDIAN AD LITEM TIFFANY TRAMMELL,

Plaintiffs,

v.

CITY OF HAYWARD, A MUNICIPAL CORPORATION; MICHAEL MILLER, IN HIS INDIVIDUAL CAPACITY AS A POLICE OFFICER FOR THE CITY OF HAYWARD; CHRISTOPHER SUOZZO IN HIS INDIVIDUAL CAPACITY AS A POLICE OFFICER FOR THE CITY OF HAYWARD; DYNATON TRAN IN HIS INDIVIDUAL CAPACITY AS A POLICE OFFICER FOR THE CITY OF HAYWARD; AND DOES 1-50, INCLUSIVE,

Defendants.

Case No.: 4:21-CV-08467-YGR

ORDER
GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; AND

GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION TO EXCLUDE TESTIMONY OF DEFENDANTS' EXPERT

Re: Dkt. No. 93, 94

This action arises from an officer-involved shooting. On March 16, 2021, defendant officers Miller, Suozzo, and Tran executed a plan to detain individuals associated with a blue Volvo tied to robberies. After identifying the Volvo in a motel parking lot, the officers used their police vehicles attempting to block the blue Volvo from moving. While positioning the vehicles, decedent Caleb Smith Jr. ("Smith") attempted to drive the Volvo out of its parking spot and escape. Smith rammed into the police vehicles with the Volvo while attempting to escape as the officers, now outside the

United States District Court
Northern District of California

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 vehicles, demanded that he stop. Defendants opened fire on Smith when he did not cease his escape
2 attempt, striking him with multiple rounds, and ultimately killing him.

3 Plaintiffs bring claims under 42 U.S.C. section 1983 for use of excessive force in violation
4 of the Fourth Amendment (Claim 1), the Fourteenth Amendment Right to Familial Relationship
5 (Claim 2), Negligence (Claim 3), and violation of the Bane Act, California Civil Code section 52.1
6 (Claim 4). Plaintiffs assert all four claims against defendant officers Miller, Suozzo, and Tran and
7 only claims 3 and 4 against defendant City of Hayward, alleging vicarious liability under California
8 Government Code section 815.2 for claim 3. Before the Court is defendants' motion for summary
9 judgment, or in the alternative, partial summary judgment, and plaintiff's motion to exclude
10 testimony from defendants' police procedures expert Robert Fonzi. (Dkt. Nos. 93, 94.)

11 **I. FACTUAL BACKGROUND**

12 The Court finds the following facts undisputed unless otherwise stated:

13 In early 2021, a blue Volvo was being investigated in connection to a series of purse
14 robberies and an armed home invasion. (Dkt. No. 107-1, Plaintiffs' Responsive Separate Statement
15 ("PRSS"), at 1; Dkt. No. 94-1, Ex. A., McGiboney Decl. ¶ 4.) The purse robberies sometimes
16 involved violence and firearms. (Dkt. No. 94-1, Ex. A., McGiboney Decl. ¶¶ 2-4.) In March 2021,
17 police officers observed a blue Volvo in at least two separate incidents. In one incident, the vehicle
18 fled at a high rate of speed, though it is not clear that the officer tried to stop the Volvo. (*Id.* at ¶ 6.)
19 In another incident, an officer tried to stop the vehicle, but the Volvo eluded capture. (*Id.* at ¶ 5.)
20 Based on these incidents and separate reports, a detective investigating the robberies noted that the
21 blue Volvo had no front license plate, a paper license plate, and a white side-view mirror, though
22 when, exactly, the detective compiled the distinguishing information is disputed. (*Id.* at 7; PRSS at
23 1-3.)

24 After receiving reports that a blue Volvo matching that description was parked in a motel
25 parking lot, the three officer defendants worked with the detective to form a plan to contain the
26 vehicle in the parking lot. (Dkt. No. 94-1, Ex. A., McGiboney Decl. ¶¶ 9-10.) At approximately
27 11:30 a.m. on March 16, 2021, the officers were informed that people were walking toward the
28 blue Volvo. (*Id.* ¶ 14.) The officers then moved to execute their plan, approaching the Volvo in two

1 SUVs. First, Tran approached in a police Explorer with activated emergency lights. Tran stopped
2 the Explorer with its front bumper contacting the Volvo in attempt to contain the vehicle, which
3 was backed into a parking spot. (PRSS at 7, 10; Dkt. No. 94-1, Ex. M-2, synchronized videos.)
4 Officers Miller and Suozzo then approached in a police Tahoe. (PRSS at 7, 10; Dkt. No. 94-1, Ex.
5 M-2, synchronized videos.) Smith, who was now in the Volvo’s driver seat, accelerated, pushing
6 the Explorer and contacting the Tahoe as it was approaching. He then reversed the Volvo, and
7 Miller and Suozzo exited their vehicle.¹ (Dkt. No. 94-1, Ex. M-2, synchronized videos.)

8 The officers pointed their firearms at the blue Volvo. Tran was positioned between the
9 Explorer’s vehicle frame and the door with his firearm aimed through the “V” slot between the
10 door and the car’s frame. (*Id.*) Miller was positioned similarly by the Tahoe’s driver seat. (*Id.*)
11 Suozzo, who arrived with Miller in the Tahoe, stood in the parking lot behind and to the right of the
12 Tahoe, with the car’s front positioned between his body and the Volvo, and behind and to the left of
13 the Explorer. (*Id.*) After the Volvo reversed, Tran re-entered the Explorer and drove forward,
14 contacting the left-front bumper of the Volvo again. (*Id.*) Smith then accelerated the Volvo, pushing
15 against the Explorer, breaking free from its containment, and then contacting the Tahoe as well.
16 (*Id.*; PRSS 14.) The officers “yelled verbal commands” for Smith to “turn the car off,” (Dkt. No.
17 94-1, Ex. C-1, Miller Statement to Det. Purnell, at 27:18-19; 29:9-10), and for Smith to “show [his]
18 hands.” (Dkt. No. 94-1, Ex. D-1, Suozzo Statement to Det. Kell, at 32:11-13; Dkt. No. 94-1, Ex. E-
19 1, Tran Statement to Det. Kell at 24:21-23.)²

20 As the Volvo accelerated, the officers opened fire, shooting seven times over the course of
21 3.1 seconds. (PRSS at 22.) Smith was shot three times. (Dkt. No. 94-1, Ex. B, Kell Decl. ¶ 9.) From
22 the point defendant Tran’s vehicle initially encountered the Volvo to the last gunshot was a period
23 of about 28.6 seconds. (PRSS at 18.)

24
25 ¹ Defendants argue that Tran left his vehicle while plaintiffs contend that he remained
26 inside. (PRSS at 12.) From the video evidence, it appears that he briefly exited the vehicle and re-
27 entered it before Smith attempted escape, and then was at least partially in the vehicle with the door
open for the remainder of the incident. (Dkt. No. 94-1, Ex. M-2, synchronized videos.)

28 ² The Court cites to the declarations of the officer defendants for illustrative purposes only.
As noted *infra* Part II.A., the officers’ statements are inadmissible at this stage.

1 After the gunshots, detective McGiboney arrived at the scene and ordered Smith to crawl
2 out of the car to him. Smith made his way to McGiboney, who, with Tran, handcuffed him before
3 rendering medical aid. (Dkt. No. 94-1, Ex. A, McGiboney Decl. ¶¶ 19-20.) Smith was then
4 transferred to the hospital where he died of his gunshot wounds that afternoon. (Dkt. No. 94-1, Ex.
5 B, Kell Decl. ¶ 9.) Officers Miller and Suozzo were admitted to the hospital for injuries including
6 arm bruising, and back and neck stiffness from the vehicle contact. (PRSS at 21; Dkt. No. 94-1, Ex.
7 C-1, Miller Decl., at 12; Dkt. No. 94-1, Ex. D-1, Suozzo Decl., at 9-10.) Following the shooting, a
8 Glock-17, 9mm firearm was found on the front passenger floor and an empty 30-round Glock
9 magazine was found in the trunk of the Volvo. (Dkt. No. 94-1, Ex. B, Kell Decl. ¶ 11.)

10 **II. DISCUSSION**

11 A party may move for summary judgment on a “claim or defense.” Fed. R. Civ. P. 56(a). As
12 a general matter, where the party moving for summary judgment would bear the burden of proof at
13 trial, it bears the initial burden of proof at summary judgment as to each material fact and must
14 show that no reasonable jury could find other than for the moving party. *See S. California Gas Co.*
15 *v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003) (internal citation omitted). Summary
16 judgment is appropriate only when “there is no genuine dispute as to any material fact and the
17 movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). To determine if this is so,
18 the court must view all evidence in the light most favorable to the nonmoving party and draw all
19 justified inferences on its behalf. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

20 Under Rule 56(d), the Court may defer addressing a motion to allow sufficient time to take
21 discovery if appropriate.

22 **A. Officer Statement Admissibility**

23 At the outset, plaintiffs object to the introduction of statements given by the defendant
24 officers to homicide detectives, arguing that defendants may not rely on such statements in lieu of
25 declarations and deposition testimony. Plaintiffs knew defendants intended on asserting their Fifth
26 Amendment rights pending the re-examination of whether criminal charges would be filed and yet
27 insisted on proceeding with the litigation nonetheless. (Dkt. No. 114 at 6.)

28

1 In general, defendants’ statements to detectives are inadmissible hearsay, as is the report of
2 the district attorney relative to prosecution of the officers, *i.e.* they are out of court statements being
3 offered to prove the truth of the matters asserted therein. *See* Fed. R. Evid. 801(c); 802. The Court
4 will consider the material for purposes of determining whether further discovery should be afforded
5 to plaintiffs.³ “At the summary judgment stage, [courts] do not focus on the admissibility of the
6 evidence's form. [Courts] instead focus on the admissibility of its contents.” *Fraser v. Goodale*, 342
7 F.3d 1032, 1036 (9th Cir. 2003).

8 Defendants argue that this case is similar to one involving police reports, and when a
9 “reports’ contents may be presented in an admissible form at trial, the Court may consider them at
10 the summary judgment stage.” (Dkt. No. 114 at 6 (citing *Lawrence v. City & Cty. of S.F.*, 258
11 F.Supp.3d 977, 986 (N.D. Cal. 2017))). Plaintiffs counter that allowing the same statements at trial
12 would prejudice them.

13 Defendants’ cases do not support their proposition. Rather, the cited cases allowing
14 otherwise inadmissible trial evidence at the summary judgment stage do so to determine whether
15 the nonmoving party may survive to the trial stage. *See Lawrence v. City & Cty. of S.F.*, 258
16 F.Supp.3d 977, 986 (N.D. Cal. 2017) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, (1986) for
17 the proposition that “a party need not ‘produce evidence in a form that would be admissible at trial
18 in order to avoid summary judgment.’”). Here, however, defendants ask the Court to admit their
19 evidence to grant summary judgment, thereby precluding a trial altogether. Plaintiffs’ objections
20 are therefore **SUSTAINED** for the purposes of this summary judgment motion.

21 **B. Fourth Amendment Claim: Qualified Immunity**

22 The doctrine of qualified immunity protects government officials from section 1983 liability
23 “unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their
24 conduct was ‘clearly established at the time.’” *District of Columbia v. Wesby*, 583 U.S. 48, 62–63
25 (2018) (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)).

27 ³ “A trial court can [] consider [only] admissible evidence in ruling on a motion for
28 summary judgment.” *Orr v. Bank of Am.*, 285 F.3d 764, 773 (9th Cir.2002); Fed.R.Civ.P. 56(e).

1 **1. Constitutional Right at Issue**

2 A police officer's application of deadly force to restrain a subject's movements "is a seizure
3 subject to the reasonableness requirement of the Fourth Amendment." *Tennessee v. Garner*, 471
4 U.S. 1, 7 (1985). Accordingly, any such use of deadly force must be "objectively reasonable."
5 *Graham v. Connor*, 490 U.S. 386, 397 (1989).

6 [T]he test of reasonableness under the Fourth Amendment is not
7 capable of precise definition or mechanical application . . . [and]
8 requires "careful attention to the facts and circumstances of each
9 particular case, including [1] the severity of the crime at issue, [2]
whether the suspect poses an immediate threat to the safety of the
officer or others, and [3] whether [the suspect] is actively resisting
arresting or attempting to evade arrest by flight.

10 *Id.* at 396 (cleaned up). "The most important *Graham* factor is whether the suspect posed an
11 immediate threat to anyone's safety." *Nehad v. Browder*, 929 F.3d 1125, 1132 (9th Cir. 2019).

12 The *Graham* factors "are not exclusive." *Bryan v. MacPherson*, 630 F.3d 805, 826 (9th Cir.
13 2010). Courts must "examine the totality of the circumstances and consider whatever specific
14 factors may be appropriate in a particular case, whether or not listed in *Graham*." *Id.* (internal
15 quotation marks omitted). "Other relevant factors may include the availability of less intrusive
16 force, whether proper warnings were given, and whether it should have been apparent to the officer
17 that the subject of the force used was mentally disturbed." *Estate of Lopez v. Gelhaus*, 871 F.3d
18 998, 1006 (9th Cir. 2017) (internal quotation marks omitted). "With respect to the possibility of less
19 intrusive force, officers need not employ the least intrusive means available, so long as they act
20 within a range of reasonable conduct." *Id.* (cleaned up).

21 When weighing these competing factors two key principles must be
22 kept in mind. First, the 'reasonableness' of a particular use of force
23 must be judged from the perspective of a reasonable officer on the
24 scene, rather than with the 20/20 vision of hindsight. Second, the
25 calculus of reasonableness must embody allowance for the fact that
26 police officers are often forced to make split-second judgments—in
circumstances that are tense, uncertain, and rapidly evolving—about
the amount of force that is necessary in a particular situation.

27 *Williams v. City of Sparks*, 112 F.4th 635, 643 (9th Cir. 2024) (cleaned up).

1 “Because the excessive force inquiry nearly always requires a jury to sift through disputed
2 factual contentions, and to draw inferences therefrom, we have held on many occasions that
3 summary judgment or judgment as a matter of law in excessive force cases should be granted
4 sparingly.” *Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir. 2005), *disapproved of on other*
5 *grounds by Lemos v. Cnty. of Sonoma*, 40 F.4th 1002 (9th Cir. 2022); *see also Liston v. County of*
6 *Riverside*, 120 F.3d 965, 976 n. 10 (9th Cir.1997) (as amended) (“We have held repeatedly that the
7 reasonableness of force used is ordinarily a question of fact for the jury.”)

8 Further, video evidence “alone [can] raise[] material questions of fact about the
9 reasonableness of [officers’] actions and the credibility of [the] post-hoc justification of [their]
10 conduct.” *Longoria v. Pinal Cnty.*, 873 F.3d 699, 706 (9th Cir. 2017), *cert denied* 138 S.Ct. 2601
11 (2018). “[T]he probative value of real-time videos and frozen frames is more appropriately a matter
12 for a jury to view and evaluate, not a matter for a court to resolve on summary judgment.” *Id.* at
13 706, n.5.

14 The Court considers the *Graham* factors:

15 *Severity of crime.* The underlying crimes concerned prior incidents of purse robberies
16 targeting older Asian females, sometimes involving dragging victims to the ground or breaking
17 their car windows, an armed home invasion, and a refusal to obey police officers and attempted
18 escape. (Dkt. No. 94-1, Ex. A., McGiboney Decl. ¶¶ 3-4.) The Ninth Circuit has counseled,
19 however, that the “intrusiveness of a seizure by means of deadly force is unmatched. The use of
20 deadly force implicates the highest level of Fourth Amendment interests both because the suspect
21 has a fundamental interest in his own life and because such force frustrates the interest of the
22 individual, and of society, in judicial determination of guilt and punishment.” *A.K.H. by & through*
23 *Landeros v. City of Tustin*, 837 F.3d 1005, 1011 (9th Cir. 2016) (quoting *Tennessee v. Garner*, 471
24 U.S. 1, 8 (1985) (internal quotations omitted)). This factor weighs in favor of plaintiffs, though the
25 evidence of prior firearm possession and violence is relevant as the Court considers the other
26 factors. *See S.R. Nehad v. Browder*, 929 F.3d 1125, 1136 (9th Cir. 2019) (“Although the danger a
27 suspect posed is a separate *Graham* consideration, courts, including this one, have used the severity
28 of the crime at issue as a proxy for the danger a suspect poses at the time force is applied.”).

1 *Immediate Threat*. With respect to whether “there was an immediate threat, a ‘simple
2 statement by an officer that he fears for his safety or the safety of others is not enough; there must
3 be objective factors to justify such a concern.’” *Mattos v. Agarano*, 661 F.3d 433, 441–42 (9th Cir.
4 2011) (quoting *Deorle v. Rutherford*, 272 F.3d 1272, 1281 (9th Cir. 2001)). A court cannot “simply
5 accept what may be a self-serving account by the police officer.” *Scott v. Henrich*, 39 F.3d 912, 915
6 (9th Cir. 1994).

7 Here, whether an immediate threat existed is disputed. Defendants identify the threat as
8 Smith’s car running over the officers. Defendants rely on several cases to support this position, *i.e.*
9 that deadly force is objectively reasonable when officers are in close proximity to a vehicle. (Dkt.
10 No. 114 at 11.) Most cases involved antecedent high-speed pursuits involving contact with police
11 vehicles, *see Scott v. Harris*, 550 U.S. 372 (2007), or threats to shoot officers, *see Mullenix v. Luna*,
12 577 U.S. 7, 8 (2015), which are probative of immediate threats to officers. Another involved
13 multiple attempts to drive at unprotected officers (in addition to a high-speed pursuit). *See Monzon*
14 *v. City of Murrieta*, 978 F.3d 1150, 1161 (9th Cir. 2020). Similarly, in *Wilkinson v. Torres*,
15 evidence showed an officer on the ground in front of a vehicle that was revving its engine and
16 spinning its tires. 610 F.3d 546, 551-52 (9th Cir. 2010). Likewise, *Plumhoff v. Rickard* involved an
17 antecedent high-speed chase and a prior near-miss with an on-foot officer. 572 U.S. 765, 776–77
18 (2014).

19 None of the cases cited involve the factual circumstance here, namely a parked car, pinned
20 into a space by larger police vehicles, which then attempted to escape the police vehicles. Also,
21 here, in the period both before and during which the shots were fired, Miller and Tran were either
22 inside their vehicles or had immediate access to the safety of their vehicles. Suozzo was on foot
23 behind the front-end of the Tahoe. Construing facts in the light most favorable to plaintiffs, and
24 based on the video evidence, Suozzo does not appear to be in the path of the Volvo, even if the
25 Volvo were to move the Tahoe out of its way and escape through the gap between the two cars. At
26 most, whether he was immediately in the path of Smith’s vehicle or could have stepped out of the
27 way is a matter of factual dispute because the Smith’s Volvo first had to push past the police SUV
28 before it could get anywhere close to hitting Suozzo.

1 Further, the experts also disagree. Plaintiffs’ expert concludes that Smith was not an
 2 immediate threat to the officers when they fired because his car would not have been able to push
 3 past both police vehicles. (Dkt. No. 107-10 at 12.) Defendants’ expert, on the other hand, concludes
 4 that the officers acted in an objectively reasonable matter, factoring perception and reaction time.⁴
 5 (See Dkt. No. 94-1, Ex. L, Fonzi Report, at 1.) Defendants also present an expert report concluding
 6 that “[a]dditional space between the vehicles may have been created had there been no discharge of
 7 firearms” and “the Volvo’s driver had been able to continue escape maneuvers, it is likely that the
 8 Volvo would have been able to impart forces on the Tahoe and/or Explorer that would create at
 9 least six additional inches of space between the HPD vehicles which would have been sufficient to
 10 allow the Volvo to escape between the two HPD vehicles.” (*Id.*, Ex. N-1, Pittman & Merala Report
 11 at 64-65.) The report does hedge its conclusion, however, and does not clarify how much time it
 12 might have taken to move the police vehicles out of the way. It, therefore, does not even establish
 13 that the Volvo would have escaped, let alone that it was an immediate threat to the officers.

14 Given these distinguishing characteristics, a reasonable jury could find that, from the
 15 perspective of the officers at the scene, the suspect did not pose an immediate threat to the safety of
 16 the officers or others even if he was attempting escape via vehicle. Case law does not proscribe
 17 otherwise.

18 *Resisting Arrest/Fleeing and Other Factors.* Finally, plaintiffs concede that Smith attempted
 19 to flee, however “an officer must give a warning before using deadly force ‘whenever practicable.’”
 20 *Gonzalez v. City of Anaheim*, 747 F.3d 789, 794 (9th Cir. 2014) (quoting *Harris v. Roderick*, 126

21
 22 ⁴ Plaintiffs move to exclude expert Fonzi’s sixth opinion regarding action and reaction time
 23 under Federal Rule of Evidence 702, because reaction time is outside Fonzi’s scope of expertise as
 24 a police practices expert, and he does not cite to any specific studies about reaction time. (See Dkt.
 25 No. 93 at 3–4.) The Court **GRANTS IN PART** and **DENIES IN PART** plaintiffs’ motion.

26 Basic concepts such as action and reaction can be within the expertise of a seasoned police
 27 officer such as Fonzi. (Dkt. No. 94-1, Ex. L., Fonzi Report, VI. Summary of Opinions, 6th
 28 Opinion, ¶¶ 30-33 at 18-19.) Here, however, Fonzi crosses the line when he seeks to opine on
 unidentified research, including references to “brain schematic” and “sensory cortex” to bolster his
 opinion without providing a foundation for this information. (*Id.* VIII. Law Enforcement Standards,
 ¶¶ 9-22 at 56-58.) Thus, while the Court does not strike opinion 6, it excludes the following
 opinions which lack foundation: *Id.* ¶ 11 (first sentence); ¶ 12; ¶¶ 17-19; ¶ 20 (second sentence);
 and ¶ 22 (second sentence).

1 F.3d 1189, 1201 (9th Cir.1997)). Here, defendants provided a warning and were pointing guns, but
2 did not explicitly warn of deadly force. Thus, the adequacy of defendants’ warning remains
3 disputed.⁵

4 Thus, based on the foregoing, the Court finds material disputes of fact as to whether the
5 officers’ actions were reasonable.

6 2. Clearly Established Law

7 “[W]hether an official protected by qualified immunity may be held personally liable for an
8 allegedly unlawful official action generally turns on the ‘objective legal reasonableness’ of the
9 action, assessed in light of the legal rules that were ‘clearly established’ at the time it was taken.”
10 *Messerschmidt v. Millender*, 565 U.S. 535, 546 (2012) (quoting *Anderson v. Creighton*, 483 U.S.
11 635, 639 (1987)). Courts do not “define clearly established law at too high a level of generality.”
12 *City of Tahlequah, Oklahoma v. Bond*, 595 U.S. 9, 12 (2021). “It is not enough that a rule be
13 suggested by then-existing precedent; the rule’s contours must be so well defined that it is clear to a
14 reasonable officer that his conduct was unlawful in the situation he confronted.” *Id.* (cleaned up).

15 General statements, however, “are not inherently incapable of giving fair and clear warning,
16 and in other instances a general constitutional rule already identified in the decisional law may
17 apply with obvious clarity to the specific conduct in question, even though ‘the very action in
18 question has not previously been held unlawful.” *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).
19 Qualified immunity is not granted “simply because there is no case on all fours prohibiting [a]
20 particular manifestation of unconstitutional conduct.” *San Jose Charter of Hells Angels Motorcycle*
21 *Club v. City of San Jose*, 402 F.3d 962, 975–76 (9th Cir. 2005) (cleaned up). “The plaintiff must
22 instead identify precedent that holds certain conduct is a constitutional violation under facts not
23

24
25 ⁵ Defendants might argue that the officers gave verbal commands to Smith and the Volvo’s
26 other occupants. The Ninth Circuit, however, has distinguished commands given to a car’s
27 occupant from warnings of lethal force. *See Bryan v. MacPherson*, 630 F.3d 805, 831 n.14 (9th Cir.
28 2010) (“Officer MacPherson now argues that he did warn Bryan. However, Officer MacPherson’s
own testimony belies this claim. Officer MacPherson has consistently testified that he repeatedly
ordered Bryan to remain in his vehicle. This clearly constitutes a command, but it hardly warns him
that if he failed to return to his car he would be shot with a taser.”).

1 distinguishable in a fair way from the facts presented in the case at hand.” *Orn v. City of Tacoma*,
2 949 F.3d 1167, 1178 (9th Cir. 2020) (cleaned up).

3 Here, the plaintiffs identify the right by reference to *Orn*, which holds that “to warrant the
4 use of deadly force, a motorist's prior interactions with police must have demonstrated that he either
5 was willing to injure an officer that got in the way of escape or was willing to persist in extremely
6 reckless behavior that threatened the lives of all those around.” *Id.* at 1177. In *Orn*, the court held
7 that “the car was moving slowly enough that the officer could have avoided any risk of injury by
8 simply stepping to the side, rendering his use of deadly force unreasonable.” *Orn v. City of*
9 *Tacoma*, 949 F.3d 1167, 1179 (9th Cir. 2020) (cleaned up). *Orn* thus clearly established that “a
10 moving vehicle can of course pose a threat of serious physical harm, but only if someone is at risk
11 of being struck by it.” *Id.* at 1174.

12 Defendants counter, citing to *Monzon*, arguing that their “use of deadly force” was clearly
13 established as reasonable given the circumstances involved a driver who ““was trying to evade
14 arrest in an aggressive manner involving attempted or actual acceleration of the vehicle.”” (Dkt. No.
15 94 at 20 (citing *Monzon v. City of Murrieta* 978 F.3d 1150, 1157–58 (9th Cir. 2020))). *Monzon*,
16 however, is distinguishable because it involved a high-speed pursuit in which the officers had
17 witnessed the suspect violate numerous laws, including running red lights and driving over 100
18 miles per hour. *Id.* at 1157. The court in that case also “consider[ed]” how the suspect “steered []
19 near and toward officers (who were on foot) on [a] dark, dead-end street” in the early morning
20 hours. *Id.* Here, the officers were not involved in any antecedent dangerous high-speed chase, they
21 did not know if Smith was the same person that had been investigated in crimes related to the
22 Volvo, the area was well-lit, in a motel parking lot midday, and there were police SUVs adjacent to
23 and/or between Smith’s car and the officers.

24 Defendants also argued, during oral argument, that *Monzon* should take priority over *Orn*
25 because the Ninth Circuit decided it after *Orn*. An even later case Ninth Circuit case, however,
26 cited *Orn* for the proposition that the Ninth Circuit has “consistently found use of deadly force to
27 stop a slow-moving vehicle unreasonable when the officers could have easily stepped out of the
28

1 vehicle's path to avoid danger.” *Villanueva v. California*, 986 F.3d 1158, 1169 (9th Cir. 2021)
 2 (citing *Orn*, 949 F.3d at 1174).

3 The Court agrees with plaintiffs that *Orn*’s rule is clearly established and controls this
 4 circumstance. As stated above: “to warrant the use of deadly force, a motorist's prior interactions
 5 with police must have demonstrated that he either was willing to injure an officer that got in the
 6 way of escape or was willing to persist in extremely reckless behavior that threatened the lives of
 7 all those around.” Here, officers used deadly force even though there were no unprotected officers
 8 in the path of a vehicle, especially given the location of the vehicles, officers, and time of day.
 9 Defendants’ articulation does not control this circumstance, nor does it stand for the proposition
 10 that defendants’ conduct was objectively constitutional.

11 Defendants’ motion for summary judgment on qualified immunity grounds is **DENIED**.

12 **C. Fourteenth Amendment Claim**

13 “The Fourteenth Amendment standard applicable to a claim by a relative demands more of
 14 such a plaintiff than a Fourth Amendment claim by the victim of an officer's actions.” *Ochoa v.*
 15 *City of Mesa*, 26 F.4th 1050, 1056–57 (9th Cir. 2022). On top of showing that the officers' actions
 16 were not reasonable, plaintiffs must show that their conduct “shocks the conscience.” *Id.* The
 17 standard for assessing an officer's conduct is different if the officer had time to deliberate before
 18 acting. If there was time to deliberate, courts consider if the officer acted with deliberate
 19 indifference. *Wilkinson v. Torres*, 610 F.3d 546, 554 (9th Cir. 2010). If not, courts must find that
 20 that “substantial evidence indicates [the officer] acted “with a purpose to harm *unrelated to*
 21 *legitimate law enforcement objectives.*” *Tan Lam v. City of Los Banos*, 976 F.3d 986, 1003 (9th Cir.
 22 2020), *cert. denied sub nom; Acosta v. Lam*, 211 L. Ed. 2d 14 (2021) (citations and internal
 23 quotation marks omitted).

24 Plaintiffs allege that defendants’ conduct shocked the conscience under either standard
 25 because, after the shooting, they demanded that Smith crawl out of the car “and then dragged him
 26 in handcuffs while he slowly bled out and died.” (Dkt. No. 107 at 19.)⁶ They further argue that
 27

28 ⁶ Detective McGiboney declares that he and officer Tran carried Smith toward first-
 responders for medical treatment. (Dkt. No. 94-1, Ex. A, McGiboney Decl. ¶ 22.)

1 defendant Miller shot after the car stopped “in apparent retribution for [the] attempt to evade” the
2 officers. (*Id.*) Defendants respond that the record shows only evidence of “legitimate law
3 enforcement objectives like a lawful detention/arrest, self-protection and protection of the public.”
4 (Dkt. No. 114 at 15.)

5 Regarding plaintiffs’ allegations about Smith’s treatment after the shooting, plaintiffs do not
6 present any evidence to raise a dispute of material fact because they cite only evidence that
7 detective McGiboney carried Smith after the shooting. McGiboney is not a defendant, so this claim
8 fails. Regarding plaintiffs’ claim that Miller’s final shot was somehow different from the others, or
9 retributive, the Court disagrees. It occurred within the same less-than-four-second timeframe as the
10 other shots and plaintiffs provide no evidence of “retribution.” Therefore, defendants’ motion on
11 plaintiffs’ Fourteenth Amendment claim is **GRANTED**.

12 **D. Negligence Claims**

13 Defendants argue that plaintiffs’ negligence claim fails because plaintiffs “must prove
14 unreasonable force as an element of the tort.” *Edson v. City of Anaheim*, 63 Cal.App.4th 1269, 1272
15 (1998). At the outset, California “negligence law regarding the use of deadly force overall is
16 broader than federal Fourth Amendment law.” *Tabares v. City of Huntington Beach*, 988 F.3d
17 1119, 1125 (9th Cir. 2021). Negligence “liability can arise if the tactical conduct and decisions
18 leading up to the use of deadly force show, as part of the totality of circumstances, that the use of
19 deadly force was unreasonable.” *Hayes*, 57 Cal.4th at 632.

20 Plaintiffs provide a laundry list of allegedly unreasonable tactics, including improper
21 vehicle containment, mismanagement of munitions, lack of deadly force warning, and positioning
22 of officers in the vehicle’s path. (Dkt. No. 107 at 20–21.) For the same reasons specified above
23 regarding the reasonableness of plaintiffs’ Fourth Amendment claims, facts are disputed as to
24 whether the defendants’ conduct was reasonable. Consequently, defendants’ motion as to this count
25 is **DENIED**.

26 **E. Bane Act Claim**

27 The Bane Act protects against interference of rights carried out “by threats, intimidation or
28 coercion.” *Venegas v. County of Los Angeles* (2007) 153 Cal. App. 4th 1230, 1242. The “threat,

1 intimidation or coercion” element of the claim does not have to be “transactionally independent”
2 from the constitutional violation alleged, and “the egregiousness required by [the Act] is tested by
3 whether the circumstances indicate the [defendant] had a specific intent to violate the [plaintiff’s
4 rights], not by whether the evidence shows something beyond the coercion ‘inherent’ in the
5 [violation].” *Cornell v. CCSF*, (2017) 17 Cal.App.5th 766 at 801–02. “Reckless disregard of
6 constitutional” guarantees can satisfy the intent element. *Id.* at 803. Here, the Court finds a dispute
7 of fact as to whether the officers acted with reckless disregard. Therefore, defendants’ motion as to
8 this claim is **DENIED**.

9 **F. State Immunities**

10 Defendants argue that they are immune under California Penal Code section 196 and
11 California Government Code section 820.4. First, the test for immunity under section 196 is the
12 same as that governing the reasonableness of deadly force under the Fourth Amendment. *Brown v.*
13 *Ransweiler*, 171 Cal. App. 4th 516, 527 (2009). Therefore, because facts are disputed regarding
14 whether the officers acted reasonably, *see supra* Part II.B.1., defendants’ motion on this count is
15 **DENIED**.

16 Similarly, California Government Code section 820.4 does not apply to negligent acts.
17 *Sullivan v. County of L.A.*, (1974) 12 Cal. 3d 710, 717 (describing § 820.4 as an “immunity for
18 public employees for their non-negligent acts in the execution or enforcement of any law . . .”).
19 Because facts are disputed as to whether defendants acted negligently, the Court cannot find that
20 this immunity applies. Therefore, defendants’ motion as to this claim is **DENIED**.

21 **III. CONCLUSION**

22 Having carefully considered the papers submitted and the pleadings in this action, and for
23 the reasons set forth below, the Court makes the following rulings:

24 (1) Plaintiffs’ objection to the introduction of officer statements is **SUSTAINED** in
25 part.

26 (2) Defendants’ motion for summary judgment on the Fourth Amendment claim on
27 qualified immunity grounds is **DENIED**.

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

(3) Defendants’ motion for summary judgment on the Fourteenth Amendment claim is **GRANTED**.

(4) Defendants’ motion to dismiss the negligence claim is **DENIED**.

(5) Defendants’ motion to dismiss the Bane Act claim is **DENIED**.


As mentioned during oral argument, in the interests of justice, the Court believes that clarity regarding the criminal proceedings should be forthcoming. Once resolved, the depositions of the officers should occur before trial proceeds. The trial date and all related dates are therefore **VACATED**.

The parties shall file a joint update within fourteen days of notification by the Alameda County District Attorney or by March 7, 2024 (and every 60 days thereafter) whichever comes first.

This terminates Docket Nos. 93, 94.

IT IS SO ORDERED.

Date: December 2, 2024


YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE