

No. 24-5618

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

JASON FUHR, individually
and as executor of the estate of
SHAUN FUHR,
and DAVONTA TANIYA FUHR,

Plaintiff-Appellants

v.

CITY OF SEATTLE
and NOAH ZECH,

Defendant-Appellees

On Appeal from the United States District Court
For the Western District of Washington at Seattle
No. 2:23-cv-00600
Hon. Barbara J. Rothstein

APPELLANT'S OPENING BRIEF

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I. A JURY SHOULD DECIDE WHETHER NOAH ZECH’S USE OF FORCE WAS REASONABLE.

A. The district court erred when it found that there were no genuine issues of material fact in dispute.

- i. Appellants dispute the district court’s assessment of the totality of the circumstances.
- ii. Appellants dispute Shaun’s conduct in moments before he was shot warranted use of deadly force.
- iii. Appellants dispute allegations of kidnapping.

II. THE DISTRICT COURT ERRED IN FINDING THAT OFFICER NOAH ZECH DID NOT VIOLATE SHAUN FUHR’S CONSTITUTIONAL RIGHTS WHEN HE SHOT HIM, AND THAT THE OFFICER IS ENTITLED TO QUALIFIED IMMUNITY. THIS COURT SHOULD REVERSE THE DISTRICT COURT’S DECISION.

A. This Court should revive the Fuhr family's Excessive Force claims, find that Noah Zech violated Shaun Fuhr's constitutional rights, and find that Noah Zech is not entitled to qualified immunity as a matter of law.

III. THE DISTRICT COURT INCORRECTLY DISMISSED APPELLANTS' WASHINGTON STATE CLAIMS AND THIS COURT SHOULD REVERSE THE DISTRICT COURT'S DECISION.

A. This Court should revive the Fuhr Family's state negligence, Washington law against discrimination, and tort of outrage claims.

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INTRODUCTION

The Estate of Shaun Fuhr, Jason Fuhr, and Davonta Fuhr (“Appellants”) come before this Court seeking reversal of the district court’s ruling on summary judgment against them.

Here, the issues being appealed are straightforward and are all based on the trial court’s error in dismissing Plaintiffs’ claims. The parties submitted contradictory evidence regarding whether Shaun Fuhr was an imminent threat to anyone at the time he was killed and the district court erroneously and improperly granted the Defendants’ motion for summary judgment. This Court should reverse the district court’s incorrect dismissal decision.

When police fail to abide by their own policy manual and state laws by using excessive force, they should be held liable. Shaun Fuhr’s life mattered. Appellees claim they had probable cause to seize Shaun, but his rights were violated when he was shot in the face by Ofc. Noah Zech rather than arrested so he could be held accountable through the criminal justice system. That day, Ofc. Zech seized a “window of opportunity,” and had a pre-determined intent to shoot Shaun Fuhr despite encountering him when he was calm and unarmed. Both of Shaun Fuhr’s hands were visibly wrapped around his baby girl. The video evidence shows that Shaun Fuhr was *not* fleeing nor evading police as he came face to face with Seattle police, and the Court disregarded this evidence. Shaun did not make any

threatening, furtive gestures, when he was approached by Ofc. Zech, and he was attempting to surrender. Shaun was not charging at the officers, nor did he make any verbal threats of any kind to any person. Yet the Court, in its evaluation of the totality of the circumstances, failed to adopt Appellants' version of events, failed to take into account Shaun's non-threatening actions seen on the body worn camera footage as he came around the corner of that building. The district court wrongly disregarded evidence that Shaun attempted to comply and surrender, just moments before he was shot and killed with his infant daughter in his arms.

The police rely on (1) "the severity of the crime at issue," (2) "whether the suspect poses an immediate threat to the safety of the officers or others," and (3) "whether [s]he is actively resisting arrest or attempting to evade arrest by flight." *Tennessee v. Garner*, 471 U.S. 1, 8–9, (1985).

However, the video clearly shows Shaun was holding his baby daughter in his arms, had no weapon and posed no threat to anyone. Shaun was not resisting arrest as seen on the the bodyworn police video.

In addition, there are conflicting accounts of where Shaun's hands were and what he was doing in his last moments. 2-ER-51-52, 101-102. The body worn video clearly shows Shaun walking around the corner of the building to encounter the police, like a deer in the headlights. On the other hand Ofc. Zech claims he had an "expression of noncompliance," that his hands were "down near his waist" or

“underneath the child” or “out of view” and that he was “looking at the fenceline” “like he wanted to jump it” to try and escape. 2-ER-52; 3-ER-361, 364. Ofc. Zech admits that what he perceived and what the body worn camera shows were different. 2-ER-82. Ofc. Zech stated in this report that he shot Shaun because he couldn’t see Shaun’s left hand; however, the video contradicts this and shows that both of Shaun’s had were occupied carrying this baby girl. 3-ER-361.

Here, the district erred when: 1) the trial court improperly granted the City of Seattle and Noah Zech’s summary judgment motion when material facts are in dispute, and 2) the trial court held Mr. Zech was entitled to qualified immunity on Fuhr’s federal and state claims. 1-ER-3-20.

Viewing Fuhr’s complaint and all supporting evidence, when construed in the light most favorable to them, their constitutional claims should have survived the motion for summary judgment because they clearly asserted proper constitutional violations and there were material facts in dispute. 2-ER-97-122; 3-ER-493-508.

The Fuhrs respectfully request that this Court reverse the district court’s ruling dismissing the claims against the City of Seattle and Noah Zech, and remand the case for trial.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the district court err in granting Appellees' Motion for Summary Judgment on Appellants' Fourth and Fourteenth Amendment rights claims and Washington state law claims where there are disputed material facts on all those claims? Yes.
2. Did the district court err in granting Appellees' Motion for Summary Judgment that Noah Zech was entitled to qualified immunity where there are disputed material facts on that issue? Yes.

STATEMENT OF THE CASE

BACKGROUND FACTS OF THE CASE

The Incident

De-escalation was not an option for Shaun Fuhr when he came face to face with SPD on the last day of his life. On April 29, 2020, Seattle police shot and killed Shaun, an unarmed father who held his infant daughter in his two visible hands. Shaun was a troubled youth who had celebrated his 24th birthday just over a month prior to his death. Shaun also had an alcoholic substance-abuse issue that needed a therapeutic resolution-- instead, the Seattle police, by way of SWAT officer Noah Zech, killed him.

Shaun's last day began when Ajiona Taylor, Shaun Fuhr's girlfriend and the mother of his child, called 911 and told dispatch she and her Shaun had an altercation at Rainier Playfield. 2-ER-298. She stated that Shaun, who was intoxicated, claimed he had fired a gun at her and left with their child. 3-ER-426. Ms. Taylor also stated there was a No-Contact Order between her and Shaun, but no evidence of this was ever presented by the police in discovery. 2-ER-298. Ms. Taylor got the police involved believing they would handle the situation appropriately. Shaun left the park with his daughter and disappeared into the neighborhood for half an hour. *Id.*

Despite Washington state law requiring police officers to incorporate de-escalation tactics to minimize the likelihood of the need to use force, the Seattle Police department responded to Ms. Taylor's 911 call with a SWAT team, a chopper, and a K-9 unit. 3-ER-343-44; RCW 10.120.020. There was a call for "hostage negotiator teams" and yet no negotiation was made with Shaun. 3-ER-343. The Appellees argue that they had probable cause to respond with force against Shaun for kidnapping, domestic violence, and assault with a deadly weapon. 3-ER-344. A bullet shell casing was recovered at Rainier Playfield where Shaun had fired his weapon, and Terrence Roy also reported to 911 that he saw Shaun leaving the park with his daughter. 3-ER-427. However, Shaun did not kidnap his own child as there is nothing to support this. The police did not produce

any type of No-Contact Order between Shaun and Ms. Taylor, or that it included the child. Yet SPD still concluded that this was a hostage situation and deployed its most powerful weapons. This wasn't for the safety of the baby, but rather this was an overreaction by deadly force based on multiple assumptions, and a disregard for police procedures.

RCW 10.120.020, in relevant part, states when deadly force and reasonable care are to be exercised by police.

“(2) DEADLY FORCE. Except as otherwise provided under this section, a peace officer may use deadly force against another person only when necessary to protect against an immediate threat of serious physical injury or death to the officer or another person. For purposes of this subsection: "Immediate threat of serious physical injury or death" means that, based on the totality of the circumstances, it is objectively reasonable to believe that a person has the present and apparent ability, opportunity, and intent to immediately cause death or serious bodily injury to the peace officer or another person.

(3) REASONABLE CARE. A peace officer shall use reasonable care when determining whether to use physical force or deadly force and when using any physical force or deadly force against another person. To that end, a peace officer shall:

(a) When possible, use all de-escalation tactics that are available and appropriate under the circumstances before using physical force;

(b) When using physical force, use the least amount of physical force necessary to overcome resistance under the circumstances. This includes a consideration of the characteristics and conditions of a person for the purposes of determining whether to use force against that person and, if force is necessary, determining the appropriate and least amount of force possible to effect a lawful purpose. Such characteristics and conditions may include, for example, whether the person: Is visibly pregnant, or states that they are pregnant; is known to be a minor, objectively appears to be a minor, or states that they are a minor; is known to be a vulnerable adult, or objectively appears to

be a vulnerable adult as defined in RCW [74.34.020](#); displays signs of mental, behavioral, or physical impairments or disabilities; is experiencing perceptual or cognitive impairments typically related to the use of alcohol, narcotics, hallucinogens, or other drugs; is suicidal; has limited English proficiency; or is in the presence of children;...”

The district court erred in its finding that deadly force was justified for the following reasons:

(1) Shaun did not pose an immediate threat to anyone when he was coming around the corner of the apartment building; (2) Shaun appeared to be surrendering to police; (3) there were no reports that Shaun ever directed any violence at any bystander, the police, nor his infant daughter.

Here, the totality of the circumstances was incorrectly assessed because Shaun’s conduct was visibly non-threatening, non-evasive and calm. Shaun’s intent not to cause anyone harm is patently clear. The police and district court wrongfully and solely focused on what Shaun was accused of doing prior to the actual physical encounter that ended his life. In fact, a significant amount of time elapsed, and Shaun’s conduct just before being shot was disregarded in concluding that deadly force was necessary.

Ofc. Noah Zech stated he decided to seize a “window of opportunity” and set himself in a shooting position *before* Shaun Fuhr even appeared around the corner. 4-ER-532 – 5-ER-904. This pre-calculated decision left no room for reasonable assessment and de-escalation, but only for a death sentence. In his

fully armored SWAT gear, Noah Zech charged down the alley determined to shoot and kill Shaun regardless of the current events happening before him.

At the time he was shot, Shaun was not resisting the police in any way, had no weapons in his hands, was under the influence of alcohol (which also likely affected his reaction time to police commands), and lastly, Shaun was holding his infant child. These factors should have been given more weight in their consideration of the totality of the circumstances for using de-escalation instead of deadly force. Instead, the district court bolsters the Appellees' argument that Shaun essentially deserved to be shot and killed "regardless" of his actions when encountering Ofc. Zech. 1-ER-14-15 lines 25-1. The district court order asserts that "Fuhr had committed crimes involving 'the infliction or threatened infliction of serious physical harm,' was attempting to evade arrest, and according to both witnesses and video footage, was posing an immediate threat to the safety of the infant he was carrying." 1-ER-16.

This Court should reverse the district court's ruling here.

PROCEDURAL HISTORY

On April 20, 2023, the Fuhr family filed a civil rights complaint pursuant to 42 U.S.C. § 1983, stating that the City of Seattle and Ofc. Zech violated their constitutional and state rights when Ofc. Zech shot and killed Shaun Fuhr. Dkt. 1, 3-ER-461-476. The Fuhrs claim that the City of Seattle and Ofc. Zech's actions

violated the Fuhrs’ constitutional rights under the 4th and 14th Amendments to the U.S. Constitution and their Washington state law rights. The Fuhrs timely requested and demanded a jury trial. *Id.* The City of Seattle filed a motion for summary judgment on June 7, 2024. Dkt. 28-38. On August 23, 2024, District Court Judge Barbara J. Rothstein granted the summary judgment motion in its entirety, dismissing the case. Dkt. 66, 1-ER-3—20. The summary judgment ruling is the subject of the Fuhr family’s instant appeal.

DISTRICT COURT’S FINDINGS

The district erred when it granted summary judgment and failed to adopt the Fuhrs’ version of events as true.

The district court improperly weighed the evidence in favor of the City of Seattle and Noah Zech. *Id.* The district court injected itself in the weighing the evidence and chose to weigh the evidence against the Fuhrs. The court decided that the officer’s intent and state of mind was an undisputed fact. 1-ER-9.

“It is undisputed that Zech’s *intent* was to stop a felony suspect from causing further—and possibly deadly—harm to a defenseless baby, among other legitimate law enforcement objectives discussed herein...” *Id.*

Additionally, the trial court failed to account for the fact that the Appellees’ story is significantly and materially inconsistent with the video evidence. 2-ER-98; 2-ER-51-52, 101-102; 3-ER-361. Video evidence supports that Shaun Fuhr was

seeking to comply with the officers' commands and attempt to safely surrender with his baby, which is why he was visibly and obviously unarmed. *Id.* Shaun's calm demeanor and both of his hands were apparently visible on the child show that he was not an immediate threat -- and he was seeking to surrender. This contradictory video evidence is a sufficient basis to deny summary judgment.

There are numerous material disputed facts the district court overlooked:

- 1) At the time he was shot, Shaun was not advancing towards officers, charging at them, or showing any signs of aggression or furtive gestures. Contrary to the video evidence, the police claim Shaun had one hand by his waist and one on his child. 3-ER-361. The video clearly shows Shaun had both of his hands out in front of him as he carried his child. 4-ER-532 – 5-ER-904. The video clearly shows Shaun holding his child in a way that ensures her safety. *Id.*
- 2) Shaun did not draw or display any weapon, nor did he point it at anyone. Without any furtive gestures, *in these specific moments*, Shaun was just a man holding his baby. Any reasonable officer should have taken this into account.
- 3) Shaun did not make any verbal threats to his child, officers, himself, or anyone else.

- 4) Shaun can be clearly seen stopping when instructed and attempting to comply with the officers' commands. *Id.*, 2-ER-99 lines 11-12. Any argument that Shaun did not immediately stop needs to take into account that Shaun was intoxicated and this affects his reaction time. However, it is clear on the video that Shaun stopped and was attempting to stop as he appeared to be like a deer in headlights upon being confronted by SPD, and was attempting to surrender.
- 5) Shaun was not fleeing, evading police, or attempting to escape in any way when he came face to face with Seattle Police officers. Despite Zech's claim that Shaun was eyeing the fence, the video shows Shaun did not in any way gauge an escape route.
- 6) The district court went on to assume that because of Shaun's alleged conduct prior to coming around the apartment building corner, there was no reason he should not have been shot. 1-ER-14.
- 7) The district court essentially ruled any individual who commits a felony can be shot and killed at any time no matter if occurred hours before or whether the individual is surrendering. The district court also assumed that when Shaun was about 35-40 yards away from police at the opposite end of the residential block with a fence between him and police, that Shaun heard police commands and did not comply. 2-ER-101.

8) Additionally, the district court assumed that the City of Seattle had probable cause for all of the alleged crimes they accused Shaun of. However, Shaun is the biological father of L.F. Despite Ajiona Taylor's claims that there was a No-Contact Order in place, the City never looked for such an order on the day Shaun was killed to confirm that there was 1) a No-Contact order, or 2) to confirm that L.F. was in fact included in this order. To date, Appellees have never presented any evidence of any order regarding Shaun from having his baby in his care and custody. There was also no evidence that Shaun's firearm was ever directed at the child or used to take her. Therefore, probable cause for kidnapping was assumed. The City's strategy to approach the incident as a hostage situation was blown out of proportion.

The district court failed to weigh the evidence in light of the nonmoving party, and instead accepted the Police's arguments in their entirety. The district court accepted the exaggerated accounts of Shaun's behavior at the Playfield, but completely downplayed and dismissed his non-threatening conduct after coming around the corner of the apartment building to face police officers, including his attempt to surrender. Therefore, the district court erred when it granted the City of Seattle and Noah Zech's request for summary judgment on the Fuhr family's

claims because it made evidentiary determinations that should have been reserved for the jury.

The court stated that the Fuhrs' claim for negligence failed. 1-ER-17-18. The Court concluded that "Plaintiffs have demonstrated that there is, at a minimum, a question of fact as to whether Defendants owed Fuhr a duty of reasonable care" but claimed "Plaintiffs fail to provide any specific evidence or argument regarding how that duty may have been breached, or how a breach may have been the proximate cause of Fuhr's injury." *Id.* The court went on to conclude that "[g]iven the myriad intervening causes indisputably contributing to Fuhr's death, this general and conclusory assertion is inadequate to withstand summary judgment." *Id.*

Appellants disagree that there were any intervening causes other than the Seattle Police Department that contributed to Shaun's death, and believe the question of whether the duty was breached is a question of fact that should be answered by the jury, not the judge.

Notwithstanding all of these contradictions, and assumptions in favor of the officer, the district court claims that there are no disputed facts, and/or despite such disputes that the Fuhr family's claims were improperly pleaded. However, the evidence in this case clearly shows that factual disputes on the central issues in this

case exist, that the Appellants' claims are in fact proper, and those claims and disputes should be resolved by a jury.

Further, as previously stated, RCW 10.120.020(3) provides the standard of reasonable care that must be implemented when officers employ force. Any failure to implement such standard of care is a breach of that care. The Fuhrs made a sound argument when stating that "SPD officers were negligent when they failed to exercise reasonable care..." 2-ER-121 line 13-15. Supporting this, Appellants included Officer Aguilar's statement that he did not believe Shaun was given enough time to comply with police commands. 2-ER-94 line 7-9. This is a sufficient showing of breach of duty in addition to Officer Zech's firing the fatal shot with his AR-15 as causation.

SUMMARY OF THE LEGAL ARGUMENTS

Standard of Review For Summary Judgment Orders

This Court reviews grants of summary judgment de novo. *Buono v. Norton*, 371 F.3d 543, 545 (9th Cir. 2004). This Court will not affirm a grant of summary judgment if there are any genuine issues of material fact, or if the district court misapplied the substantive law. *Blankenhorn v. City of Orange*, 485 F.3d 463, 470 (9th Cir. 2007). "Summary judgment is appropriate only 'if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as

a matter of law.’ ” *Stoot v. City of Everett*, 582 F.3d 910, 918 (9th Cir. 2009) (quoting Fed. R. Civ. P. 56(c)). Summary judgment is proper if the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The movant bears the initial burden to demonstrate that absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A genuine dispute over a material fact exists if there is sufficient evidence for a reasonable jury to return a verdict for the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986).

In determining whether the factfinder could reasonably find in the nonmoving party’s favor, “the court must draw all reasonable inferences in favor of the non-moving party, and it may not make credibility determinations or weigh the evidence.” *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000); see also *Galvin v. Hay*, 374 F.3d 739, 745 (9th Cir. 2004). (In reviewing a summary judgment ruling, we draw all reasonable inferences in favor of the non-moving party. Both questions of fact as well as questions of witness credibility fall within the “exclusive province of the [jury] ...” *Long v. Johnson*, 736 F.3d 891, 896 (9th Cir. 2013) (quoting *U.S. v. Archdale*, 229 F.3d 861, 867 (9th Cir. 2000)

The Court is obligated to construe the record in the light most favorable to the party opposing summary judgment. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

Evidence is to be viewed “in the light most favorable to the non-moving party, and all justifiable inferences are to be drawn in its favor.” *Slumier v. Verity, Inc.*, 606 F.3d 584, 587 (9th Cir. 2010)(citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). “[C]ourts may not resolve genuine disputes of fact in favor of the party seeking summary judgment.” *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014).

Standard of Review for Qualified Immunity

The Court reviews an officer's entitlement to qualified immunity de novo. *Glenn v. Washington Cty.*, 673 F.3d 864, 870 (9th Cir. 2011). Summary judgment should not be granted before the completion of discovery. *Harris v. Duty Free Shoppers Ltd. P'ship*, 940 R.2d 1272, 1276 (9th Cir. 1991).

Genuine questions of material fact as to whether a suspect involved in a police chase had ceased fleeing and was attempting to surrender at the time the police officer in a canine unit commanded the dog to attack the suspect precluded entry of summary judgment, on qualified immunity theory, for officers who were purportedly present when the attack occurred and failed to take steps to prevent it; no objective officer would think it reasonable to release a dog on an individual

who was indicating surrender, so the officers were not entitled to qualified immunity at summary judgment stage of civil rights action. *Maye v. Vargas*, 638 F.Supp.2d 256 D. Conn. (2009); Factual disputes as to whether police officer warned a suspect before firing a gun, whether suspect was turned away from the officer during the shooting, and whether the officer could see that suspect's hands were empty were material to the question of whether the officer violated the suspect's clearly established right to be free from unreasonable seizure, precluding summary judgment in favor of the officer on ground of qualified immunity in § 1983 action alleging excessive force arising from an incident in which the suspect was shot four times when officers attempted to detain him. *Poole v. City of Shreveport*, C.A.5 13 F.4th 420 (La. 2021); Genuine issues of material fact existed as to whether a police officer saw a fleeing suspect during an on-foot pursuit drop the gun he was carrying when he was ordered to do so, and therefore whether officer knew the suspect was unarmed when he fatally shot the suspect, and whether the officer who fatally shot the suspect was unreasonable in believing the suspect was taking a firing position rather than surrendering after the suspect fell to the ground, precluding summary judgment on qualified immunity grounds in § 1983 action brought by deceased suspect's estate alleging excessive force in violation of Fourth Amendment. *Williams v. City of Burlington, Iowa*, C.A.8 (Iowa) 2022, 27 F.4th 1346.

Summary Judgment In Excessive Force Cases Is Disfavored

The Ninth Circuit has repeatedly held that summary judgment in excessive force cases should be granted sparingly, and the courts must conduct “strict” summary judgment analysis. *See Gonzalez v. City of Santa Monica* 88 Fed. Appx. 161 (9th Cir. 2003) (the Court of Appeals reversed the district court when it granted the Defendants’ motion for summary judgment because the district court failed to review Gonzalez’s complaint and supporting evidence in the light most favorable to him); *see also Glenn*, 673 F.3d 864 (Court of Appeals reversing grant of summary judgment in deadly force case because, generously viewing facts in light most favorable to the victim, facts concerning immediacy of threat posed by the suspect suggested that decedent was likely trying to harm himself and not the officers or others, and therefore raised a genuine dispute of material fact under *Graham v. Connor*, 490 U.S. 386 (1989); *Smith v. City of Hemet*, 394 F.3d 689, 690 (9th Cir. 2005) (Court of Appeals reversing grant of summary judgment in excessive force case involving police’s response to domestic violence complaint, where victim of police use of force, the alleged male perpetrator, refused to comply with police commands, because, generously viewing facts in light most favorable to the victim, testimony of officers and victim raised genuine disputes of fact with regard to each of the three *Graham* factors); *Santos v. Gates*, 287 F.3d 846 (9th Cir. 2002) (Court of Appeals reversing grant of summary judgment in excessive force

case where, generously viewing facts in light most favorable to the victim, the facts—officers brought to the ground victim who appeared to be intoxicated in public and did not pose an immediate risk to the officers or others, breaking the victim’s back—created genuine disputes of material facts under *Graham*).¹

For this reason, we have explained that summary judgment should be granted “sparingly” in deadly force cases and courts must take special care to “ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story—the person shot dead—is unable to testify.” *Gonzalez v. City of Anaheim*, 747 F.3d 789, 795 (quoting *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994)); see *Newmaker v. City of Fortuna*, 842 F.3d 1108, 1116 (9th Cir. 2016) (explaining that summary judgment is not appropriate in a deadly force case if the

¹ The Seventh Circuit has similarly analyzed cases involving police officers’ use of deadly force when the police officers are the only surviving witnesses. See, e.g., *Abdullahi v. City of Madison*, 423 F.3d 763, 773 (7th Cir. 2005) (Court of Appeals reversing grant of summary judgment in deadly force case where, generously viewing facts in light most favorable to the victim, medical expert testimony conflicted regarding cause of victim’s lethal injuries—allegedly caused by an officer kneeling on the victim’s shoulder during an arrest—and therefore raised genuine dispute of material fact under *Graham*).

plaintiff's claim turns on an officer's credibility, and credibility is genuinely in doubt).

The defendants must prove the actions are overwhelmingly reasonable under the analysis. *See Graham*, 490 U.S. at 396; *see, e.g., Scott*, 39 F.3d at 915 (holding summary judgment appropriate where facts, testimony, and circumstantial evidence showed no genuine dispute of fact, and where officers who applied deadly force “*clearly*” satisfied the *Graham* test, as suspect raised a gun at officers when officers opened the door and identified themselves as police officers).

As the next section demonstrates, consideration of Appellants' claims under the Fourth and Fourteenth Amendment and related state law claims demonstrates reversible error by the district court.

ARGUMENT

I. A JURY SHOULD DECIDE WHETHER NOAH ZECH'S USE OF FORCE WAS REASONABLE.

The district court erred when it concluded that there are no genuine issues of material fact in dispute. Where disputed issues of material fact exist, the Court must assume the version of facts presented by the plaintiff. *Sanchez v. Canales*, 574 F.3d 1169, 1173 (9th Cir. 2009).

First, the district court erred in dismissing the Fuhr family's claims based on Jason Fuhr being an improper representative of the estate. A court-appointed personal representative of Shaun Fuhr's estate was appointed on July 25, 2024.

Dkt. 55, 57. Although this was after Appellees filed their motion for summary judgment, it was before the court ruled on the motion and dismissed the case. Meaning, at the time the district court dismissed the case, a proper personal representative of the estate had already been appointed to properly assert the Appellants' claims moving forward. This Court should reverse the district court's decision to dismiss for unqualified personal representative because a personal representative was appointed for the Estate.

Second, when evaluating a Fourth Amendment claim of excessive force, courts examine whether the officer's actions are objectively reasonable given the totality of the circumstances. *Byrd v. Phoenix Police Dep't*, 885 F.d 639, 642 (9th Cir. 2018); *Bryan v. MacPherson*, 630 F.3d 805, 823 (9th Cir. 2010). This inquiry must balance the nature of the intrusion upon an individual's rights against the countervailing government interests at stake, without regard for the officers' underlying intent or motivations. *Graham*, 490 U.S. at 396-97. Whether use of force was reasonable will depend on the facts of the particular case, including, but not limited to, whether the suspect posed an immediate threat to anyone, whether the suspect resisted or attempted to evade arrest, and the severity of the crime at issue. *Id.* at 396. Only information known to the officer at the time the conduct occurred is relevant. *Cty. of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1546–47 (2017); *Glenn*, 673 F.3d at 873.

The factors identified in *Graham* are not exclusive. *See Bryan*, 630 F.3d at 826. When assessing the officer's conduct, a court must examine "the totality of the circumstances and consider 'whatever specific factors may be appropriate in a particular case, whether or not listed in *Graham*.'" *Id.* (quoting *Franklin v. Foxworth*, 31 F.3d 873, 876 (9th Cir. 1994)). Other relevant factors may include the availability of less intrusive force, whether proper warnings were given, and whether it should have been apparent to the officer that the subject of the force used was mentally disturbed. *See, e.g., Bryan*, 630 F.3d at 831; *Deorle v. Rutherford*, 272 F.3d 1272, 1282–83 (9th Cir. 2001).

Severity of the Crime at Issue

Relevant to the reasonableness inquiry is the severity of the crime at issue. *Graham*, 490 U.S. at 396. The *Graham* factors are not "considered in a vacuum," but must be weighed "in relation to the amount of force used to effect [the] particular seizure." *Smith*, 394 F.3d at 701 (en banc) (quoting *Chew v. Gates*, 27 F.3d 1432, 1441 (9th Cir. 1994)). We take the perspective of the officer on the scene without the benefit of 20/20 hindsight. *Graham*, 490 U.S. at 396–97.

Because deadly force involves a serious intrusion on Fourth Amendment rights, deadly force is reasonable only if the officer has probable cause to believe the suspect poses an immediate and significant threat of death or serious physical

injury to the officer or others. *Gonzalez*, 747 F.3d at 793 (quoting *Scott*, 39 F.3d at 914); see *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). The Ninth Circuit has also repeatedly stated that an officer must give warning before using deadly force “whenever practicable.” *Gonzalez*, 747 F.3d at 794 (quoting *Harris v. Roderick*, 126 F.3d, 1189, 1201 (9th Cir. 1997)).

Deadly force cases present additional, heightened challenges because defendant officers are often the only surviving eyewitnesses. See, e.g., *Gonzalez*, 747 F.3d at 794; *Scott*, 39 F.3d at 915.

When other evidence in the record, “such as medical reports, contemporaneous statements by the officer, the available physical evidence, and any expert testimony proffered by the plaintiff is inconsistent with material evidence offered by the defendant, “[q]ualified immunity should not be granted.” *Newmaker*, 842 F.3d at 1116 (alterations, quotation marks, and citation omitted). In such cases, district courts must allow juries to consider the evidence that contradicted the officers’ version of events and decide whether they were persuaded by the officers’ testimony. See, e.g., *Bator v. State of Hawai’i*, 39 F.3d 1021, 1026 (9th Cir. 1994) (“At the summary judgment stage, . . . the district court may not make credibility determinations or weigh conflicting evidence.”).

In *Tennessee v. Garner*, the Court held that the use of deadly force “to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally

unreasonable." Furthermore, the Court observed that "[i]t is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." Moreover, whenever practicable, a warning must be given before deadly force is employed. *Garner*, 471 U.S. at 11-12, 105 S.Ct. at 1701-02.

Finally, "[t]o the extent that there is a difference between the parties [version of the facts], however, we look to the version most favorable to the plaintiff, the non-moving party. *Smith*, 394 F. 3d at 693.

The district court wrongfully overlooked Shaun Fuhr's conduct immediately before Noah Zech fired his fatal kill shot. In *Cunrow*, the Ninth Circuit rejected a request for qualified immunity based on evidence that contradicted the officers' account of a fatal shooting. *Cunrow v. Ridgecrest Police*, 952 F. 2d 321 (9th Cir. 1991).

There, as here, the crux of the case turned on what the jury would decide about what happened in the moments before the shooting. In *Cunrow*, Steven Cunrow, and Mercedes Taylor called the police in response to the belief that someone had shot and shattered the kitchen window of Cunrow's home. *Id.* at 322. Officers determined no one had shot at them. Cunrow had retrieved his HK-91 semi-automatic rifle in response to the window shattering and confirmed with police that

possession of the gun was legal. The following night, while interviewing neighbors, an officer “heard shouting” coming from Cunrow’s home. At least two officers claimed that Cunrow was “slapping and shaking” Taylor and called for backup.

In an attempt to enter the home, unable to break down the door, Cunrow allegedly reached for the HK-91 and pointed it at an officer. This officer shot and killed Cunrow in response. However, according to a statement from Ms. Taylor, Cunrow did not reach for the gun before the officer shot him in the back with the first shot, and he grabbed the weapon by the muzzle while fleeing his home.

The Ninth Circuit found that, in the light most favorable to the nonmoving party, the defendants-appellants were not entitled to qualified immunity and the district court properly denied the summary judgment motion.

Similarly, in the case at hand, the Appellants and Appellees have two sharply contested versions of what happened with the video evidence supporting the Fuhrs’ claims. At the time Shaun Fuhr was shot, it was established that police could use deadly force to effectuate the arrest of a fleeing felon, if, under the circumstances, he reasonably believed the use of force was necessary to protect himself or others from death or serious physical harm. *Id.* at 325. Under Appellants’ version of the events, Noah Zech could not have reasonably believed that deadly force was lawful because in the moment he shot him, Shaun did not possess, display, reach for, or

point a weapon of any kind at police, his daughter, or himself at any time. Shaun was facing the officers, with both hands visibly on his daughter's body as he carried her in front of his own body. Similar to the Plaintiff in *Poole v. City of Shreveport*, in which the court denied summary judgment because there was factual disputes as to whether officer could see that the suspect's hands were empty were material to the question of whether the officer violated the suspect's clearly established right to be free from unreasonable seizure, precluding summary judgment in favor of officer on ground of qualified immunity in § 1983 action alleging excessive force arising from an incident in which the suspect was shot four times when officers attempted to detain him. *Id.* In this case, the Court should reverse the district court's ruling and deny summary judgment because there is a factual dispute as to Shaun's hands and whether they were visible and occupied when he was carrying his baby daughter. 2-ER-51-52, 101-102; 4; 3-ER-361. Here, the district court weighed the evidence when it interpreted the video evidence which is a role for the jury, not the court. 4-ER-532 – 5-ER-904. Shaun was not fleeing or evading police any longer, nor was he looking anywhere for an escape route. Shaun was attempting to surrender to the police.

In *Williams v. City of Burlington*, the Court held there is a question of fact of whether a fatal police shooting was unreasonable when believing suspect was surrendering rather than fleeing, and that this precludes summary judgment on

qualified immunity grounds in § 1983. Like the court held in *Williams*, in this case, there is also a question of fact as to whether Shaun was attempting to surrender and not flee, thus, this Court should reverse the district court's ruling.

Therefore, viewing the evidence in light most favorable to the nonmoving party, the Appellees are not entitled to qualified immunity. *Id.* The district court grossly expands Shaun's conduct prior to his confrontation with police and prejudicially ignores his non-evasive, non-aggressive demeanor once officers actually encountered him. A proper analysis of the totality of the circumstances should *not* be based on whether Shaun posed an immediate threat to others solely before the face to face confrontation by police. This final interaction with him shows a completely different version of Shaun through his non-aggressive conduct, as seen on the video evidence. The Fuhrs' expert also confirms that Shaun was attempting to comply and surrender. 2-ER-48, 52. Whatever alleged probable cause the City did have, should have been decided by the jury or court; not in the alley where Shaun Fuhr was shot dead with his baby in his arms.

Additionally, Ofc. Zech should have known Shaun was not holding a weapon of any kind when he was shot and killed. 2-ER-82-83; 4-ER-532 – 5-ER-904. Shaun had both hands on his child and the video evidence obviously shows this. *Id.* Shaun's hands were not down near his waist, nor was he making any gestures suggesting he was reaching for a weapon of some kind. 2-ER-52, 101-102; 3-ER-

361. Zech also confirmed that what he perceived in those moments before taking Shaun's life were not the same as what the video captures. 2-ER-82 line 1-3. Zech's own statements contradict video evidence with at least seven inconsistencies. 2-ER-52. Zech states that Shaun took one more step after he commanded him to "stop!", however Zech fired his rifle simultaneous to other officers' commands. 2-ER-47-48 section 13. Officer Zech asserts that Shaun had "an expression of noncompliance on his face" and that he was "eyeing the fence" to escape, but it is clear from the video that none of those things were actually taking place. 2-ER-51-52; 3-ER-361-62, 364; 4-ER-532 – 5-ER-904. The jury should view the video evidence and decide.

The district court accepted all inferences in favor of the police and disregarded that actual actions of Shaun as seen on the video. Shaun was not a threat to his child in the way he was carrying her, his hands were clearly visible, his demeanor was calm, and he was not evading police in the last moments before he was shot. The district court improperly analyzed the totality of the circumstances by claiming that "[r]egardless....it simply cannot be disputed that Fuhr's behavior in the 30 minutes leading up to his death was an immediate threat to the life and safety of the baby." 1-ER-14-15. At no time was the way in which Shaun carried his child an immediate threat to her life. Other than her father's blood on her clothes, and the violent fall she suffered when he was shot, the child

was unscathed. Additionally, the time prior to Shaun's face to face police encounter is significantly different from his actions and demeanor when he came around the corner of the apartment building. Shaun was attempting to comply and surrender, he was *not* an immediate threat to the safety of his baby girl or the police, thus, the district court's analysis was improper and prejudicial.

The totality of the circumstances included Shaun's conduct in the moment he was confronted by police.

The district court and the police focus primarily on Shaun's alleged conduct in the time before and leading up to the moment he was shot and killed. 1-ER-14-15.

In the deadly force context, courts cannot "simply accept what may be a self-serving account by the police officer." (Emphasis Added) *See Cruz v. City of Anaheim*, 765 F.3d 1076, 1079 (9th Cir. 2014) citing *Scott*, 39 F.3d at 915. Because the person most likely to rebut the officers' version of events — the one killed — can't testify, "[t]he judge must carefully examine all the evidence in the record ... to determine whether the officer's story is internally consistent and consistent with other known facts." *Id.*; *see also Gonzales*, 747 F.3d at 794-95 (en banc). Here, there is video footage that captures exactly what happened in Shaun's last moments alive. The jury should

weigh this critical evidence. The Court must also consider any "circumstantial evidence that, if believed, would tend to discredit the police officer's story." *Scott*, 39 F.3d at 915.

In *Cruz v. City of Anaheim*, an informant told police officer Nathan Stauber that Caesar Cruz was a gang member who sold methamphetamine and carried a gun. *Id.* at 1077. The informant told Officer Stauber where Cruz was, gave a description of his vehicle, said that Cruz was armed with a nine- millimeter pistol in his waistband, and that he was “not going back to prison.”. *Id.* at 1078. Officer Stauber relayed this message to other officers and they arrived at Cruz’s location with multiple police vehicles. *Id.* Cruz had a broken taillight so they executed a traffic stop. *Id.* Cruz pulled into a Walmart parking lot, and police surrounded him. *Id.* Cruz tried to escape, but eventually stopped, and the officers got out of their vehicles with weapons drawn. *Id.* Cruz opened his door, and the police commanded him to get on the ground as he was emerging from the vehicle. *Id.* According to four of the officers, he ignored their commands and instead reached for the waistband of his pants. *Id.* Fearing that he was reaching for a gun, all five officers opened fire. *Id.* They fired about twenty shots in two to three seconds. *Id.* Bystander-witness, Norman Harms, saw most of the event from the other side of Cruz's vehicle, but he could only see Cruz's feet and the top

of his head at the time of the shooting, so he did not see whether or not Cruz did, in fact, reach for his waistband. *Id.* After they ceased fire, the officers approached Cruz's body to find it tangled in his seat belt and hanging from it. *Id.* After they cut his body loose, they found no weapon on him, but a loaded nine-millimeter handgun was later recovered from the passenger seat. *Id.* The district court granted summary judgment to defendants on all claims, finding that Cruz's decedents hadn't presented anything to contest the officers' version of events. *Id.*

The Ninth Circuit Court of Appeals held that the district court erred in ruling that only an unreasonable jury would disbelieve the four officers' version of events and reversed and remanded. *Id.* at 1080-81. The court reversed the district court's *Monell* decision regarding specific defendants as well. *Id.* The district court wrongly believed the question it was addressing was: *Did the police see Cruz reach for his waistband?* *Id.* at 1079. If they did, they were entitled to shoot; if they didn't, they were not. *Id.*

However, the 9th Circuit Court of Appeals correctly restated the question posed for a judge ruling on the officers' motion for summary judgment, which translates into: "*Could any reasonable jury find it more likely than not that Cruz did not reach for his waistband?*" *Id.* (Emphasis Added). The Court held that circumstantial evidence could give a reasonable jury pause.

Id. The court stated, the most obvious is the fact that Cruz didn't have a gun on him, so why would he have reached for his waistband? *Id.* Cruz making a gesture of reaching for his gun when no gun is there makes no sense whatsoever. *Id.* A jury could have doubted that Cruz ever did this. *Id.* A jury could also reasonably conclude that the officers lied. *Id.* at 1080.

A jury might find other aspects of the officers' story implausible. *Id.* A reasonable jury could doubt that Cruz would have reached for a non-existent weapon with his off hand. *Id.* Ultimately, the court held, "we make no determination about the officers' credibility, because that's not our decision to make." *Id.* "We leave it to the jury." *Id.*

This case is similar to *Cruz v. City of Anaheim*, because there is circumstantial evidence that could cause a reasonable jury to pause. The same rationale in *Cruz v. City of Anaheim* applies here. First, just like in *Cruz*, Shaun was not armed at the time he was shot. In *Cruz* the suspect might have been trying to comply with commands to get on the ground, but got caught in his seat belt. Here, Shaun might be viewed by a reasonable jury as having tried to stop as directed by officers, but was not allowed sufficient time to comply with the commands while he was holding his baby daughter in his arms. 2-ER-94 line 7-9. Not to forget that he was impaired

due to intoxication which likely affected his reaction time. Shaun was not given a warning he would be shot if he did not comply.

The officers' claim that that Shaun was going to jump the fence with his daughter in his arms makes no logical sense whatsoever because he was not looking at, focused on, or approaching the fence in any way, according to the body worn video. 4-ER-532 – 5-ER-904. A jury may doubt that Shaun did what the officers claim and could even conclude that Shaun was attempting to, and did in fact, comply with officers' commands to stop.

A jury could also reasonably conclude that the officers lied. This court should not simply accept what may be a self-serving account by the police officers. Accusations that Shaun had his hands by his waist, Zech couldn't see his hands, Shaun was using his baby as a shield, wanted to hurt her, and that was carrying her in a violent manner are all exaggerated claims to justify the unnecessary shooting. 3-ER-361, 433 lines 7-10. A jury could be skeptical that some officers stated that Shaun was going to harm his daughter without any facts based in reality to support this likelihood. Comments like "he could've thrown her down before trying to escape" or "shoot the baby" are entirely baseless, fabricated "what ifs." *Id.* Shaun did not intend on escaping or harming anyone which is why he was unarmed and without a weapon on him before he came face to face with police.

Lastly, a jury could reasonably believe that Shaun wanted to comply with the officers' commands, and was attempting to surrender - It's possible that the officers intentionally didn't wait for Shaun to comply because Officer Zech planned to take him out before he ever showed his face around that corner. During his deposition he let it be known he needed to "seize my window of opportunity." 2-ER-51, 83. There was no room for compliance, surrender, or consideration of Shaun's conduct in those short moments before he was killed.

There are genuine material questions of fact in dispute, and this is a basis to deny summary judgment. Yet the district court improperly did not do so. Even more, a jury should have the opportunity to hear and deliberate these issues.

This Court should rule similar to the decision in *Cruz v. City of Anaheim* and overturn the district court's decision *not* to deny summary judgment.

Kidnapping Allegations Disputed

The district court improperly accepted the City of Seattle and Noah Zech's claim that Shaun Fuhr intended to kidnap his own child. The Court assumed that Shaun's behavior did in fact raise to the level of kidnapping. 1-ER-11, 18. However, the Court failed to provide any analysis *how* Shaun's behavior amounted to this crime. Not a single officer for the City of Seattle even looked into the

existence of an alleged No-Contact Order or to see that L.F. was included in such order, thus prohibiting Shaun from having contact with her. The Appellees never presented the alleged No-Contact Order to support their claim for probable cause for kidnapping at any point after this case as filed in federal district court. Rather, Officer Zech's report alleges and claims that Shaun had committed domestic violence assault and kidnapping, solely based on Ajiona Taylor's 911 call. 3-ER-353, 369.

The district court accepted the Police's argument that Shaun "might use the baby as a shield or throw her down and run or..." 2-ER-51. However, Shaun's behavior on video contradicted all of this. What occurred is that Shaun was cradling his baby girl in his arms. The Court allowed too many "what if's" from the Appellees, which were all negative inferences *to the detriment of Shaun*, rather than in the light most favorable to him. The district court failed to consider what actually occurred--that Shaun was attempting to comply and surrender as demonstrated by the evidence. The court went down a dangerous path because it allowed an over simplification and justification for Shaun's death when he didn't even commit a gesture that might support a reasonable inference that he would act in such a way.

RCW 9A.40.020 states that:

- (1) "A person is guilty of kidnapping in the first degree if he or she intentionally abducts another person with intent

- (a) to hold him or her for ransom or reward, or as a shield or hostage; or
- (b) to facilitate commission or any felony or flight thereafter; or
- (c) to inflict bodily injury on him or her; or
- (d) to inflict extreme mental distress on him, her, or a third person; or
- (e) to interfere with the performance of any governmental function.

(2) Kidnapping in the first degree is a class A felony.”

Shaun did not intentionally abduct his daughter L.F. to hold for ransom or reward because Shaun never made any demands for ransom or reward in exchange for the child back. Shaun did not intentionally use his child as a shield or hostage, despite the false claims of officers when no witnesses attest to Shaun holding his child in such a way as to shield himself from violence, or make threats to her in any way that would suggest he was holding her hostage. Shaun did not facilitate the commission of any felony while in possession of his daughter because there was no court order or other legal restrictions preventing Shaun from having residential time or custody of L.F. Shaun did not facilitate the commission of flight of any kind with his daughter, as he had no intention of fleeing the state or country, or the neighborhood for that matter, and his evasion of police does not amount to the statute’s plain language definition of facilitating the commission of flight after abduction. Shaun had no intention of inflicting bodily injury on his daughter, and the alleged violent way he carried her is an exaggeration of presumed danger L.F.

was in. 3-ER-364. Ultimately, the baby was unscathed, facing the most violent encounter when she hit the ground after falling from her father's arms when he was shot just inches from her little body. 4-ER-532 – 5-ER-904. Shaun did not exhibit intent to inflict extreme mental distress on the child or any other person; his intent seemed focused on having time with his child away from the child's mother, who had toxic traits at times. 2-ER-50. Lastly, Shaun did not leave with his child with the intent of interfering with any sort of governmental function because, again, there was no court order in place preventing such conduct. *Id.* Therefore, at no time did Shaun's behavior of leaving with his child amount of kidnapping in the first degree.

In response to any argument that the Appellees had probable cause for circumstances not amounting to kidnapping in the first degree, RCW 9A.40.030 states that "it is a defense if established by the defendant by a preponderance of the evidence that (a) the abduction does not include the use or intent to use or threat to use deadly force, and (b) the actor is a relative of the person abducted, and (c) the actor's sole intent is to assume custody of that person." RCW 9A.40.030(2). Shaun wanted time with his daughter and at no time exhibited intentional violence towards her. There was no Order preventing his custody of her and therefore, the Appellees did not have probable cause for kidnapping.

II. THE DISTRICT COURT ERRED IN FINDING THAT OFFICER NOAH ZECH DID NOT VIOLATE SHAUN FUHR'S CONSTITUTIONAL RIGHTS WHEN HE SHOT HIM, AND THAT THE OFFICER IS ENTITLED TO QUALIFIED IMMUNITY. THIS COURT SHOULD REVERSE THE DISTRICT COURT'S DECISION.

A. This Court should revive the Fuhr family's Excessive Force claims, find that Noah Zech violated Shaun Fuhr's constitutional rights, and find that Noah Zech is not entitled to qualified immunity as a matter of law.

In this case, the district court wrongfully determined that Noah Zech acted reasonably, and was therefore entitled to qualified immunity. As discussed above, there are questions of fact in dispute that preclude a finding of reasonableness as a matter of law.

A. Qualified Immunity

In *Tennessee v. Garner*, the Supreme Court held that a “police officer may not seize an unarmed, nondangerous suspect by shooting him dead.” *Garner*, 471 U.S. at 11. In *Garner*, the fleeing suspect 1) committed a serious felony, and 2) was actually fleeing *from* an officer when he was shot.

In evaluating qualified immunity, courts ask two questions: (1) whether, taking the facts in the light most favorable to the nonmoving party, the officer's conduct violated a constitutional right, and (2) whether that right was clearly established at the time of the alleged misconduct. *See Saucier v. Katz*, 533 U.S. 194, 200-01, 121 S. Ct. 2151, 150 L.Ed.2d 272 (2001) overruled in part by *Pearson v. Callahan*, 555 U.S. 223, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009).

Under the Fourth Amendment, the amount of force used must be “objectively reasonable under the circumstances.” *See also Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1056 (9th Cir. 2003)(citing *Graham*, 490 U.S. at 396; *See Cruz*, 765 F.3d at 1079 (In the usual case, we review the record “from the perspective of a reasonable officer on the scene, rather than with 20/20 vision of hindsight.” *Graham*, 490 U.S. at 396; *Wilkinson v. Torres*, 610 F.3d 546, 551 (9th Cir. 2010)(explaining that “the critical inquiry is what [the officer] perceived”). So that fact that Cruz did not have a gun on him normally wouldn’t factor into the reasonableness analysis because the officers couldn’t know what was (or wasn’t) underneath Cruz’s waistband. But, because the officers killed Cruz, we must examine whether the officers accounts are “consistent with other known facts.” *Scott*, 39 F.3d at 915. One of those facts is that no gun was found on Cruz (though a gun was found – with safety on – on the passenger’s seat.) Because the excessive force inquiry ordinarily “requires a jury to sift through disputed factual contentions, and to draw inferences therefrom,” the Ninth Circuit has emphasized that “summary judgment...in excessive force cases should be granted sparingly.” *See Smith*, 394 F.3d at 701 (emphasis added)(en banc.) At the time of the shooting, it was clearly established that officers may not use deadly force against a person who is armed but cannot reasonably be perceived to be taking any furtive, harrowing, or threatening actions. *See George v Morris*, 736

F.3d 829, 838 (9th Cir. 2013). This is true even where the suspect has allegedly “committed a violent crime in the immediate past.” *See Harris*, 126 F.3d at 1203-04; *See also N.E.M. et. al. v. City of Salinas* 5:14-cv-05598 (9th Cir Court of Appeals 2019)(Court affirmed district Court that denied Defendants Motion for Summary Judgment and officers request for qualified immunity as it must view all facts in favor of the non-moving party.)

Consequently, at summary judgment, an officer may be denied qualified immunity in a Section 1983 action “only if (1) the facts alleged, taken in the light most favorable to the party asserting injury, show that the officer’s conduct violated a constitutional right, and (2) the right at issue was clearly established at the time of the incident such that a reasonable officer would have understood [his] conduct to be unlawful in that situation. *Torres v. City of Madera*, 648 F.3d 1119, 1123 (9th Cir. 2011). Although qualified immunity is a question of law, because issues of reasonableness depend on the facts of the situation, if there is a dispute as to the facts, that must be resolved by the factfinder before qualified immunity can be granted. *See Zellner v. Summerlin*, 494 F.3d 344, 368 (2d Cir.2007). Therefore, if there are disputed facts such that one version of the facts could demonstrate unreasonable force by the police, it is not appropriate to find qualified immunity on a summary judgment motion. *Supra Maye*, 638 F.Supp.2d.

In cases where the best (and usually only) witness who could offer direct

testimony for the plaintiff about what happened before a shooting has occurred, 9th Circuit precedent permits the decedent's version of events to be constructed circumstantially from competent expert and physical evidence, as well as from inconsistencies in the testimony of law enforcement. *See Scott*, 39 F.3d at 915; *Santos*, 287 F.3d at 852 (“Nowhere in our cases have we held that police misconduct may be proved only through direct evidence.”).

Here, the question of a constitutional violation involves disputed facts which were discussed above and when viewed most favorably to the Appellants, could support a jury finding in their favor. Moving to the second question: whether the right at issue was clearly established such that a reasonable officer would have understood his actions were unlawful.

To be “ ‘clearly established’ . . . [t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.” *Anderson v. Creighton*, 483 U. S. 635, 640 (1987). That standard is not nearly as onerous as the district court made it out to be. The Supreme court has long rejected the notion that “an official action is protected by qualified immunity unless the very action in question has previously been held unlawful,” *Id.* The law does not “require a case directly on point, but existing precedent must have placed the . . . constitutional question beyond debate.” *See Ashcroft v. Al-Kidd*, 563 U.S. 731, at 740 (2011). That said, the Ninth

Circuit Court has acknowledged that qualified immunity may be denied in novel circumstances. *See Mattos v. Agarano*, 661 F.3d 433, 442 (9th Cir. 2011) (*citing Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). “Otherwise, officers would escape responsibility for the most egregious forms of conduct simply because there was no case on all fours prohibiting that particular manifestation of unconstitutional conduct.” *See Deorle*, 272 F.3d at 1286; *see also Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (stating that “in an obvious case, these [Graham] standards can ‘clearly establish’ the answer, even without a body of relevant case law”).

Here, the constitutional violation the Appellants argue was violated is Shaun Fuhr’s right to be free from unreasonable seizure and excessive force. The Appellants rely on numerous cases where an officer acting under similar circumstances...was held to have violated the Fourth Amendment. *See Dist. Of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018) (quoting *White v. Pauly*, 137 S. Ct. 548, 552 (2017)).

George v. Morris is similar to this case. Deputies were dispatched to the George residence after Mrs. George called and reported a domestic disturbance involving a firearm. *George v. Morris*, 736 F.3d 832, 838 (9th Cir. 2013).

Donald George had grabbed his pistol, loaded it, and sat outside on his balcony. *Id.* When Mr. George opened the balcony door and came into view of the deputies, they opened fire. *Id.* at 833. Mrs. George brought a suit where summary

judgment and qualified immunity was denied to the defendants. *Id.* After an evidentiary hearing, the district court concluded that, "whether Mr. George presented a threat to the safety of the deputies is a material fact that is genuinely in dispute." *Id.* at 833-34. "This meant a constitutional violation *could* be proven and the court denied qualified immunity on that basis." *Id.* at 834 (emphasis added). The Ninth Circuit affirmed and denied qualified immunity because the facts showed that the deputies could be found to have violated the Fourth Amendment's prohibition of excessive force. *Id.* at 841.

The district court claims *George v. Morris* is too dissimilar to the facts in this case. However, Appellants argue that no Ninth Circuit case law provides for the specific facts in this case and that *George v. Morris* provides similar facts that are *material* to this case. For instance, the police in both *George v. Morris* and the case at hand responded to a domestic dispute or disturbance call. *Id.* at 832. Both of the women who made the 911 call in these cases state similar facts, such as their significant other having "a gun". *Id.* Both cases also show police officers shooting and killing men without any "furtive movement, harrowing gesture, or serious verbal threat [that] might create an immediate threat." *Id.* at 838. Very similarly to this case, in *George* "[t]here were genuine disputes of fact such that a reasonable jury could 'disbelieve the officers' testimony' and rely on record evidence to

conclude that Donald had not ignored commands to drop the gun, or taken other threatening measures such as pointing the weapon at deputies.” *Id.* at 836.

Appellants argue that the severity of the alleged crime in this case does not constitute an immediate threat at the time police officers confronted Shaun because he was no longer engaging in any alleged criminal conduct. 4-ER-518 - 5-ER-888. Appellants argued this in response to Appellees’ summary judgment motion and the district court was obligated to weigh all the facts in the plaintiffs’ favor. Had the district court properly done so, qualified immunity should have been denied.

Similarly, in *Harris v. Roderick*, the Ninth Circuit held that the officer unreasonably used deadly force against a man who, although armed, made “no threatening movement” or “aggressive move of any kind.” *Id.* at 1203.

The court stretched the facts regarding the danger to Shaun’s infant daughter, and contravened the Supreme Court’s repeated admonition that inferences must be drawn in the favor of the plaintiff, i.e. the Fuhrs. *See Tolan*, 572 U.S. at 8. The facts, properly viewed, in favor of the non-moving party, show that, when he was shot, Shaun was more than 10 feet away and doing nothing other than holding his child; he was not evading police, he was not scanning for an escape route, was not reaching near his waist, was not displaying a weapon, or threatening any harm to anyone and the video evidence shows this. 4-ER-532 – 5-ER-904.

Additionally, “Force justified when an encounter begins “is not justified even seconds later” if the danger that justified the initial use of force has been eliminated. *Waterman v. Batton*, 393 F.3d 471, 481 (4th Cir. 2005). Although in *Waterman* the court found justification for use of deadly force due to the suspect driving his vehicle at the officers and previously attempting to drive police off the road during a highspeed chase, the court describes the use of deadly force as inappropriate once the suspect drove past the officers, because the danger posed to the officers was no longer immediate. *Id.* Here, even if Noah Zech reasonably believed use of deadly force was necessary initially, video evidence supports the position that he began setting himself in position to shoot Shaun before he came around the corner of the building. 4-ER-532 – 5-ER-904. Appellees claim that Shaun was sizing up the fence, that he had his hands down at his waist, that he had an “expression of noncompliance on his face” or that he might do a number of harmful things to his child in order to escape, yet are not supported by facts and the video shows none of this, contradicting Appellees version of the events. 2-ER-51; 4-ER-532 – 5-ER-904. But without such claims, Noah Zech had no justification to shoot Shaun at the time he did because Shaun was no longer engaged in criminal activity.

It is undisputed that Noah Zech had alternative ways to approach and handle the situation consistent with Seattle Police Department policies and Washington

statutory law when encountering Shaun. 2-ER-45-53. Although police officers must make “split-second decisions” in highly dynamic and uncertain situations, the need for the use of force, the relationship between need for force and amount of force applied, the extent of the injury caused, and whether force was applied in good faith or maliciously all must be considered. *Graham*, 490 U.S. at 390.

Regarding the assessment for the need for force, the district court stated that “...officers reasonably perceived Fuhr to pose an immediate threat to the life and safety of the baby he was holding and to the officers and other third parties around him.” 1-ER-16 lines 12-13. However, none of these circumstances were present *at the time Shaun was shot* because he wasn’t holding his child recklessly or violently, nor was he evading police, nor was he threatening anyone verbally or physically, nor was he displaying a weapon, but surrendering, which is why he was unarmed. The district court focuses solely on what happened *before* Shaun’s face to face encounter with police to justify his being shot. *Id.* at lines 1-4.

The relationship between the need for the use of force and the amount of force used are completely disproportionate in this case. Evidence suggests Shaun had been engaged in a domestic dispute with his girlfriend half hour prior where he allegedly fired his gun at her, but which has not been supported by any facts other than Ms. Taylor’s testimony who never testified or was deposed in this case. 2-ER-100. Then Shaun hid with his daughter in the surrounding neighborhood. *Id.* At

some point Shaun is no longer in possession of the gun. 2-ER-82, 83, 101. Shaun now contemplates both the safety of his daughter and his inevitable surrender. Does that mean in the moment of confrontation with the police, when he is no longer evading, running, brandishing a weapon, that Shaun Fuhr deserved to be struck down and killed? 4-ER-532 – 5-ER-904. Appellants believe Noah Zech’s perception, assessment and reaction were unreasonable and unwarranted. *Id.* Shaun did not attempt to assault, hurt or attack the officers, his daughter, himself, or any bystanders in the area at any time, posing no threat of imminent or immediate threat of bodily harm or death *at the time he was shot. Id.* Based on the circumstances, the need for lethal use of force was not present, and therefore it was excessive. Shaun, if given a full, genuine opportunity, could have been subdued without violence because at the time he was shot he engaged in no act of resistance whatsoever. *Id.* Shaun was surrounded by officers. Yet Noah Zech set himself in position to take the kill shot and opened fire with his AR-15, just inches above the child’s head. *Id.* The relationship between the need for force and the force executed was and is ultimately an issue for the jury to decide.

There is no evidence in this case showing that alternative uses of force, less-lethal, would have been *ineffective*, especially when Washington statutory law requires the consideration of a child’s presence in using force. RCW 10.120.020(3). This is another factual dispute for the jury.

III. THE DISTRICT COURT IMPROPERLY DISMISSED APPELLANTS' WASHINGTON STATE CLAIMS AND THIS COURT SHOULD REVERSE THE DISTRICT COURT'S DECISION.

This Court should revive the Fuhr Family's state negligence claim.

The district court erred when it held that Noah Zech's negligence was not the proximate cause of death of Shaun Fuhr. The district court correctly concluded that "Plaintiffs have demonstrated that there is, at minimum, a question of fact as to whether Defendants owed Fuhr a duty of reasonable care." 1-ER-17 lines 17-18. RCW 10.120.020 requires officers to exercise reasonable care when using force, and because the City of Seattle and Noah Zech failed to use reasonable care according to statutory law during their face-to-face encounter with Shaun Fuhr, their use of deadly force was a breach of duty. Failing to de-escalate, to properly assess the threat Shaun did not pose at the time he was shot, and failing to consider the presence of his child when shooting Shaun all constitute breach of the duty of reasonable care. But-for Noah Zech's firing of his AR-15 in response to Shaun coming around the apartment building corner, Shaun Fuhr could still be alive. There was no superseding, intervening causes outside of the firing of Zech's weapon that caused Shaun Fuhr to be shot in the face while holding his child and die. The district court claims Appellants failed to provide any specific argument about what duty was breached or how the breach caused injury despite Appellants

clearly stating that defendant officers failed to exercise reasonable care according to statutory law. This is a sufficient and specific argument and the district court erred in concluding it failed. *Id.*

Appellants sufficiently alleged Zech knew or should have known several factors which would have avoided the resulting harm was improper. 2-ER-98—122.

Zech knew or should have known that Shaun's non-aggressive and non-evasive demeanor was a reason not to use deadly force. Zech knew or should have known that there was a child present and, thus, according to the statutory requirement of reasonable care, he should have engaged less-lethally. Zech knew or should have known that Shaun was under the influence of alcohol and that because of this, his reasoning and reaction time to commands likely would have been substantially impaired. Zech knew or should have known that Shaun was not holding or attempting to access a weapon of any kind because both of his hands were visible, out in front of him, holding his child against his body at the time Zech shot him. Zech knew or should have known Shaun did not desire nor was he attempting to further evade police because he was not actively looking, scanning, searching, or conducting himself in a way that otherwise constituted such desire to escape.

In *Beltran-Serrano v. City of Tacoma*, the Washington Supreme Court held that intentional tort and negligence claims may coexist in a suit arising from an officer-involved shooting, where the plaintiff alleged negligence in the series of actions leading up to the decision to shoot. *Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537, 544-45 (2019).

The series of actions culminating in the use of deadly force may be analyzed in its constituent parts or, alternatively, as involving either negligent or intentional conduct.” *Id.* at 545 46. The Washington Supreme Court analogized to a person who is injured, “not by an officer shooting, but perhaps by running into a car as he attempts to flee from the officer in panic.” *Id.* at 546. *Dkt. #35* page 19.” In *Beltran-Serrano*, the Washington Supreme Court held that Defendants failed to appreciate the nature of Beltran-Serrano’s claim. *Id.* at 544.

The Court held the core of Beltran-Serrano’s negligence claim is that Officer Volk unreasonably failed to follow police practices calculated to avoid the use of deadly force. *Id.* at 544. *Beltran-Serrano* focused on Officer Volk’s negligence leading up to the shooting, including her failure to respond appropriately to clear signs of impairment, her decision to continue to engage with Beltran-Serrano in English, and her decision to prevent him from walking away. *Id.* The negligence allegations also identify Officer Volk’s lack of adequate training and her failure to recognize the ineffectiveness of using a stun gun against a mentally impaired

individual. *Id.* at 545. While these negligence claims relate to events that culminated in Officer Volk intentionally shooting Beltran-Serrano, they do not assert a “negligent intentional shooting.” *Id.* Instead, they require consideration of the totality of the circumstances involved in the encounter between Officer Volk and Beltran-Serrano and identify potential negligence in the series of actions leading up to the decision to shoot. *Id.* The Court held the fact that Beltran-Serrano may have a valid intentional tort claim for excessive force has no bearing on the viability of his negligence claim for violation of the duty to act reasonably. *Id.* at 546- 547. A jury could find one claim or the other (or neither claim) to be supported. *Id.* at 547.

Similar to *Beltran-Serrano*, here the Appellants’ negligence claim is that Officer Noah Zech, like Officer Volk, unreasonably failed to follow police practices calculated to avoid the use of deadly force against Shaun. *Id.* at 544. Like *Beltran-Serrano*, here the Apellants have focused on Noah Zech’s negligence leading up to the shooting, including but not limited, to his failure to consider assessing Shaun’s demeanor upon coming face to face with him, deciding to “seize the window of opportunity” regardless of Shaun’s surrender, and Zech’s failure to respond appropriately to clear signs of Shaun’s chemical impairment.

A jury should evaluate whether Noah Zech’s decision to take Shaun out rather than take into account his non-threatening conduct at the time he was shot

was reasonable or not. *Id.* Analogous to Beltran-Serrano’s negligence allegations that identify Officer Volk’s failure to recognize the ineffectiveness of using a stun gun against a mentally ill individual, here the Appellants too also identify the lack of using less than lethal force against a chemically impaired individual - Shaun. *Id.* at 545. A jury should decide whether Zech knew or should have known Shaun was under the influence of alcohol and how that impacted Zech’s coming to the conclusion that it was best to just shoot and kill Shaun. Moreover, a jury should also decide whether Noah Zech failed to follow the statutory law of Washington that requires a more careful and reasonable way of handling citizen encounters.

In *Beltran-Serrano* , the City of Tacoma argued the officer did not owe a duty to Beltran-Serrano under the public duty doctrine. *Id.* at 542. However, the Supreme Court disagreed, stating that “every individual owes a duty of reasonable care to refrain from causing foreseeable harm in interactions with others...This duty applies in the context of law enforcement and encompasses the duty to refrain from directly causing harm to another through affirmative acts of misfeasance.” *Id.* at 550. The Court ultimately held that “Beltran-Serrano’s negligence claims arise out of Officer Volk’s direct interaction with him, not the breach of a generalized public duty.” *Id.* at 551.

Just like *Beltran-Serrano*, the Appellants’ claims arise out of Noah Zech’s direct interaction with Shaun and not the breach of a generalized, public duty.

Although the officer in *Beltran-Serrano* approached Beltran-Serrano unsolicited, and in Shaun’s case, Officer Zech was responding to allegations of Shaun’s criminal conduct, the Supreme Court unequivocally held that when a police officer has a direct interaction with a plaintiff, that officer has a duty to act with reasonable care. *Id.* There is nothing in the case to suggest that this duty only exists when direct interaction is the result of an unsolicited social contact or when a citizen has done nothing wrong. *Beltran-Serrano* holds that an officer owes a legal duty to exercise reasonable care when engaging in affirmative conduct towards others, whether they be crime victims or individuals suspected of committing crimes. Regardless of what caused the police to engage with Shaun, Noah Zech knew or should have known that, due to his use of alcohol and his state of intoxication, he did not possess the requisite reasoning or mental state to immediately respond to police commands.

When “harm result[s] from the officer’s direct contact with [a] plaintiff, [and] not the performance of a general public duty of policing,” the public doctrine does not apply. *Id.* at 551. Even further, there are well-established negligence principles cementing that police officers owe a duty of reasonable care in situations such as this. *Id.* at 609. This Court found that Beltran-Serrano had presented sufficient evidence to allow a jury to find that the City failed to follow accepted practices in the officer’s interactions with him leading up to the shooting and that

this negligence resulted in his injuries. *Id.* Appellants argue that RCW 10.120.020 is the critical piece of Washington’s police practices that the City and Noah Zech failed to implement during their encounter with Shaun Fuhr and in consideration of the totality of the circumstances.

A jury should decide if Officer Noah Zech acted reasonably in his only face-to-face interaction with Shaun Fuhr that cost the young father his life.

This Court should revive Appellants’ Washington Law Against Discrimination Claim

The district court improperly concluded that Appellants’ allegations of discrimination failed to be supported by an inference that Zech’s actions were racially motivated. 1-ER-19-20 lines 26-2. Plaintiffs sufficiently argued Noah Zech knew or should have known that Shaun Fuhr was African American. As this Court is aware, all people have a level of implicit bias. Police in Washington state are educated on implicit bias so as to help eliminate it in encounters with citizens. Noah Zech has been on the Seattle Police force for numerous years and is a highly decorated, well-trained sergeant to date. Appellants argue that Shaun’s race influenced Zech’s actions because Zech did not place the same value on Shaun’s life as he would a Caucasian man in the same situation. A white man accused of taking a “hostage” might have been “walked off the ledge”—asked to surrender, put his child down, given a verbal warning that police might shoot, and given

sufficient time to respond. The lack of de-escalation and the pre-calculated decision to seize any opportunity to kill Shaun showed a lack of value for his life, not because Zech actually believed Shaun was a threat to his own child, but because Zech is implicitly biased towards Shaun for being Black.

This Court should revive the Appellants' state tort of outrage claim and reverse the district court's decision.

The district court's holding that the Appellants' tort of outrage claim "rises and falls with [Plaintiffs'] excessive force claim, which as discussed above, lacks merit" when Plaintiffs sufficiently argued Noah Zech used excessive force against Shaun Fuhr was improper. 1-ER-19. As discussed above in this brief, Appellants have hopefully shown this Court multiple reasons why their excessive force claim should be revived and brought back on its merits. If the Court finds favor with the Appellants excessive force claim and chooses to reverse the district court on that claim, Appellants respectfully request the same for their tort of outrage claim.

Additionally, Appellants argue that Noah Zech's actions exceeded the bounds of decency when, without first assessing Shaun's non-threatening, non-evasive demeanor, in the presence of Shaun's infant daughter who was against his body and in his arms, in violation of Zech's statutory obligation to exercise reasonable care, and without warning of deadly force, he shot Shaun Fuhr in the face and killed him. This act of violence was extreme and outrageous because it

placed no value on the preservation of Shaun's life, or the preservation of the Fuhr family, or the potential trauma caused to the infant child who was in her Daddy's arms when he was shot and killed by the police despite being no immediate threat to her or anybody else at the time. Appellants' expert found this execution more disturbing than that of George Floyd. 2-ER-53. This extreme and outrageous conduct is also described in the Appellants' excessive force claim analysis.

CONCLUSION

For the foregoing reasons, the Appellants respectfully request this Court to reverse the district court's decision, and that this case should be reversed and remanded, and allowed to go to a trial by jury for the consideration of Appellants' claims.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,614 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

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