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FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KIMBERLY J. ZION, individually
and as successor in interest to
Connor Zion,
Plaintiff-Appellant,
v.
COUNTY OF ORANGE; MICHAEL
HIGGINS,
Defendants-Appellees.

No. 15-56705
D.C. No.
8:14-cv-01134-
JVS-RNB
OPINION

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

Argued and Submitted June 6, 2017
Pasadena, California

Filed November 1, 2017

Before: Stephen Reinhardt and Alex Kozinski,
Circuit Judges, and Terrence Berg,* District Judge.

Opinion by Judge Kozinski

* The Honorable Terrence Berg, United States District
Judge for the Eastern District of Michigan, sitting by designation.

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COUNSEL

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Lann G. McIntyre (argued), Lewis Brisbois Bisgaard & Smith LLP, San Diego, California; Greg Ryan, Matthew P. Harrison, and Dana Alden Fox, Lewis Brisbois Bisgaard & Smith LLP, Los Angeles, California; for Defendants-Appellees.

OPINION

KOZINSKI, Circuit Judge:

When police confront a suspect who poses an immediate threat, they may use deadly force against him. But they must stop using deadly force when the suspect no longer poses a threat. We explore the murky boundary between these two circumstances.

BACKGROUND

Connor Zion suffered several seizures. He then had a seemingly related episode where he bit his mother and cut her and his roommate with a kitchen knife. Police were called. Deputy Juan Lopez arrived at Zion's apartment complex. As Lopez exited his police car, Zion ran at him and stabbed him in the arms. Deputy Michael Higgins drove up separately and witnessed the attack on Lopez.

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What happened next is captured in two videos taken by cameras mounted on the dashboards of the two police cruisers.¹ Zion is seen running toward the apartment complex. Lopez Video 2:58. Higgins shoots at him from about fifteen feet away. Higgins Video 3:25. Nine shots are heard and Zion falls to the ground. Lopez Video 2:54. Higgins then runs to where Zion has fallen and fires nine more rounds at Zion's body from a distance of about four feet, emptying his weapon. *Id.* at 3:00-03. Zion curls up on his side. *Id.* Higgins pauses and walks in a circle. *Id.* at 3:05. Zion is still moving. *Id.* at 3:00-12. Higgins then takes a running start and stomps on Zion's head three times. *Id.* at 3:11-20.

Zion died at the scene. His mother brought suit under 42 U.S.C. § 1983, claiming Higgins used excessive force. She also claims Higgins deprived her of her child without due process. She raised a separate substantive due process claim on Zion's behalf, municipal liability claims and various state law claims. The district court granted summary judgment to defendants on all claims.

ANALYSIS

A. Fourth Amendment

1. Police use of force is excessive and violates the Fourth Amendment if it's objectively unreasonable under the circumstances. *Graham v. Connor*, 490 U.S.

¹ The videos can be viewed at <https://www.ca9.uscourts.gov/media/15-56705/evidence/Lopez> (Lopez Video) and <https://www.ca9.uscourts.gov/media/15-56705/evidence/Higgins> (Higgins Video).

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386, 388 (1989); *Scott v. Harris*, 550 U.S. 372, 383 (2007). We assess reasonableness using the non-exhaustive *Graham* factors: “the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.” 490 U.S. at 396. The most important factor is whether the suspect posed an immediate threat. *Mattos v. Agarano*, 661 F.3d 433, 441 (9th Cir. 2011) (en banc). If the evidence, viewed in the light most favorable to plaintiff, could support a jury finding of excessive force, defendants aren’t entitled to summary judgment. *Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir. 2005) (en banc).

Plaintiff doesn’t challenge Higgins’s initial nine-round volley, but does challenge the second volley (fired at close range while Zion was lying on the ground) and the head-stomping. By the time of the second volley, Higgins had shot at Zion nine times at relatively close range and Zion had dropped to the ground. In the video, Zion appears to have been wounded and is making no threatening gestures. Lopez Video 3:04. While Higgins couldn’t be sure that Zion wasn’t bluffing or only temporarily subdued, Zion *was* lying on the ground and so was not in a position where he could easily harm anyone or flee. A reasonable jury could find that Zion was no longer an immediate threat, and that Higgins should have held his fire unless and until Zion showed signs of danger or flight. Or, a jury could find that the second round of bullets was justified, but not the head-stomping.

Defendants argue that Higgins’s continued use of deadly force was reasonable because Zion was still moving. They quote *Plumhoff v. Rickard*: “[I]f police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended.” 134 S. Ct. 2012, 2022 (2014). But terminating a threat doesn’t necessarily mean terminating the suspect. If the suspect is on the ground and appears wounded, he may no longer pose a threat; a reasonable officer would reassess the situation rather than continue shooting. *See id.* This is particularly true when the suspect wields a knife rather than a firearm.² In our case, a jury could reasonably conclude that Higgins could have sufficiently protected himself and others after Zion fell by pointing his gun at Zion and pulling the trigger only if Zion attempted to flee or attack.

Higgins testified that Zion was trying to get up. But we “may not simply accept what may be a self-serving account by the police officer.” *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994). This is especially so where there is contrary evidence. In the video, Zion shows no signs of getting up. Lopez Video 3:01. This is a dispute of fact that must be resolved by a jury.

2. The Fourth Amendment right here was “clearly established.” *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam). If a jury determines that Zion no

² It may be that, once on the ground, Zion had dropped the knife. Whether the knife was still in Zion’s hand or within his reach, and whether Higgins thought Zion was still armed, are factual questions that only a jury can resolve.

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longer posed an immediate threat, any deadly force Higgins used after that time violated long-settled Fourth Amendment law. We have cases holding that the use of deadly force against a nonthreatening suspect is unreasonable. *See, e.g., Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985); *Harris v. Roderick*, 126 F.3d 1189, 1201 (9th Cir. 1997). We've also held that continued force against a suspect who has been brought to the ground can violate the Fourth Amendment. In *Drummond v. City of Anaheim*, we found that officers used excessive force by sitting on a prone suspect's back, asphyxiating him. 343 F.3d 1052, 1057-58 (9th Cir. 2003). And in *Davis v. City of Las Vegas*, we held that an officer violated the Fourth Amendment by punching a handcuffed suspect in the face while the suspect lay on the floor. 478 F.3d 1048, 1053 (9th Cir. 2007). If a jury were to find that Higgins shot and/or stomped on Zion's head after Zion no longer posed an immediate threat, Higgins would have been "on notice that his conduct would be clearly unlawful." *Saucier v. Katz*, 533 U.S. 194, 202 (2001). Defendants therefore aren't entitled to qualified immunity.

B. Fourteenth Amendment

Parents "have a Fourteenth Amendment liberty interest in the companionship and society of their children." *Wilkinson v. Torres*, 610 F.3d 546, 554 (9th Cir. 2010). Excessive force claims typically must be "analyzed under the Fourth Amendment's 'objective reasonableness' standard, rather than under a substantive due process standard." *Graham*, 490 U.S. at

388. But a familial relations claim alleges a different constitutional violation under the Due Process Clause that isn't barred by *Graham. Curnow v. Ridgecrest Police*, 952 F.2d 321, 325 (9th Cir. 1991). Conduct that "shocks the conscience" violates due process. *Wilkinson*, 610 F.3d at 554.

Higgins violated the Fourteenth Amendment if he acted with "a purpose to harm without regard to legitimate law enforcement objectives." *Porter v. Osborn*, 546 F.3d 1131, 1133 (9th Cir. 2008). Plaintiff mistakenly argues that the lower "deliberate indifference" standard applies. That standard is appropriate only where "actual deliberation is practical." *Id.* at 1137 (quoting *Moreland v. Las Vegas Metro. Police Dep't*, 159 F.3d 365, 372 (9th Cir. 1998)).

Higgins didn't violate the Fourteenth Amendment by emptying his weapon at Zion. The two volleys came in rapid succession, without time for reflection. Whether excessive or not, the shootings served the legitimate purpose of stopping a dangerous suspect.

The head stomps are different. After the two volleys, the video shows Higgins walking around in a circle for several seconds before returning for the head strikes. He even takes a running start before each strike. Lopez Video 3:11. This is exactly the kind of "brutal" conduct the Due Process Clause protects against. *Breithaupt v. Abram*, 352 U.S. 432, 435 (1957). Like forced stomach-pumping, head-stomping a suspect curled up in the fetal position "is bound to offend even hardened sensibilities." *Rochin v. California*, 342

U.S. 165, 172 (1952); see *United States v. Cameron*, 538 F.2d 254 (9th Cir. 1976).

This case is akin to *A.D. v. California Highway Patrol*, where we found that an officer violated due process by shooting a suspect who posed no immediate threat. 712 F.3d 446, 451, 458 (9th Cir. 2013). The suspect there had repeatedly rammed her car into the officer's vehicle, but the officer saw that the suspect had no weapons and ten seconds elapsed between the ramming and the shooting. *Id.* at 451. Similarly, here a reasonable jury could find that Higgins knew he had rendered Zion incapable of causing harm or fleeing. Higgins had just fired eighteen bullets in Zion's direction, half of them at very close range while Zion lay on the ground. No competent officer could have failed to at least wound his target under these conditions. Higgins then paused before delivering what appear to be vicious blows to Zion's head. Lopez Video 3:04-12. A jury could reasonably find that Higgins knew or easily could have determined that he had already rendered Zion harmless. If so, a reasonable jury could also conclude that Higgins was acting out of anger or emotion rather than any legitimate law enforcement purpose.

C. Remaining Claims

1. The district court granted summary judgment on plaintiff's municipal liability claims under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978), because plaintiff admitted that they lacked merit. Plaintiff doesn't challenge this finding on appeal. She argues

instead that we should restore these claims because the district court relied on its erroneous Fourth and Fourteenth Amendment rulings in rejecting the *Monell* claims. But the district court relied on plaintiff's concession, not on its Fourth or Fourteenth Amendment holdings. We affirm the district court as to the *Monell* claims.

2. The district court did rely on its rejection of plaintiff's Fourth Amendment and familial relations claims in summarily resolving plaintiff's remaining substantive due process and state law claims in defendants' favor. We remand to the district court for it to consider these claims in the first instance. *See Drummond*, 343 F.3d at 1062.

The videos – Exhibits A and B – shall be unsealed.

**AFFIRMED IN PART, REVERSED IN PART
AND REMANDED.**

Plaintiff shall recover her costs.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 14-1134 JVS (RNBx) Date October 7, 2015

Title *Kimberly Zion v. County of Orange, et al.*

Present: The Honorable James V. Selna

<u>Karla J. Tunis</u>	<u>Debbie Hino-Spaan</u>
Deputy Clerk	Court Reporter

Attorneys Present
for Plaintiffs:

Jerry Steering

Attorneys Present
for Defendants:

Matthew Harrison

**Proceedings: Defendants' Motion for Summary
Judgment or, in the Alternative,
Partial Summary Judgment**

Cause called and counsel make their appearances. The Court's tentative ruling is issued. Counsel make their arguments. The Court GRANTS the Defendants' motion and rules in accordance with the tentative ruling as follows:

Defendants County of Orange ("the County") and Michael Higgins ("Higgins" and collectively, "Defendants") move for summary judgment on all claims asserted against them by Plaintiff Kimberly Zion ("Kimberly Zion" or "Plaintiff"). (Mot. Summ. J., Docket No. 43.) Alternatively, Defendants move for partial summary judgment on each individual cause of

action, partial summary judgment on Kimberly Zion's claim for municipal liability, and partial summary judgment on Kimberly Zion's claim for entitlement to an award of punitive damages. (*Id.*) Kimberly Zion opposes, although she raises no argument claiming there was a triable issue of material fact as to the sixth, seventh, or tenth causes of action. (Opp. Summ. J., Docket No. 54.) Kimberly Zion also does not argue in her opposition papers that there is a triable issue as to her claim for municipal liability, or a triable issue as to her claim for an entitlement to an award of punitive damages. (*Id.*) Defendants have replied. (Reply Supp. Mot. Summ. J., Docket No. 59.)

As set forth below, the Court GRANTS the Defendants' Motion for Summary Judgment.

I. BACKGROUND

The following summary is based on Plaintiff's Statement of Genuine Material Facts in Dispute and two video recordings from patrol cars driven by Sheriff's Deputy Michael Higgins and Sheriff's Deputy Juan Lopez that Plaintiffs provided in their opposition to Defendants' motion for summary judgment. (Pl.'s Statement of Genuine Material Facts in Dispute ("GMFID")¹, Docket No. 53; Higgins Video, Docket No. 55, Ex. A; Lopez Video, Docket No. 55, Ex. B.)

¹ Many facts originally appearing in Defendants' Proposed Separate Statement of Uncontroverted Facts and Conclusions of Law ("SUP"), (Docket No. 47), are undisputed in Kimberly Zion's GMFID.

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This case arises from the actions of Orange County Sheriff's Deputy Michael Higgins and Kimberly Zion's adult son Connor Zion ("Connor" or "Connor Zion") on September 24, 2013 which resulted in the death of Connor Zion on the same date. (Second Am. Compl. ¶ 5 ("SAC"), Docket No. 27; Answer ¶ 10, Docket No. 31.) On the evening of September 24, Kimberly Zion, Connor, and Connor's roommate Joel Walden were involved in an altercation in which Connor injured both his mother and his roommate with a kitchen knife. (GMFID ¶¶ 2-6.) Kimberly Zion and Joel Walden sought medical attention from a neighbor, and the neighbor called 911. (*Id.* ¶ 7; Opp. Summ. J. 3.) At approximately 7:30 P.M. on September 24, 2013 Higgins and other law enforcement officers, including Sheriff's Deputy Juan Lopez ("Lopez"), responded to the 911 dispatch and arrived at Connor's residence three minutes later in two vehicles at approximately the same time. (GMFID ¶ 15, Higgins Video 19:34:28-19:37:36.)

Upon the officers' arrival at Decedent's residence, Connor Zion emerged from a structure and ran towards Lopez with a knife in his hand, verbally threatening the officers, stating "I'll kill you . . . you mother fucker." (Higgins Video 19:37:42:19:37:44; GMFID ¶ 12.) Connor chased Lopez and eventually stabbed him, causing multiple stab wounds. (GMFID ¶¶ 13-14.) Higgins witnessed Connor's attack on Lopez, including stabbing motions in Lopez's direction. (*Id.* 16.)

Higgins began firing at Connor Zion from approximately 15 feet away. (Opp. Summ. J. 5; GMFID ¶¶ 17;

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Lopez Video 19:26:58; Higgins Video 19:37:52.) After multiple shots had been fired, Connor retreated at a high rate of speed towards the structure he had emerged from moments earlier. (Lopez Video 19:27:01-19:27:03, Higgins Video 19:37:53-19:37:57; GMFID ¶ 18.) Firing ceased for less than a second, then resumed as Higgins pursued Connor. (*Id.* 19:27:01-19:27:03.) Connor collapsed onto the ground, first onto his back, then rolling onto his side, in front of the structure as firing continued. (*Id.* 19:27:03-19:27:07.) While Connor was on the ground, Higgins continued firing nine additional shots and completely depleted his clip of ammunition. (*Id.* 19:26:58-19:27:07.) In total, Higgins fired eighteen shots in approximately nine seconds. (*Id.* 19:26:58-19:27:07; SUF ¶21; Opp. Summ. J. 5.)

Higgins paused for a couple seconds before turning around towards the injured Lopez, calling out “998” on the police radio. (Lopez Video 19:27:07.) Connor Zion appears to move again, seconds after the gunfire has ceased. (*Id.* 19:27:09-19:27:13.) Higgins then turned back towards Connor Zion, walked toward Connor and struck Connor’s head twice with his foot. (*Id.* 19:27:15-19:27:18.) Higgins paused, backed up a step, then struck Connor’s head one more time with his foot. (*Id.* 19:27:22.) After this third strike Higgins ran back to Lopez to render medical assistance. (*Id.*)

Connor Zion died at the scene. (SAC ¶ 5; Answer ¶ 10.)

Based on the foregoing, Kimberly Zion filed a complaint asserting various claims relating to the action discussed above. (Compl., Docket No. 1.) Kimberly Zion filed the First Amended Complaint two weeks later. (First Amended Compl., Docket No. 12.) Defendants filed a motion to dismiss portions of the First Amended Complaint. (Docket No. 16.) On November 17, 2014 the Court granted in part and denied in part the Defendants' Motion to Dismiss. (Docket No. 23.) Kimberly Zion filed the Second Amended Complaint on December 8, 2014. (Docket No. 27.)

Kimberly Zion now alleges the following causes of action: (1) use of unreasonable force in violation of the Fourth Amendment pursuant to § 1983 and Cal. Civ. Proc. Code. § 377.30; (2) unreasonable seizure in violation of the Fourth Amendment pursuant to § 1983 and Cal. Civ. Proc. Code § 377.30; (3) loss of parent-child relationship without due process in violation of the Fourth and Fourteenth Amendment pursuant to § 1983; (4) deprivation of life without due process in violation of the Fourteenth Amendment pursuant to § 1983; (5) wrongful death pursuant to Cal. Civ. Proc. Code § 377.60; (6) failure to adequately train deputies pursuant to § 1983, Cal. Civ. Proc. Code § 377.30 and direct liability; (7) failure to adequately screen, hire, and discipline deputies pursuant to § 1983; (8) intentional infliction of emotional distress pursuant to Cal. Civ. Proc. Code. § 377.30; (9) a violation of Cal. Civ. Code § 52.1 pursuant to Cal. Civ. Proc. Code § 377.30 and direct liability; and (10) battery under California

law pursuant to Cal. Civ. Proc. Code § 377.30. (*See generally* SAC.)

II. LEGAL STANDARD

Summary judgment is appropriate where the record, read in the light most favorable to the nonmovant, indicates that “there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c)(2); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Summary adjudication, or partial summary judgment “upon all or any part of a claim,” is appropriate where there is no genuine issue of material fact as to that portion of the claim. Fed. R. Civ. P. 56(a), (b); *see also Lies v. Farrell Lines., Inc.*, 641 F.2d 765, 769 n.3 (9th Cir. 1981) (“Rule 56 authorizes a summary adjudication that will often fall short of a final determination, even of a single claim. . . .”) (internal quotation marks omitted).

Material facts are those necessary to the proof or defense of a claim, and are determined by reference to substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In deciding a motion for summary judgment, “[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Id.* at 255. However, when the non-movant’s purported evidence or interpretation of events is “blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on

a motion for summary judgment.” *Scott v. Harris*, 550 U.S. 372, 380 (2007).

The moving party has the initial burden of establishing the absence of a material fact for trial. *Anderson*, 477 U.S. at 256. “If a party fails to properly support an assertion of fact or fails to properly address another party’s assertion of fact . . . , the court may . . . consider the fact undisputed.” Fed. R. Civ. P. 56(e)(2). Furthermore, “Rule 56[(a)]² mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex Corp.*, 477 U.S. at 322. Therefore, if the nonmovant does not make a sufficient showing to establish the elements of its claims, the Court must grant the motion.

III. DISCUSSION

A. First and Second Claims: Violation of Fourth Amendment Rights

1. Objective Reasonableness of Higgins’s Initial Use of Deadly Force

“Apprehension by deadly force is a seizure subject to the Fourth Amendment’s reasonableness requirement.” *Wilkinson v. Torres*, 610 F.3d 546, 550 (9th Cir.

² Rule 56 was amended in 2010. Subdivision (a), as amended, “carries forward the summary-judgment standard expressed in former subdivision (c), changing only one word – genuine ‘issue’ becomes genuine ‘dispute.’” Fed. R. Civ. P. 56, Notes of Advisory Committee on 2010 amendments.

2010) (citation omitted). Courts determine whether the use of force was objectively reasonable through “a careful balancing of the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the countervailing governmental interests at stake.” *Graham v. Connor*, 490 U.S. 386, 396 (1989) (quotations and citations omitted). These governmental interests include: (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 [the suspect] is actively resisting arrest or attempting to evade arrest by flight.” *Graham*, 490 U.S. at 396.

All parties appear to agree that there is no triable issue of fact regarding whether Connor Zion initially posed an immediate threat to Lopez, Higgins, and others, Kimberly Zion does not dispute that Connor attacked his roommate and his mother prior to the arrival of law enforcement at Decedent’s residence. (GMFID IN 4-6.) Kimberly Zion also does not dispute that Connor wielded a dangerous weapon, a knife, and used that knife on a law enforcement officer causing potentially mortal wounds. (*Id.* ¶¶ 12, 14.) Kimberly Zion also acknowledges that upon Connor’s retreat, and as Higgins fired his gun, Connor held onto that knife. (*Id.* ¶ 18.) For at least the duration of the first nine shots fired by Higgins, a span of approximately three seconds, the parties appear to be in agreement that Higgins was confronted with a severe, life threatening emergency – an attack on a fellow police officer. Applying *Graham*, the Court concludes that the

uncontroverted record establishes that it was objectively reasonable for Higgins to utilize deadly force when faced with this situation because the crime was very severe: Connor Zion was engaged in life-threatening behavior and was attempting to evade arrest by violent means and then flight.

2. Objective Reasonableness of Higgins's "Second Volley"

Kimberly Zion would instead have the Court focus on the immediate aftermath of Higgins's first nine shots. Kimberly Zion argues that "conditions for Deputy Higgins to stop shooting Connor Zion arose after he shot his first nine shots at Connor Zion, and before he shot the second nine shot volley." (Opp. Summ. J. 13.) But even assuming that factually such conditions were present, and assuming solely for the sake of argument that shots 9-18 constituted a second volley, Kimberly Zion must present a triable issue of material fact that this subsequent conduct of Higgins was not itself objectively reasonable under *Graham*. Kimberly Zion is unable to do so.

"The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. The amount of time that Kimberly Zion would have the Court recognize as a break between separate volleys is the very definition of split-second – a full second at the very longest – and during that fraction of a moment Higgins

observed Connor Zion continuing to move at a high rate of speed, all while continuing to hold onto the weapon Higgins had just witnessed Connor use to wound a fellow officer. (Lopez Video 19:26:58-19:27:07.) Reasonable law enforcement officers find themselves forced to make “split-second judgments – in circumstances that are tense, uncertain and rapidly evolving.” *Graham*, 490 U.S. at 397. The record indicates, specifically through the video from Lopez’s patrol car, that the situation remained fluid and dangerous through the start of the second set of shots.

Kimberly Zion asks the Court to fit this case into the situation described in hypothetical dicta in *Plumhoff v. Rickard*, ___ U.S. ___, 134 S. Ct. 2012 (2014). In holding that law enforcement officers’ firing of 15 shots in a 10-second span was constitutionally permissible, Justice Alito wrote for the Court that “[t]his would be a different case if [law enforcement] had initiated a second round of shots after an initial round had *clearly* incapacitated [decedent] and had ended *any threat* of continued flight. . . .” *Id.* at 2022 (emphasis added). But this case aligns more closely to the facts of *Plumhoff* than to its hypothetical. In *Plumhoff*, 15 shots were fired in a 10-second span. *Id.* In this case all 18 shots were fired in a nine-second span. (Lopez Video 19:26:58-19:27:07.) More importantly than specifics of duration or the number of bullets, in both cases the record disproves that the threat was completely over or that the suspect had been clearly incapacitated when the officers began, or resumed, shooting. *Plumhoff*, 134 S. Ct. at 2021-22.

Applying *Graham*, the Court concludes that the uncontroverted record establishes that Higgins's actions in continuing to fire his weapon when faced with a fluid and evolving situation, a situation that in total lasted less than 10-seconds, were objectively reasonable and the Court holds that no reasonable jury could conclude otherwise.

3. Objective Reasonableness of Higgins's Strikes to Connor's Head

Kimberly Zion further argues that Deputy Higgins, "apparently out of pure rage" and with "no justification," went "nuts" and then stomped Connor Zion's head with his boot. (Opp. 13.) Between these three strikes to the head and shots 9-18, Kimberly Zion argues that Higgins unconstitutionally executed Connor Zion, or that at the very least there is a material fact in dispute as to whether he did. The Court disagrees.

Whether Higgins's strikes to Connor Zion's head constituted excessive force is also to be determined under *Graham*'s objective reasonableness standard. The strikes must be judged from the perspective of a reasonable officer on the scene and not with the bias of hindsight. *Graham*, 490 U.S. at 396. The constitutionality of a law enforcement officer's actions must also be determined by an assessment of the totality of the circumstances. *Green v. City & Cty. of San Francisco*, 751 F.3d 1039, 1049 (9th Cir. 2014). On summary judgment, the Court construes facts and makes inferences in favor of the non-moving party unless the

non-movant's version of events is mere speculation or blatantly contradicted by the record, particularly a record as reliable as video. *Scott*, 550 U.S. at 380-81.

Therefore, although Kimberly Zion argues Higgins's kicks were the product of rage against a completely neutralized and completely motionless Connor Zion, (Opp. 13), the Court concludes that the video record contradicts Kimberly Zion's version of events.³ Specifically, the video shows Connor Zion continuing to move even after Higgins has depleted his ammunition, (Lopez Video 19:27:09), and again when Higgins first turned to attend to Lopez. (*Id.* 19:27:13.) These movements, witnessed by Higgins, cloud the situation as Higgins faced it. (Higgins Decl. if 5, Docket No. 45.) A police officer in this situation would have been confronted with the prospect that the threat from the suspect may not have been over.

Specifically, the totality of the circumstances Higgins faced that evening included the following: a fellow officer grievously wounded and in need of immediate medical attention, a primary firearm no longer loaded, and an armed and dangerous suspect who might have been capable of causing further harm. Higgins had in fact, moments earlier, witnessed Connor Zion darting towards a residential structure despite having been shot at nine times. Although Higgins could have made a calculated risk that Connor Zion's motions on the ground were meaningless and there was no longer any

³ As noted above, it was Kimberly Zion who tendered the video record the Court relies on.

threat, that is not what the Fourth Amendment requires – Higgins “need not have taken that chance and hoped for the best.” *Scott*, 550 U.S. at 385. The Court cannot conceive that any reasonable jury would view the situation posed to Higgins differently, and the Court holds that no reasonable jury could conclude that within the totality of the circumstances that unfolded an officer holding a bona fide suspicion that the danger was not over is constitutionally prohibited from taking the measures that Higgins took.

The Court concludes that the video record and undisputed facts establish that Higgins’s actions were objectively reasonable and no reasonable jury could conclude otherwise. Within the totality of the circumstances, Higgins’s use of deadly force, including re-initiating force upon observation that the dangerous suspect was not in fact motionless, was reasonable to protect himself, his fellow officers, and the public. Defendants are entitled to summary judgment on Kimberly Zion’s First and Second Causes of Action.

B. Third Cause of Action – Loss of Parent-Child Relationship

A parent has a fundamental liberty interest in the companionship and society of her child and the state’s interference with that liberty interest may be remedied under § 1983. *Crowe v. Cty. of San Diego*, 593 F.3d 841, 876 (9th Cir.), *amended by* 608 F.3d 406 (9th Cir. 2010). Official conduct that “shocks the conscience” in depriving the parent of such an interest can constitute

a due process violation. *Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir. 2008). The “shocks the conscience” standard may be met by a showing that an officer engaged in excessive force with “deliberate indifference” or “acted with a purpose to harm . . . unrelated to legitimate law enforcement objectives.” *Id.* The standard that should be applied depends upon the degree to which, under the circumstances, actual deliberation is practical. *Wilkinson*, 610 F.3d at 554. “[W]hen an officer encounters fast-paced circumstances presenting competing public safety obligations, the purpose to harm standard must apply.” *Porter*, 546 F.3d at 1139. A purely reactive decision to give chase does not evidence an intention to “induce . . . lawlessness, or to terrorize, cause harm, or kill,” *id.* at 1140 (quoting *Lewis*, 523 U.S. at 855), unlike situations where an officer uses force against a suspect to “teach him a lesson” or “get even.” *Id.*

The discussion above demonstrates that throughout the confrontation between Higgins and Connor Zion, Higgins was acting with legitimate law enforcement objectives. Kimberly Zion’s characterization of Higgins’s actions as a lawless execution motivated by a purpose to harm is discredited by both the undisputed facts and the video record. Pinpointing the cause of death is immaterial to the present case because the Court concludes that the uncontroverted record and video evidence demonstrate that there is no genuine dispute of material fact that Higgins acted with anything other than legitimate law enforcement purposes, and no reasonable jury could find otherwise.

Defendants are entitled to summary judgment on Kimberly Zion's Third Cause of Action.

C. Fourth Cause of Action – Substantive Due Process Claim

Kimberly Zion's Substantive Due Process claim essentially tracks the claim raised by his Fourth Amendment claims discussed above. *See Koch v. Lockyer*, 340 Fed. Appx. 372 (9th Cir. 2009) (Substantive due process claims under the Fifth and Fourteenth Amendments may be more properly analyzed and disposed of within the more specific constitutional context).

As discussed above, granting summary judgment for Defendants is proper as to Kimberly Zion's specific Fourth Amendment claims, and is therefore also proper as to Kimberly Zion's substantive due process claims in the Fourth Cause of Action for the same reasons.

D. Fifth Cause of Action – Wrongful Death

Kimberly Zion's Fifth Cause of Action is brought under state law. The same standards apply to state law claims and § 1983 claims premised on constitutionally prohibited excessive force. *Hernandez v. City of Pomona*, 46 Cal. 4th 501, 513-16 (2009).

The Court grants summary judgment for Defendants on Kimberly Zion's Fifth Cause of Action for the

same reasons it grants summary judgment on Kimberly Zion's First through Fourth Causes of Action.

E. Eighth Cause of Action – Intentional Infliction of Emotional Distress

The tort of intentional infliction of emotional distress has three elements: “(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff suffered severe or extreme emotional distress; and (3) the plaintiff's injuries were actually and proximately caused by the defendant's outrageous conduct.” *Cochran v. Cochran*, 65 Cal. App. 4th 488, 494 (1998).

Kimberly Zion alleges that there is outrageous conduct because Higgins executed Connor Zion. As described above, Higgins's actions were related to his legitimate law enforcement activities and no reasonable jury could find them to constitute a lawless execution of Connor Zion. Therefore, in the circumstances that unfolded Higgins was engaged in no extreme or outrageous conduct and consequently the Court grants summary judgment for Defendants on Kimberly Zion's Eighth Cause of Action.

F. Ninth Cause of Action – Bane Act

Because, as described above, Higgins did not violate Connor Zion's Fourth Amendment rights, there is no Civil Code § 52.1 violation. Therefore, the Court

grants summary judgment for Defendants on Kimberly Zion's Ninth Cause of Action.

G. Sixth & Seventh Causes of Action – Municipal Liability

Kimberly Zion admits there is no dispute as to the factors that would give rise to municipal liability against the County. (GMFID ¶¶ 25-29; Decl. Powell, Docket No. 46.) Accordingly, no reasonable jury could find for Kimberly Zion on the Sixth and Seventh Causes of action. The Court grants summary judgment for Defendants on the Sixth and Seventh Causes of Action.

H. Tenth Cause of Action – Battery

“In order to prevail on a claim of battery against a police officer, the plaintiff bears the burden of proving the officer used unreasonable force.” *Munoz v. City of Union City*, 120 Cal. App. 4th 1077, 1102 (2004), *disapproved of on other munch by Hayes v. Cty. of San Diego*, 57 Cal. 4th 622, 639 n.1 (2013). This inquiry engages in the same *Graham* balancing analysis as above. For the same reasons as above, the Court grants summary judgment on Kimberly Zion's Tenth Cause of Action.

I. Qualified Immunity

Because the Court holds that there was no constitutional violation in Higgins's conduct, the Court does not need to discuss whether Higgins was violating

constitutional rights that were clearly established in light of the specific context of the case. *Pearson v. Callahan*, 555 U.S. 223, 242 (2009).

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS Defendants' Motion for Summary Judgment.

IT IS SO ORDERED.
