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Other Authorities

that there was no constitutional violation and that Officer Browder was entitled to qualified immunity because his belief of an imminent threat to his safety and that of others was objectively reasonable. The District Court also properly found that the law in this area was not clearly established at the time of the incident and qualified immunity on that basis was also proper. Absent a constitutional violation,

Record ("EOR") at 1.) Plaintiffs filed a notice of appeal with the District Court on January 9, 2018. (EOR at 20.) This court has appellate jurisdiction over this action pursuant to 28 U.S.C. § 1291: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ."

III. STATEMENT OF ISSUES PRESENTED

The issues presented in this appeal are:

1. Did the District Court properly determine that Officer Browder acted reasonably

reported a male in his 50s or 60s, wearing a gray shirt or sweater was in a back lot threatening people with a knife. (City Defendants' Supplemental Excerpts of Record ("SEOR") at 208.)

Mr. Yoon also told Simmie Barber, who worked at The Body Shop, that he had seen Nehad in the alley with a knife that evening. (SEOR at 139:4-18.) Mr. Barber reported that after Nehad had confronted Mr. Yoon, Nehad came over to The Body Shop. (SEOR at 140:5-139:7.) Mr. Barber told Nehad that he could not come in that night and Nehad showed Mr. Barber what Mr. Barber believed to be

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B. The Arrival of Officer Browder

Officer Browder responded to the call regarding the person threatening

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Browder saw Nehad shortly after Officer Browder turned his vehicle into the alley. (EOR at 295:10-17; 736:10-17.) Officer Browder identified Nehad, confirmed with dispatch the description of the suspect and confirmed the description matched the person he saw in the alley. (EOR at 297:9 – 298:2.) After he confirmed that Nehad matched the description of the suspect, Officer Browder noticed what appeared to be a knife in Nehad's hand. (EOR at 738:3-10.)

C. Ne Movement Toward Officer Browder

Approximately 33 seconds passed between the time Officer Browder pulled into the alley and when he discharged his weapon. (EOR at 694:1-3; SEOR at 214; 216.) During that time, Nehad advanced towards Officer Browder's vehicle from an original distance of 50 feet and 7 inches. (EOR at 693:4-6.) Nehad maintained a steady pace as he approached, crossing the alley towards Officer Browder and the nearby civilians until Officer Browder fired his first and only shot. (EOR at 692:25 – 693:10; 698:3-8; 737:2-22; SEOR at 214; 216). After exiting his vehicle, Officer Browder had

D. The Perception of a Knife

Several individuals that evening believed that Nehad had a knife. Andre Nelson, the witness who saw Officer Browder put up his hand in a "stop" manner, and who had training as military police, observed Nehad fiddling with a silver, shiny object in his hand. (SEOR at 200:4-19; 202:1-24; 204:7-13.) Mr. Nelson thought it was a weapon; that it could have been a gun, a knife, or ninja stars. (SEOR at 204:14-21.) After the shooting, Mr. Nelson originally told officers that he thought Nehad had shot himself, because the circumstances observed by Mr. Nelson led him to believe that Nehad could have had a gun. (SEOR at 202:14-20.)

Prior to the shooting, the bookstore clerk Andrew Yoon, also saw Nehad pull a five to eight-inch knife from a backpack and unsheath it. (EOR at 759:7-9; 765:1-5.) Nehad also flashed his knife prior to the shooting at an employee at The Body Shop. (SEOR at 140:5-17.)

Officer Browder also believed that Nehad was armed with a knife. After Officer Browder confirmed the suspect's description with dispatch, Officer Browder noticed what he believed to be a knife in Nehad's hand. (EOR 738:3-10; 741:18-19; 746:1-5.) Officer Browder believed that because of the way Nehad handled the metallic silvery object in his hand, that Nehad was walking toward Officer Browder to stab him. (EOR at 742:10-25; 743:10-19; 745:12-18.)

E.

Officer Browder was faced with a life-threatening scenario: Nehad was reported to be armed with a knife, had threatened Andrew Yoon, and was now steadily approaching Officer Browder, all while manipulating a bright metallic object with his hand and keeping his eyes focused on Officer Browder. (EOR at 733:16-22; 734:4-7; 742:6-15; 759:7-9; SEOR at 204:7-13.) There were also civilians in the area. (EOR at 726:8-21; 735:8-11; SEOR at 199:17-19; 201:6-9.)

Based on his training and experience, Officer Browder feared the immediate threat posed by the suspect armed with what he believed was a knife. Officer Browder knew from his training regarding the 21-foot rule that a suspect can close a 21-foot distance before an officer can react. (EOR at 751:12 – 752:7.)

He was looking at me. . . .

> [V]ideo shows the suspect [Nehad] appear and walk at steady pace toward Officer Browder's vehicle. The video shows Officer Browder exit his vehicle and the suspect continue to advance toward Officer Browder. The video shows Officer Browder shoot the suspect at a distance of between fifteen and twenty feet. The video shows the suspect begin to slow less than a second before he was shot by Officer Browder.

(EOR at 5:13-18; SEOR at 214; 216.)

V. STATEMENT OF THE CASE

Plaintiffs filed this lawsuit on June 24, 2015. (EOR at 795.) On August 28, 2015, they filed the Second Amended Complaint alleging nine causes of action: (1) deprivation of civil rights under 42 U.S.C. § 1983 (Fourth Amendment); (2) deprivation of civil rights under 42 U.S.C. § 1983 (Fourteenth Amendment); (3) deprivation of civil rights under 42 U.S.C. § 1983 (*Monell*

at 184.) City Defendants filed their reply on April 28, 2017

238, 245 (1937) ("[I]f the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason."); *United States v. Fonseca-Martinez*, 36 F.3d 62, 65 (9th Cir. 1994) ("The court of appeals may affirm so long as there exists any ground, fairly supported in the record, that supports the district court's ruling.").

Summary judgment is appropriate if the "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." ." Fed. R. Civ. P. 56(a). A fact is material when it affects the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

Where the plaintiff bears the burden of proof at trial, summary judgment for the defendant is appropriate if the defendant shows that there is an "absence of evidence" to support the plaintiff's claims. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *see also Garneau v. City of Seattle*, 147 F.3d 802, 807 (9th Cir. 1998). The movant has the initial burden of demonstrating that there is no issue of material fact and that summary judgment is proper. *Adickes v. S.H. Kresss & Co.*, 398 U.S. 144, 157 (1970); *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001).

If the movant met his or her burden, the burden then shifts to the non-movant to show that summary judgment is not appropriate. *Celotex*, 477 U.S. at

324. The non-movant does not meet this burden by showing "some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The "mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient . . . ." *Anderson*, 477 U.S. at 252. Accordingly, the non-moving party cannot oppose a properly supported

which Plaintiffs cite, including the videos, is actually analyzed, it does not dispute the City Defendants' facts. Plaintiffs also attempt to disguise their legal arguments as disputed facts.

Additionally, the District Court properly found that Officer Browder's use of

force in the instant, without the benefit of hindsight, was reasonable. *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994).

Considering the overwhelming evidence in the record, Plaintiffs cannot make out a claim for a Fourth or Fourteenth Amendment violation. Moreover, even if Plaintiffs could survive summary judgment on their Fourth and Fourteenth Amendment claims, Officer Browder is entitled to qualified immunity as their claimed rights were not clearly established. *S. B. v. County of San Diego*, 864 F.3d 1010, 1015 (9th Cir. 2017). None of the cases Plaintiffs point to are sufficiently analogous to the facts presented here. Therefore, summary judgment on the clearly established prong was proper as well.

With respect to Plaintiffs' *Monell* and supervisory liability claims, without an underlying constitutional violation, the District Court was correct to dismiss those claims. Plaintiffs failed to present any evidence that any policy or deficient training was a "moving force" behind Officer Browder's decision to use deadly force in this case. Therefore, summary judgment in favor of the City and Chief Zimmerman on these claims was also proper.

Finally, because

Here, the District Court viewed "the facts in the light most favorable to Plaintiffs," properly evaluated the evidence, and determined that there was no triable issue of material fact. (EOR at 8:23.) The material facts relevant to the District Court's analysis are undisputed: Officer Browder responded to a 911 call regarding a man threatening people with a knife; Officer Browder spotted the suspect (Nehad) and confirmed the description matched; Officer Browder saw the suspect with what Officer Browder believed was a knife; the suspect advanced towards Officer Browder with the shiny object in his hand; Officer Browder believed the suspect was going to stab him with a knife; the time between when Officer Browder arrived at the alley and the time he fired his service weapon was approximately 33 seconds; less than five seconds elapsed between the time Officer Browder got out of his patrol vehicle and the time he fired; and Nehad was approximately 17 feet from Officer Browder at the time of the shooting. (EOR at 3-5.) Plaintiffs provided no evidence that disputed any of these material facts.

Plaintiffs argue that the District Court viewed the evidence in the light most favorable to Cf3*3 792 reW* nBT/F13(r)8(t223.s)-3( )] TJETQq00 t C4353(a)8(9h)-3(i)-84(m)1

Additionally, that a police officer receives training to differentiate weapons from ordinary objects also does not dispute that Officer Browder thought that Nehad had a knife. Several witnesses, including one who had training as a military police officer, saw Nehad with a knife. Plaintiffs argue that Nehad did not have a knife at the incident, and therefore Officer Browder's belief that Nehad did not have a knife is conclusory proof that Officer Browder could not have believed that he saw Nehad

Plaintiffs' argument that Officer Browder's belief, formed in the few seconds he had to assess and react to the situation, is contradicted by a post-incident interview in which Officer Browder stated that there were no weapons at the scene is also flawed. First, Plaintiffs argue that Officer Browder's post-incident statements which were taken after he had learned that Nehad did not have a knife is conclusory proof that Officer Browder could not have believed that he saw Nehad

subjective "good faith" of the officers is irrelevant. *Id.* "This analysis 'requires balancing the "nature and quality of the intrusion" on a person's liberty with the "countervailing governmental interests at stake" to determine whether the force used was objectively reasonable under the circumstances.'" *Davis v. City of Las Vegas*, 478 F.3d 1048, 1054 (9th Cir. 2007) (quoting *Smith*, 394 F.3d at 701).

"Factors we consider in assessing the government interests at stake 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 he is actively resisting arrest or attempting to evade arrest by flight." *Davis*, 478 F.3d at 1054 (citation omitted); *see also Graham*, 490 U.S. at 396. "Other relevant factors include the availability of less intrusive alternatives to the force employed, whether proper warnings were given and whether it should have been apparent to officers that the person they used forced against was emotionally disturbed." *Glenn v. Washington Cty*, 673 F.3d 864, 872 (9th Cir. 2011). "The 'most important' factor is whether the individual posed an 'immediate threat to the safety of the officers or others.'" *Id.*

"Whether the use of deadly force is reasonable is highly fact-specific . . . but the inquiry is an objective one . . . . A reasonable use of deadly force encompasses a range of conduct, and the availability of a less-intrusive alternative will not render conduct unreasonable." *Wilkinson v. Torres*, 610 F.3d 546, 551 (9th Cir. 2010).

"attempting to flee police by driving a car with a wanton or willful disregard for the lives of others." *Id.* at 960, 965. The Ninth Circuit held in that case that the government's interest in apprehending a suspected felon was strong. *Id.*

Here, Nehad was suspected of threatening Mr. Yoon and several others with a knife. (EOR at 759:7-9; 760:3-7; 760:14-20; 760:25 – 761:9; SEOR at 140:5-17.) Nehad said he was going to kill people. (EOR at 760:1-3.) Officer Browder was responding to a hot call to investigate a serious crime and reasonably anticipated that he could encounter someone with a knife. (EOR at 288:19 – 290:9, 732:2-9; 750:18-22; SEOR at 208

domestic disturbance. *Id.* at 832, 838-39. Therefore, *George v. Morris* is not

Roger Clark

764:18.) Officer Browder's inability to recall if he issued these warnings does not contradict what the witnesses testified that they heard.

Plaintiffs argue that Nehad did not attempt to flee or resist arrest in any way. Plaintiffs cite to *Glenn v. Washington County* in support of their argument that merely holding a knife is not sufficient resistance to warrant being shot with a beanbag shotgun. (AOB at 37.) This case is distinguishable. In *Glenn*, officers responded to a call regarding a suicidal teen with a pocketknife. *Glenn,* 673 F.3d at 867. The officers encountered the teen holding the knife to his own neck and issued commands to the teen to drop the knife. *Id.* at 868. Three minutes had elapsed between the time that the commands were given and the beanbag shotgun was fired. *Id.* at 873.

Here, Nehad was not holding the perceived knife at his own neck, but rather was manipulating it with his hands at waist level in front of him as he continued to walk towards Officer Browder

going to arrest him. However, Nehad's perception is irrelevant in this analysis. Plaintiffs speculate about what Nehad knew: Where did Nehad intend to go? Did he see the police car? Did he recognize it was a police vehicle? Did he see the light bar on top? Did he recognize Officer Browder as a police officer? Did he hear or understand the commands? These questions are not critical to Officer Browder's assessment in less than five seconds of what he observed and believed. The "critical inquiry is what [the officer] perceived. *Wilkinson*, 610 F.3d at 551.

4. The Availability of Less Intrusive Alternatives

Plaintiffs argue Officer Browder failed to use less intrusive alternatives when he encountered Nehad that evening. While the evaluation of less intrusive alternatives is a factor that courts consider when analyzing the reasonableness of an officer's use of force:

> Detached reflection cannot be demanded in the presence of an uplifted knife. Therefore . . . it is not a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety or to disable his assailant rather than to kill him.

Brown v. U.S., 256 U.S. 335, 343 (1921).

"The Fourth Amendment does not require law enforcement officers to exhaust every alternative before using justifiable deadly force." *Forrett v. Richardson*, 112 F.3d 416, 420 (9th Cir. 1997) *superseded by rule on unrelated*

grounds as stated in Chroma Lighting v. GTE Prods. Corp

reasonable man might not think it possible to fly with safety or to disable his assailant rather than to kill him." *Brown*, 256 U.S. at 343.

Moreover, Plaintiffs' argument that Officer Browder should have used his Taser because Nehad was within the 21-foot range of the Taser is flawed. (AOB at 41.) Plaintiffs fail to consider whether the Taser (or other alternatives) would have been an effective alternative given the circumstances. While it is possible that Officer Browder could have used his Taser, it is equally possible that one or both of the Taser probes could have missed Nehad and the Taser rendered ineffective. Meanwhile Nehad was continuing to approach Officer Browder and others in the area. Just because the use of the Taser was possible does not mean it was an appropriate alternative given the situation that Officer Browder faced. When an officer is facing an immediate threat of serious bodily injury or death, the officer is not required to take further risks for his personal safety or that of others. Nor is the officer required to engaged in detached reflection or metaphysical debate about what possibilities might exist that could save him from the threat he is facing. And more importantly, five seconds] TJET(r in)-3(eff)sl(i)-3(cer r)-3(c4-4(a)1( )11(t)-3(h)4((m)17(

A failure to warn, does not by itself, create a constitutional violation. Some warning is only required where feasible. *Tennessee*, 471 U.S. at 11-12; *Deorle v. Rutherford*

on scene approximately 33 seconds before he fired and less than five seconds elapsed between when Officer Browder exited his vehicle and when he fired. He had very little time to assess the situation and react. *Glenn v. Washington*, which Plaintiffs cite in support of their argument that a warning was required, is distinguishable. In that case, three minutes had elapsed between the time officers arrived and when shots were fired. *Glenn*, 673 F.3d at 876. Moreover, the officers in that situation knew that the suspect was suicidal and intoxicated. *Id.* at 867. Here, Officer Browder did not have three minutes, he had 33 seconds, and less than five seconds from the time he got out of this vehicle and the time that he fired while Nehad continued to advance towards him. Officer Browder also had no information about Nehad's mental state at the time of the incident. Therefore, *Glenn v. Washington* is not applicable here.

6. The District Court Properly Weighed the Relevant Factors

The District Court properly

As set forth

at 1276-1277. The suspect also complied with the commands to drop the weapon. *Id.* at 1277.

In this case, Officer Browder was responding to a call that someone had threatened Mr. Yoon with a knife and made statements about "killing people." Officer Browder reasonably believed that Nehad posed an immediate threat to his safety and others in the area. Nehad was reported to be armed with a knife, had threatened to kill people, and was now steadily approaching both Officer Browder and civilians, all while manipulating a bright metallic object with his hands and keeping his eyes focused on Officer Browder. (EOR at 733:16-22; 734:4-7; 742:6-15; 759:7-9; SEOR at 204:7-13.) Officer Browder also confirmed with dispatch that the description of the suspect matched. (EOR at 297:9 – 298:2.)

Based on his training and experience, Officer Browder feared the immediate threat posed by the suspect armed with what he believed to be a knife. Officer Browder knew from his training regarding the 21-foot rule that a suspect can close a 21-foot distance before an officer can react. (EOR at 751:12 – 752:7.) Trained officers know reaction time in response to a perceived threat must account for the time to draw a weapon, raise, aim and shoot. In weighing the *Graham* factors, both case law and the evidence in the record demonstrate that Officer Browder used reasonable force and the District Court properly found that Officer Browder was

entitled to summary judgment in his favor because there was no violation of Nehad's Fourth Amendment right.

C. The District Court Properly Determined There Was No Fourteenth Amendment Violation

The Fourteenth Amendment confers upon parents a substantive due process right "to the companionship of a child." *Johnson v. Bay Area Rapid Transit Dist.*, 724 F.3d 1159, 1168-69 (9th Cir. 2013).

> Police conduct violates due process if it "shocks the conscience." [Citation omitted.] Conscience-shocking actions are those taken with (1) "deliberate indifference" or (2) a "purpose to harm ... unrelated to legitimate law enforcement objectives. [Citation omitted.] The lower "deliberate indifference" standard applies to circumstances where "actual deliberation is practical." [Citation omitted.] However, in circumstances where an officer cannot practically deliberate, such as where "a law enforcement officer makes a snap judgment because of an escalating situation, his conduct may only be found to shock the conscience if he acts with a purpose to harm unrelated to legitimate law enforcement objectives."

A.D. v. California Highway Patrol, 712 F.3d 446, 453 (9th Cir. 2013).

Where the quick pace of events prevents an officer from actual deliberation, "only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation." *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 836 (1998).

In evaluating whether there is a purpose to harm, the Ninth Circuit has clarified that "where force against a suspect is meant only to 'teach him a lesson' or to 'get even'" it is possible a "reasonable factfinder would conclude the officer intended to harm, terrorize or kill." *Porter*, 546 F.3d at 1140-41 (quoting *Davis v. Township of Hillside*, 190 F.3d 167, 174 (3rd Cir. 2017)).

Here, Officer Browder had very little time to assess the situation and react. As examined extensively above, the exceedingly quick timeframe did not afford Officer Browder the necessary opportunity to deliberate. Additionally, as the District Court noted, there are no facts in the record to establish that Officer Browder acted v BT/F1 14.04 Tf1 0 0 eaq0.000000912 0 6h re4th( )1l.00000912 0 6ETQq0.091

the plaintiff must present clear evidence to the contrary . . . .”

thirty seconds and was forced to decide what level of force was necessary within five seconds from exiting his patrol car." (EOR at 17:6-8.)

Therefore, *Deorle v. Rutherford*, is not particularized to the facts of this case such that it would have put Officer Browder on notice that his use of force here was objectively unreasonable. Moreover, the United States Supreme Court has cautioned against applying *Deorle* as precedent when analyzing the clearly established prong for qualified immunity: "[as] for *Deorle*, this Court has already instructed the Court of Appeals not to read its decision in that case too broadly in deciding w

facts presented here as each is factually dissimilar in several crucial aspects: timing, behavior of the suspect, and threat posed by the suspect. Therefore, summary judgment on the clearly established prong was proper as well.

Plaintiffs also argue that no case precedent was required because the alleged constitutional violation here was obvious. Plaintiffs cite to *Torres v. City of Madera*, in support of their argument, stating that the law is clear that an officer

material facts show that Officer Browder acted reasonably in the face of a perceived threat. Without an underlying constitutional violation, the District Court was proper to dismiss Plaintiffs' *Monell* and supervisory liability claims.

Additionally, Plaintiffs have not proffered sufficient, reliable or relevant proof to support these Monell/supervisory claims. "A municipality may be liable under § 1983 . . . where the constitutional deprivation was caused by the implementation or execution of 'a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.'" *Muhammad v. San Diego Cty. Sheriff's Department*, No. 07-1430, 2007 WL 3306071, at *4 (S.D. Cal. Nov. 2, 2007) (quoting *Monell v. Dep't of Soc. Serv.*, 436 U.S. 658, 691 (1978)

force in this case. Therefore, summary judgment in favor of the City and Chief Zimmerman on these claims was proper.

F. The District Court Properly Entered Summary Judgment on State Law Claims

1. California Civil Code Sections 52.1 and 52.3 Claims

A favorable summary judgment ruling in favor of Defendants in a Section 1983 action precludes further legal action pursuant to California Civil Code sections 52.1 or 52.3 ("Section 52.1" and "Section 52.3"). Absent any underlying constitutional violations, Plaintiffs' Section 52.1 and Section 52.3 claims fail as a matter of law. *See Sholtis v. City of Fresno,* No. CV F 09-0383 LJO GSA, 2009 WL 4030674, at *12-13 (E.D. Cal., Nov. 18, 2009) (dismissing Section 52.1 claim in the absence of valid constitutional claims); *see also Jaa v. City of Dublin*, No. 14-cv-03260-WHO, 2015 WL 1967344, at *5 (N.D. Cal. Apr. 30, 2015).

Plaintiffs' second amended complaint ("SAC") specifically premises their Sections 52.1 and 52.3 claims on 336.53 Tm0 g0 G[(A)4(p)-3(r.)4(3)4(0)-3(,)4(2)4(0)-3(1)4(5)

“The word ‘interferes’ as used in the Bane Act means ‘

Government Code section 815.2(b), "a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability." Cal. Gov't Code § 815.2(b).

Here, Plaintiffs allege wrongful acts by Officer Browder, but all such acts are in the context of the alleged use of excessive force. Plaintiffs fail to present any evidence which would indicate threats, intimidation, and coercion independent from the intimidation and coercion inherent in the alleged use of excessive force. Moreover, as set forth above, Officer Browder's actions were reasonable, therefore there can be no section 52.1 claim and summary judgment was appropriate. With respect to the Section 52.3 claim, which mimics a Section 1983 *Monell* claim, there was no unlawful pattern or practice that led to Officer Browder's actions and summary judgment on that issue was also proper.

2. The Assault and Battery Claims

"The elements of civil battery are: (1) defendant intentionally performed an act that resulted in a harmful or

v. City of Union City, 120 Cal. App. 4th 1077, 1102 (2004), *disapproved on other grounds by Hayes v. County of San Diego*, 57 Cal. 4th 622 (2013).

A California peace officer "may use reasonable force to make an arrest, prevent escape or overcome resistance, and need not desist in the face of resistance." *Id.* at 1102 (citing Cal. Penal Code § 835a). Determination whether an officer breached such duty is "analyzed under the reasonableness standard of the Fourth Amendment to the United States Constitution." *Id*. at 1102. Thus, the question is whether a peace officer's actions were objectively reasonable based on the facts and circumstances confronting the peace officer. *Id.* at 1103. The test is "highly deferential to the police officer's need to protect himself and others." *Brown*, 171 Cal. App. 4th at 527.

Battery by a peace officer is based upon the accepted standard that a peace officer is entitled to use some force to carry out his duties. *Id.*; *Munoz*, 120 Cal. App. 4th at 1109; *Edson v. City of Anaheim*, 63 Cal. App. 4th 1269, 1272-73 (1998).

> Unlike private citizens, police officers act under color of law to protect the public interest. They are charged with acting affirmatively and using force as part of their duties, because "the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." [Citation omitted.] "[Police officers] are, in short, not similarly situated to the ordinary battery defendant and need not be treated the same. In these cases, then, "… the defendant police officer is in the exercise of the privilege of protecting the public peace and order [and]

he is entitled to the even greater use of force than might be in the

diligence as other members of [the] profession commonly possess and exercise," (3) there was a "proximate causal connection between the [officer's] negligent conduct and the resulting injury" to the plaintiff; and (4) the officer's negligence resulted in "actual loss or damage" to the plaintiff. *Harris v. Smith*, 157 Cal. App. 3d. 100, 104 (1984). Therefore, "to prevail on their negligence claim, Plaintiffs must show that the deputies acted unreasonably and that the unreasonable behavior harmed. . . ." them. *Price v. County of San Diego*, 990 F.

demonstrated above, Plaintiffs' negligence and wrongful death claims are barred.

IX. CONCLUSION

For all the above stated reasons, City Defendants respectfully requests this Court affirm the District Court's Order entering summary judgment in favor of Defendants on all causes of action.

Dated: August 20, 2018 MARA W. ELLIOTT, City AttorneyTQq0.00000912 0

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CERTIFICATE OF COMPLIANCE

(F.R.A.P. 32(a)(7)(c)

Pursuant to F.R.A.P. 32(a)(7)(c), I certify that the Appellee's Answering Brief is proportion(F.R.A.P. 32(a)(7sp.0000dre, 792 reaA.P.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 20, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: August 20, 2018 */s/ Kathy J. Steinman*