JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. 8:18-cv-00821-JLS-JDE Date: July 30, 2019
Title: Tiffany Tabares v. City of Huntington Beach et al.

Present: **Honorable JOSEPHINE L. STATON, UNITED STATES DISTRICT JUDGE**

Terry Guerrero	N/A
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFF:	ATTORNEYS PRESENT FOR DEFENDANT:
Not Present	Not Present

PROCEEDINGS: (IN CHAMBERS) ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (Doc. 30)

Before the Court is a Motion for Summary Judgment brought by Defendants Eric Esparza and the City of Huntington Beach. (Mot., Doc. 30.) Plaintiff opposed. (Opp., Doc. 36.) Defendants replied. (Reply, Doc. 41.) After considering the briefs, holding oral argument, and taking the matter under submission, for the following reasons, the Court GRANTS the Motion.[1]

I. BACKGROUND

Plaintiff Tiffany Tabares brings this action individually and on behalf of her son, Decedent Dillan Tabares, who was shot and killed by Defendant Eric Esparza, a police officer employed by Defendant City of Huntington Beach.

[1] As an initial matter, the Court addresses the parties' numerous, largely boilerplate evidentiary objections. In such instances, it is "unnecessary and impractical for a court to methodically scrutinize each objection and give a full analysis of each argument raised." *Doe v. Starbucks, Inc.*, No. SACV 08–0582 AG (CWx), 2009 WL 5183773, at *1 (C.D. Cal. Dec. 18, 2009). To the extent that the Court relies on objected-to evidence, the relevant objections are overruled. *See Capitol Records, LLC v. BlueBeat, Inc.*, 765 F. Supp. 2d 1198 n.1 (C.D. Cal. 2010).

A. Before the Use of Force

Esparza, a patrol officer employed by the Huntington Beach Police Department ("HBPD"), has received substantial training to identify and respond to the mentally ill and persons under the influence of drugs, including certification as a Drug Recognition Expert. (Plaintiff's Statement of Disputed Facts ("PSDF"), Doc. 36-1 ¶¶ 20-23.) On September 22, 2017, around 9:30 a.m., Esparza drove westbound on Edinger toward Springdale, intending to conduct a patrol check of the alley behind the 99 Cent Only Store. (*Id.* ¶ 25.) As he approached the shopping center, he observed Tabares walking on the north sidewalk near the parking lot of the shopping center, toward the intersection. (*Id.* ¶ 26.) Esparza performed his patrol check behind the 99 Cent Only Store and turned south onto Springdale toward the intersection of Springdale and Edinger. (*Id.* ¶ 29.) Esparza ended up in the left-hand turn pocket and again observed Tabares on foot at the northeast corner of the intersection. (*Id.* ¶ 30.) His observations included Tabares's hands flinching and a demeanor of paranoia over Esparza's presence, which Esparza took to be indicia of potential drug intoxication. (*Id.* ¶ 31.) Esparza also testified that he saw Tabares flick ashes from a cigarette onto the ground, which Plaintiff disputes. (*Id.* ¶ 33.) Esparza then decided to attempt a consensual encounter. Tabares crossed the street and entered the parking lot of the 7-11, and Esparza followed in his vehicle, ultimately parking in that parking lot. (*Id.* ¶¶ 36-38.) As or upon exiting his vehicle, Esparza asked Tabares if he could talk to him. (*Id.* ¶ 39.) Esparza testifies that he then observed Tabares's face and that Tabares appeared "dazed" with bloodshot and watery eyes. (*Id.* ¶¶ 40-41.) Plaintiff disputes the relative positions of Esparza and Tabares at that moment and whether Esparza would have been able to observe Tabares's eyes. (*Id.*) The parties do not dispute that Tabares responded negatively to Esparza's request and proceeded to walk away, at which point Esparza decided to attempt to detain Tabares. (*Id.* ¶¶ 42-43.) Esparza told Tabares to stop and that he was being detained. (*Id.* ¶ 44.) The parties dispute how many times Esparza issued such commands and how long Tabares continued to walk away, but they agree that Tabares eventually stopped and turned to face Esparza. (*Id.* ¶¶ 44-45, 47, 50-53, 55.) This stage of the encounter was witnessed by three third-party witnesses who were also in the parking lot: Shanon Forge, Mike Martin, and Philip

Azevedo. (*Id.* ¶¶ 46, 51, 53.) After turning to face Esparza, Tabares clenched his fists, and began speaking loudly at Esparza. (*Id.* ¶¶ 56, 59.) Tabares then began to move toward Esparza, and Esparza backed away. (*Id.* ¶¶ 58, 61, 63.) As Tabares approached, Esparza pulled out his handheld radio and called for emergency "Code 3" backup, as well as pulled out his Taser and told Tabares to stop. (*Id.* ¶¶ 66-67.) Tabares continued to advance. (*Id.* ¶¶ 68.)

B. Use of Force – Objective Video

At this point, Forge began to film the encounter on her cell phone. (Forge Video, Dfdts' Ex. O.) The following facts are described as they appear in the Forge Video.

The recording begins with Esparza holding his radio in his left hand near his face, his right arm outstretched holding his Taser pointed at Tabares, who is approximately two feet from Esparza's outstretched arm. Esparza deploys his Taser, striking Tabares. Tabares does not break stride and takes an additional six steps toward Esparza over the next four seconds, while Esparza continues to back away. After the sixth step, at which point Tabares is an arm's length from Esparza, Tabares throws a right-cross punch at Esparza's head. Esparza parries with his left hand and his radio is knocked to the ground. Esparza steps to his left and wraps his left arm around Tabares's neck, placing Tabares in a headlock, and Tabares grasps at Esparza's upper-legs and waist. The two men wrestle upright for a few seconds before the struggle goes to the ground, with Tabares landing on his back and Esparza ending up on top. Esparza throws one punch on their way down while Tabares continues to grasp at Esparza's waist. When they go to the ground, the view of the Forge Video becomes obstructed by the hood of Forge's car such that Tabares's head and torso are not visible, but his limbs and any part of him that moves more than approximately one foot off the ground are visible. Esparza gains an upright, kneeling position on Tabares, who is still on his back, and throws three punches at Tabares. Esparza then says "let go of my gun" twice. As he says it the second time, Esparza regains his feet and begins tugging upward at his belt and holster. Tabares kicks upward twice at Esparza, who is now straddling Tabares. Esparza's head and torso are

rotated approximately 45 degrees to the right; he is looking down and apparently struggling to remove something from the right side of his belt.

At this point, another third-party witness, Timothy Newtson, begins to film the encounter on his cell phone. (Newtson Video, Dfdts' Ex. Q.) The following facts are described as they appear in either the Forge Video, Newtson Video, or, where possible, both. While Esparza is looking down to his right, Tabares reaches up to the left side of Esparza's belt and removes a small black object, approximately five inches in length, from Esparza's belt. Esparza turns back toward Tabares and flinches. Tabares rolls to the side and attempts to regain his feet. As he does, Esparza uses his left hand to push Tabares away by the head and neck and uses his right hand to draw his gun. At this point, the fight has lasted approximately 40 seconds and approximately four seconds have elapsed since Tabares removed the object from Esparza's belt.

As he draws his gun, Esparza's body-worn camera begins to record. (BWC Video, Dfdts' Ex. P.) The following facts are described as they appear in either the Forge Video, Newtson Video, BWC Video, or, where possible, a combination thereof. Immediately after Esparza simultaneously draws his gun and pushes Tabares, he begins to retreat. Over the course of the next two seconds, Esparza retreats approximately 15 feet and Tabares stands up and turns to face Esparza. Esparza fires six shots in quick succession, pauses for between one and two seconds, during which he yells "get down" twice, and then fires a seventh shot. Tabares remains standing during the entire salvo, staggers for a moment, and ultimately collapses about two seconds after the final shot.

It is undisputed that Tabares died of gunshot wounds. (PSDF ¶ 119.)

C. Use of Force – Esparza's Account

The following facts are aspects of the altercation between Esparza and Tabares not captured or not clear in the video recordings and are primarily matters of Esparza's perception. While they were fighting on the ground, Esparza felt his gun belt move. (*Id.* ¶ 83.) He looked down and saw Tabares grabbing and pulling on the handle of his gun. (*Id.* ¶ 84.) Esparza took Tabares's efforts to obtain the gun as an indication that Tabares intended to kill him. (*Id.* ¶ 93.) Esparza felt Tabares take something off Esparza's

person. (*Id*. ¶ 97.) At this point, Esparza began to try to draw his gun, stand up fully, and disengage from Tabares. (*Id*. ¶ 98.) The parties dispute whether Esparza immediately knew that the removed object was his flashlight. (*Id*.) They also dispute whether Esparza correctly identified the object as his flashlight at any point after seeing it, or whether he consistently erroneously identified it as his knife. (*Id*. ¶¶ 103-04.) The parties do not dispute that Esparza's knife and flashlight are roughly the same length and color. (Defendant's Reply Statement of Uncontroverted Facts ("DRSUF"), Doc. 41-1 ¶ 60.) Finally, they dispute whether Tabares made an aggressive expression or motion as he got to his feet and turned toward Esparza. (PSDF ¶ 107.)

D. Claims

Plaintiff filed this action on May 14, 2018. (*See* Compl., Doc. 2.) She brings nine claims in the operative First Amended Complaint, as follows:

— Two federal claims pursuant to 42 U.S.C. § 1983, on behalf of Decedent, against Esparza: (1) Unreasonable Detention and Arrest; (2) Excessive Force;

— One federal claim pursuant to 42 U.S.C. § 1983, in her individual capacity, against Esparza: (3) Substantive Due Process for interference with familial relations;

— Three federal claims pursuant to 42 U.S.C. § 1983, on behalf of Decedent, against both Defendants, alleging municipal liability for: (4) ratification; (5) inadequate training; (6) unconstitutional policy;

— Two California tort claims, individually and on behalf of Decedent, against both Defendants: (7) battery; (8) negligence;

— One California claim pursuant to the Bane Act, Cal. Civil Code § 52.1, on behalf of Decedent, against both Defendants: (9) interference with constitutional rights.

(FAC ¶¶ 24-98.) Defendant now moves for summary judgment on all of Plaintiff's claims. (Mot. at ii-iii.)

II. LEGAL STANDARD

In deciding a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-moving party and draw all justifiable inferences in that party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Summary judgment is proper "if the [moving party] shows that there is no genuine dispute as to any material fact and the [moving party] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. A factual dispute is "genuine" when there is sufficient evidence such that a reasonable trier of fact could resolve the issue in the non-movant's favor, and a fact is "material" when it might affect the outcome of the suit under the governing law. *Anderson*, 477 U.S. at 248. But "credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Acosta v. City of Costa Mesa*, 718 F.3d 800, 828 (9th Cir. 2013) (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000)). "The mere existence of video footage of the incident does not foreclose a genuine factual dispute as to the reasonable inferences that can be drawn from that footage," but the Court discredits a party's version of the facts that is "blatantly contradicted by the video evidence." *Vos v. City of Newport Beach*, 892 F.3d 1024, 1028 (9th Cir. 2018) (citing *Scott v. Harris*, 550 U.S. 372, 378-80).

The role of the Court is not to resolve disputes of fact but to assess whether there are any factual disputes to be tried. The moving party bears the initial burden of demonstrating the absence of a genuine dispute of fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "Once the moving party carries its initial burden, the adverse party 'may not rest upon the mere allegations or denials of the adverse party's pleading,' but must provide affidavits or other sources of evidence that 'set forth specific facts showing that there is a genuine issue for trial.'" *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (quoting Fed. R. Civ. P. 56(e)).

III. DISCUSSION

A. Section 1983 Claims Against Esparza

Esparza raises a qualified immunity defense to each of the § 1983 claims against him. (Mot. at ii-iii.) The resolution of a qualified immunity defense turns on two questions: (1) whether, "[t]aken in the light most favorable to the party asserting the injury, . . . the facts . . . show the officer's conduct violated a constitutional right," and (2) "whether the right was clearly established" at the time of the officer's conduct. *Saucier v. Katz*, 533 U.S. 194, 201 (2001), *overruled on other grounds by Pearson v. Callahan*, 555 U.S. 223 (2009). If the first inquiry reveals no constitutional violation, however, then the second inquiry is moot because there is no actionable claim at all and qualified immunity becomes irrelevant. *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998).

1. Fourth Amendment: Unreasonable Detention and Arrest

Although Plaintiff pleads this as a single claim, unreasonable arrest and detention are two separate but related claims. Both are seizures under the Fourth Amendment. Whereas a mere investigatory detention need only be predicated on an officer's "reasonable suspicion" that a suspect was engaged in criminal activity, *see Terry v. Ohio*, 392 U.S. 1, 23-27 (1968), a lawful arrest requires a showing of probable cause. *McKenzie v. Lamb*, 738 F.2d 1005, 1007 (9th Cir. 1984) (citing *Beck v. Ohio*, 379 U.S. 89, 90-91 (1964). The threshold question is thus: when did Esparza "seize" Tabares? After establishing when a seizure occurred, the Court may then inquire into the nature of the seizure—detention or arrest—and whether it was adequately justified. *See United States v. Hernandez*, 27 F.3d 1403, 1406 (9th Cir. 1994) ("Only when an encounter is classified as a seizure must [the Court] determine whether there was reasonable suspicion.").

"[A] person is not 'seized' within the meaning of the Fourth Amendment unless 'by means of physical force or show of authority, his freedom of movement is

restrained.'" *United States v. Smith*, 633 F.3d 889, 892-93 (9th Cir. 2011) (quoting *United States v. Mendenhall*, 446 U.S. 544, 553 (1980)). An "attempted seizure is not a seizure; the suspect must actually be subdued." *Brendlin v. California*, 551 U.S. 249, 254 (2007). Thus, "[a] seizure does not occur if an officer applies physical force in an attempt to detain a suspect but such force is ineffective." *Hernandez*, 27 F.3d at 1407 (citing *California v. Hodari D.*, 499 U.S. 621, 625 (1991)). Similarly, "[i]n the absence of physical force, in order to constitute a seizure, an officer's show of authority must be accompanied by *submission* to the assertion of authority." *Smith*, 633 F.3d at 893 (internal quotation marks omitted). "The Supreme Court has held that a seizure does not occur where the subject does not yield." *Id.* (citing *Hodari D.*, 499 U.S. at 626).

Plaintiff contends that Tabares was seized when, after initially walking away, he turned around and walked toward Esparza in response to Esparza's command to stop and advisement that Tabares was being detained. (Opp. at 11.) But this case is analogous to *Smith*, in which the suspect "claim[ed] that he was seized when he paused momentarily, turned to and moved toward [the officer], and engaged in a short verbal exchange," before continuing to flee. 633 F.3d at 892. In *Smith*, rejecting the notion of such an ephemeral "seizure" under the Fourth Amendment, the Ninth Circuit "expressly 'declined to adopt a rule whereby momentary hesitation and direct eye contact prior to flight constitute submission to a show of authority.'" *Id.* at 893 (quoting *Hernandez*, 27 F.3d at 1407). Here, any "submission" to Esparza's command was similarly fleeting, as all witness testimony establishes beyond genuine dispute that Tabares became aggressive almost immediately thereafter. (Esparza Decl. ¶¶ 35-36 ("Tabares turned around and adopted a fighting stance with clenched fists . . . [and] began making a grunting or growling sound."); Martin Decl. ¶¶ 9-11 ("[W]hen he turned around, Tabares started walking directly at Esparza with a purpose. Tabares was not merely walking toward Esparza in response to Esparza's commands. Tabares was, rather, walking at Esparza in a confrontational manner."); Forge Decl. ¶ 14 ("Tabares turned around, and started talking loudly and aggressively at Esparza.").) Plaintiff's only attempt to dispute this version of events is to assert that it is not corroborated by the video evidence. (*See* PSDF ¶¶ 57, 59.) But it is obvious from the record that this portion of the incident occurred before Forge started recording. (PSDF ¶¶ 56-59.) Indeed, Forge testified that she *began*

recording precisely *because* she was concerned about Tabares's aggression, and her recording begins with Tabares already only an arm's length from Esparza. (Forge Decl. ¶ 14; Forge Video.) Therefore, there is no genuine dispute that Tabares's response to Esparza's verbal commands was not submission to authority comprising a seizure under the Fourth Amendment.

Esparza next attempted to subdue Tabares by deploying his Taser. But this attempted seizure also failed to seize Tabares for Fourth Amendment purposes. The video shows that Tabares was hardly fazed by the Taser and continued to bear down on Esparza without yielding, and Forge and Esparza testify to the same. (Esparza Decl. ¶ 44; Forge Decl. ¶ 14; Forge Video.) Plaintiff does not dispute that the Taser had no apparent incapacitating effect. (PSDF ¶ 73.) Such an ineffective use of force is not a seizure. *See Hernandez*, 27 F.3d at 1407; *Brooks v. Gaenzle*, 614 F.3d 1213, 1224 (10th Cir. 2010) (concluding that a suspect who was shot by an officer but continued to climb a fence and elude arrest was not "seized" because "[the gunshot] clearly did not terminate his movement or otherwise cause the government to have physical control over him").

It is undisputed that Tabares then attempts to punch Esparza, at which point Esparza grabs Tabares around the neck and they begin to wrestle. This is plainly a restraint on Tabares's movement and amounts to a seizure. Just as obvious, however, is that Tabares's assault on Esparza provided ample probable cause for the seizure and the seizure was eminently reasonable. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."); Cal. Penal Code §§ 69 (felony resisting an officer by threat or violence), 241(c) (assault on a peace officer).

Accordingly, Plaintiff's seizure is not actionable under § 1983 because probable cause existed to arrest Tabares for a crime at the time a seizure was accomplished. The Court therefore GRANTS the Motion as to Plaintiff's unreasonable detention or arrest claim. Because the Court finds no constitutional deprivation, it need not reach whether Esparza is entitled to qualified immunity on that claim.

2. Fourth Amendment: Excessive Force

In *Tennessee v. Garner* and *Graham v. Connor*, the Supreme Court clarified that the Fourth Amendment's protection against "unreasonable . . . seizures" protects all persons from the use of excessive force during an arrest, detention, or other seizure. *Tennessee v. Garner*, 471 U.S. 1, 3 (1985); *Graham v. Connor*, 490 U.S. 386, 395 (1989); U.S. Const. amend. IV. In examining a claim of excessive force, a court should "balance 'the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake'" to determine whether the officer's conduct was "objectively reasonable." *Bryan v. MacPherson*, 630 F.3d 805, 823 (9th Cir. 2010) (quoting *Graham*, 490 U.S. at 396 (internal quotation marks omitted).

The nature of the intrusion is apparent; Esparza used deadly force against Tabares.[2] "The intrusiveness of a seizure by means of deadly force is unmatched." *Garner*, 471 U.S. at 9. "The use of deadly force implicates the highest level of Fourth Amendment interests both because the suspect has a 'fundamental interest in his own life' and because such force 'frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment.'" *A. K. H. ex rel. Landeros v. City of Tustin*, 837 F.3d 1005, 1011 (9th Cir. 2016) (quoting *Garner*, 471 U.S. at 9). Thus, while "there are no per se rules in the Fourth Amendment excessive force context," *George v. Morris*, 736 F.3d 829, 838 (9th Cir. 2013), an officer generally cannot use deadly force unless "the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Gonzalez v. City of Anaheim*, 747 F.3d 789, 793 (9th Cir. 2014) (quoting *Scott v. Henrich*, 39 F.3d 912, 914 (9th Cir. 1994)); *Garner*, 471 U.S. at 3. Hence, "[b]ecause no one disputes that [Esparza] used the highest level of force against [Tabares], the issue is determining whether the governmental interests at stake were sufficient to justify it." *Vos*, 892 F.3d at 1031.

[2] Plaintiff clarified at oral argument that her excessive force claim is based only on the deadly gunshots and not also on Esparza's initial attempt to subdue Tabares by deploying his Taser.

"The strength of the government's interest is measured by examining three primary factors: (1) 'the severity of the crime at issue,' (2) 'whether the suspect poses an immediate threat to the safety of the officer[] or others,' and (3) 'whether the suspect is actively resisting arrest or attempting to evade arrest by flight.'" *Id*. (quoting *Landeros*, 837 F.3d at 1011). Yet, rather than mechanically marching through these nonexhaustive factors, the Court should "examine the totality of the circumstances, including whatever factors may be relevant in a particular case." *Marquez v. City of Phoenix*, 693 F.3d 1167, 1174-75 (9th Cir. 2012). A court should examine an officer's use of force based on the "perspective of a reasonable officer on the scene" and avoid post-hoc judgments based on the benefit of hindsight. *Graham*, 490 U.S. at 396. "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396-97. Because this is purely an objective inquiry, an officer's intentions—good or ill—have no bearing on whether he employed excessive force. *Id.* at 397.

Here, the Court finds that there are no genuine disputes of material fact that Esparza's use of deadly force was objectively reasonable; a reasonable jury could not find liability as a matter of law.

As a threshold matter, Plaintiff asks the Court to invoke *Deorle v. Rutherford* and its progeny, which hold that the government's interest in employing deadly force is lessened "where it is or should be apparent to the officer[] that the individual involved is emotionally disturbed." 272 F.3d 1272, 1283 (9th Cir. 2001); *see also Bryan*, 630 F.3d at 829; *Glenn v. Washington County*, 673 F.3d 864, 875-76 (9th Cir. 2011). This consideration does not fundamentally alter the *Graham* analysis, but rather adds another factor into the mix. *Bryan*, F.3d at 829 (explaining that there are not "two tracks of excessive force analysis, one for the mentally ill and one for serious criminals," but rather that "the governmental interest in using [deadly] force is diminished [where] the officers are confronted with a mentally ill individual" (alterations and internal quotation marks omitted)). Regardless of whether Tabares was actually mentally ill, it is undisputed that Esparza did not ascertain as much. (DRSUF ¶ 103.) The question is thus whether a reasonable officer would have concluded that Tabares was mentally ill and acted

accordingly. Despite extensive argument that *Deorle* should apply, Plaintiff does not point to *any* evidence probative of the fact that Tabares exhibited symptoms of mental illness that would have been apparent to Esparza. Therefore, the Court does not adjust its analysis based on Tabares's purported mental impairment.

Regarding the severity of the crime at issue, there is no genuine dispute that Tabares had just attempted a violent assault on Esparza. As catalogued in the preceding section, undisputed evidence establishes that Tabares—provoked only by a verbal command to halt—aggressively bore down on and attacked a retreating Esparza. Unlike where an officer is summoned to a scene on a vague assertion of misconduct, Esparza was both a witness and a victim of this deliberate and violent act. *Cf. Vos*, 892 F.3d at 1031 (citing *Glenn*, 673 F.3d at 874). Thus, this factor weighs in favor of Esparza's interest in using deadly force.

The second two factors merge in this case because Tabares's efforts to resist arrest are the same efforts that threatened Esparza's safety. Hence, Esparza's interest in using deadly force to execute the arrest and interest in using deadly force to protect himself will rise and fall together. There are genuine disputes concerning two facts relevant to this evaluation. First, Plaintiff raises a dispute as to whether Esparza knew Tabares was "armed" only with a flashlight at the time Esparza employed deadly force. Although Esparza attests that he thought the item Tabares obtained from Esparza's belt during the struggle was Esparza's knife, he also admitted that the object was consistent in color and size to his flashlight. (Esparza Decl. ¶ 61; Esparza Dep., Pltf's Ex. 1 at 112:20-24, 115:11-22.) Hence, considering his proximity to the object at the moment of perception, and presumed awareness of what his own gear looks like, a reasonable jury could conclude that Esparza knew or should have known that the object was his flashlight. Second, Plaintiff sufficiently disputes whether Tabares made an "overt movement" to reengage combat with Esparza, as the video recordings show only that Tabares gets to his feet and assumes a stance partially facing Esparza. (Esparza Decl. ¶ 67; Forge Video; BWC Video; Newtson Video.) Although a reasonable jury could find that Tabares's stance indicated an intent to reengage, it could also find that Tabares made no such indication.

Even accepting that Esparza knew Tabares was armed with only a flashlight and that Tabares did not immediately attempt to reengage combat, however, Esparza's conduct was objectively reasonable. Plaintiff analyzes in isolation Esparza's decision to fire his weapon, and she argues that a reasonable officer would not shoot an unarmed man 15 feet away. (*See* Opp. at 15-17.) But that is simply not this case. Taking such a narrow time-slice of the encounter ignores *Graham*'s mandate not to rely on slow-motion hindsight to assess the reasonableness of the full context of a rapidly-developing situation in real time. *See Graham*, 490 U.S. at 396-97. The full context and undisputed facts tell a much different story. First, Tabares immediately evinced an intent to do grievous bodily harm. This is not a case where the suspect provoked the officer with a relatively innocuous use of force. *Cf. Estate of Najera v. City of Anaheim*, No. 8:16-cv-01243-JLS-JCG, 2017 WL 10544043, at *4 (C.D. Cal. July 10, 2017) (finding officer may have acted unreasonably by employing deadly force in response to suspect throwing a handful of sand at him). Rather, the video clearly shows Tabares rapidly close into striking distance and throw a haymaker punch at Esparza's head. Throughout the ensuing struggle, Tabares repeatedly attempted to arm himself by reaching for a weapon on Esparza's belt.[3] Indeed, Tabares ultimately succeeded in securing such a tool, even if one less deadly than a knife or firearm. Second, Tabares never evinced relinquishment of this vicious intent or otherwise submitted to Esparza's control. He kicked, punched, and sought arms until the moment Esparza finally pushed him away. Esparza, on the other hand, repeatedly sought to avoid a deadly confrontation, first retreating, then brandishing his Taser, then deploying his Taser, then continuing to retreat. Yet Tabares persisted to engage in combat.

In *Billington v. Smith*, the Ninth Circuit addressed a highly similar situation and concluded that the officer's conduct was objectively reasonable:

[3] Plaintiff does not cite evidence to refute Esparza's testimony that Tabares grabbed at Esparza's gun. (PSDF ¶¶ 84, 87, 94.) At oral argument, however, Plaintiff argued that the video—though it shows Tabares grabbing at Esparza's waist—does not definitively show an attempt to secure the gun. Even assuming ambiguity as to whether Tabares was reaching for Esparza's gun, in particular, it is far beyond dispute that he was attempting to secure a weapon or tool from Esparza's belt to service him in his fight against Esparza and amplify his ability to harm Esparza.

> Hennessey actively, violently, and successfully resisted arrest and physically attacked Detective Smith and tried to turn Smith's gun against him. No one who saw the fight disputes that Hennessey was the aggressor, and that he kept beating Detective Smith even when Detective Smith tried to retreat . . . Hennessey posed an imminent threat of injury or death; indeed, the threat of injury had already been realized by Hennessey's blows and kicks.
>
> Under the circumstances, a reasonable officer would perceive a substantial risk that Hennessey would seriously injure or kill him, either by beating and kicking him, or by taking his gun and shooting him with it. Indeed, once Hennessey grabbed the barrel of Detective Smith's gun and tried to pry it from his hand, a reasonable officer would infer a substantial possibility that he was fighting for his life. Maybe he could have hoped that Hennessey simply wanted to disarm him, not shoot him, but that would have been a gamble. Under these circumstances, taking the facts alleged in the light most favorable to Hennessey, Detective Smith could have reasonably shot Hennessey even if he had just pushed Hennessey back a few feet.

292 F.3d 1177, 1185 (9th Cir. 2002), *abrogated on other grounds by County of Los Angeles v. Mendez*, 137 S. Ct. 1539 (2017).

The hypothetical posed in the last sentence of the quoted passage describes precisely what happened here, and the supporting analysis demonstrates why the same conclusion is appropriate in this case. An officer's ability to temporarily retreat out of striking distance from otherwise sustained, life-threatening combat does little to end the threat absent a clear sign of submission from the assailant. That blows cease to be exchanged for an instant does not mean the fight is over. The undisputable video evidence shows no definitive end to the brawl before Esparza fires. Indeed, Esparza is still fending off Tabares with one hand while drawing his gun with the other, and he fires within the next *two seconds*. These are precisely the type of "split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving"—contemplated by *Graham*. 490 U.S. at 396-97. That Esparza managed to put some distance between himself and Tabares in this exceedingly thin temporal window does not by itself call into

question the reasonableness of his conduct. Plaintiff argues that Tabares made no clear motion to reengage combat, but that asks Esparza to ignore that he had theretofore been under attack and gamble that the attack had ceased. The law does not require him to do so.

In *Tanuvasa v. Morton*, however, a court in this district addressed similar facts and reached a different result. No. 5:12-cv-02120-VAP-SP, 2014 WL 12588685, at *8-9 (C.D. Cal. Oct. 1, 2014). There, drawing all factual inferences in the plaintiff's favor, the court concluded that a jury could find an officer's decision-making unreasonable where the officer and an assailant struggled to control the officer's gun before becoming separated by a mere four feet, at which point the officer shot and killed the assailant. *Id.* At first blush, *Tanuvasa* appears on point, but it is in fact quite distinct. In particular, the court noted that there were only two eyewitnesses to the incident—the officer and a bystander—who "present[ed] substantially different accounts of what happened," and the case would likely therefore turn on credibility determinations. *Id.* at *8. The witness accounts differed not only on the precise conditions at the moment of shooting, but also regarding nearly all of the prefatory events. *Id.* at *5-6. Thus, the court concluded that "[s]ummary judgment is not warranted when so many material facts are in dispute." *Id.* at *8.

This Court has been similarly skeptical of granting summary judgment in cases with few witnesses and where an officer's reasonableness is supported largely by his own self-serving account. *See Najera*, 2017 WL 10544043, at *3. Here, however, the material facts are not in dispute, as there are multiple eyewitnesses to every stage of the incident, a video recording of most of the events leading up to the shooting, and *three* video recordings of the shooting itself. Plaintiff raises some doubt as to Esparza's subjective perceptions—*i.e.*, what he saw and when he saw it—but these do not materially affect the outcome compelled by the objective evidence.

Finally, the full chain of events belies Plaintiff's assertion that Esparza did not adequately warn Tabares or otherwise attempt non-deadly methods of restraint. Despite backing away, giving verbal orders to halt, deploying his Taser, physically wrestling Tabares to the ground, and warning him not to attempt to take Esparza's weapons, Plaintiff would require Esparza to attempt further warnings and non-deadly methods of

restraint *ad infinitum*. Just as a brief retreat does not obviate an officer's reasonable fears of an assailant, not every pause in the action requires an officer to start over with his non-lethal options and warnings. At some point, reasonable officers are entitled to infer that no amount of warnings or non-lethal means will succeed in safely subduing a suspect. Indeed, after multiple ignored warnings and nearly a minute of sustained combat, Esparza is objectively entitled to that inference.

Accordingly, the Court GRANTS Defendants' Motion as to Plaintiff's excessive force claim. Because the Court finds no constitutional deprivation, it need not reach whether Esparza is entitled to qualified immunity on that claim.

3. Fourteenth Amendment: Substantive Due Process

Survivors "may assert a Fourteenth Amendment [substantive due process] claim based on the related deprivation of their liberty interest arising out of their relationship with [a decedent killed by law enforcement]." *Moreland v. Las Vegas Metro. Police Dep't*, 159 F.3d 365, 371 (9th Cir. 1998) (citing *Byrd v. Guess*, 137 F.3d 1126, 1133-34 (9th Cir. 1998)). Whether the underlying seizure violated the Fourth Amendment has no bearing on the success of such a claim, as the two rights are governed by distinct standards. *Id.* Specifically, a substantive due process claim requires a plaintiff to demonstrate that an officer's conduct "shocks the conscience," a standard that requires either "deliberate indifference" or "purpose to harm," depending on "whether the officer[] had the opportunity for actual deliberation." *Porter v. Osborn*, 546 F.3d 1131, 1138-39 (9th Cir. 2008). At summary judgment, the appropriate standard of culpability may be determined as a matter of law if there is no genuine dispute over whether the officer had sufficient time to deliberate. *Garlick v. Cty. of Kern*, 167 F. Supp. 3d 1117, 1165 (E.D. Cal. 2016); *Chien Van Bui v. City & Cty. of San Francisco*, 61 F. Supp. 3d 877, 901 (N.D. Cal. 2014).

For substantially the same reasons justifying Esparza's use of deadly force, the Court concludes that "[Esparza] faced a fast paced, evolving situation presenting competing obligations with insufficient time for the kind of actual deliberation required for deliberate indifference," and the proper standard of culpability is therefore a "purpose

to harm." *Porter*, 546 F.3d at 1142. Thus, Esparza can be held liable under a substantive due process theory only if he "acted with a purpose to harm [Tabares] for reasons unrelated to legitimate law enforcement objectives." *Id*. at 1137. Under this standard, a plaintiff must submit non-speculative evidence that demonstrates an officer's improper motive. *Jeffers v. Gomez*, 267 F.3d 895, 907 (9th Cir. 2001); *Shirar v. Guerrero*, 673 Fed. Appx. 673, 675 (9th Cir. 2016) (quoting *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998)). But Plaintiff provides no such evidence of motive apart from Esparza's legitimate motives to execute an arrest and protect himself. In the context of a rapidly-evolving situation, the decision to accomplish these legitimate ends through deadly force does not evidence an intent to harm. *Wilkinson v. Torres*, 610 F.3d 546, 554 (9th Cir. 2010).

Accordingly, the Court GRANTS Defendants' Motion as to Plaintiff's substantive due process claim. Because the Court finds no constitutional deprivation, it need not reach whether Esparza is entitled to qualified immunity on that claim.

B. Section 1983 Claims for Municipal Liability

Pursuant to the Supreme Court's holding in *Monell*, a municipality is liable under § 1983 if official municipal policy causes a constitutional tort. *Oviatt v. Pearce*, 954 F.2d 1470, 1473-74 (9th Cir. 1992) (citing *Monell v. Department of Social Services*, 436 U.S. 658, 691(1978) and *City of Canton v. Harris*, 489 U.S. 378, 388 (1989)). But "[t]he Supreme Court [has] held that a public entity is not liable for § 1983 damages under a policy that can cause constitutional deprivations, when the factfinder concludes that an individual officer, acting pursuant to the policy, inflicted no constitutional harm to the plaintiff." *Quintanilla v. City of Downey*, 84 F.3d 353, 355 (9th Cir. 1996) (citing *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986)).

Accordingly, because no reasonable factfinder could find that Esparza violated the Constitution, Plaintiff's *Monell* claims are foreclosed as a matter of law, and the Court GRANTS Defendants' Motion as to those claims.

C. State-Law Claims[4]

Plaintiff's state-law claims are brought against Esparza and Huntington Beach. *See* Cal. Govt. Code § 815.2 ("A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment."); *see also Hayes v. County of San Diego*, 57 Cal. 4th 622, 629 (2013) (citing Cal. Gov. Code § 815.2). There is no dispute that Esparza was acting within the scope of his employment as a HBPD officer. Thus, any state law claim that can be made against him can also be made against Huntington Beach.

1. Battery

The standard for determining the reasonableness of an officer's use of force pursuant to a battery claim is analogous to the Fourth Amendment's reasonableness inquiry. *See Hayes*, 736 F.3d at 1232. Thus, for the same reasons discussed above, no reasonable jury could conclude that Esparza's use of force was unreasonable.

Accordingly, the Court GRANTS Defendants' Motion as to Plaintiff's battery claim.

2. Negligence

The California Supreme Court has "long recognized that peace officers have a duty to act reasonably when using deadly force." *Hayes*, 57 Cal. 4th at 629. Under California negligence law, "liability can arise if the tactical conduct and decisions leading up to the use of deadly force show, as part of the totality of circumstances, that the use of deadly force was unreasonable." *Id.* at 626. Plaintiff relies on the same arguments she relied on regarding her unreasonable detention and excessive force claims—*to wit*, that

[4] Because Plaintiff's state-law claims present substantially identical issues as the dismissed federal claims, the Court opts to retain supplemental jurisdiction over the state-law claims and resolve the entire Motion. *See* 28 U.S.C. § 1367(c)(3).

Esparza did not properly identify Tabares's mental illness or establish cause to initiate a stop—and, for the same reasons, those arguments are insufficient here.

Accordingly, the Court GRANTS Defendants' Motion as to Plaintiff's negligence claim.

3. Bane Act

"The Bane Act civilly protects individuals from conduct aimed at interfering with rights that are secured by federal or state law, where the interference is carried out 'by threats, intimidation or coercion.'" *Reese v. City of Sacramento*, 888 F.3d 1030, 1040 (9th. Cir. 2018); Cal. Civ. Code § 52.1(a). "Section 52.1 'provides a cause of action for violations of a plaintiff's state or federal civil rights committed by "threats, intimidation, or coercion."'" *Reese*, 888 F.3d at 1040 (quoting *Chaudry v. City of Los Angeles*, 751 F.3d 1096, 1105 (9th Cir. 2014)). "The elements of a section 52.1 excessive force claim are essentially identical to those of a § 1983 excessive force claim. Thus, where a plaintiff's claims under the federal and state constitutions are co-extensive, the discussion of a plaintiff's federal constitutional claim resolves both the federal and state constitutional claims." *Knapps v. City of Oakland*, 647 F. Supp. 2d 1129, 1168 (N.D. Cal. 2009). "As the California Constitution contains a similar provision [to the Fourth Amendment], and the United States Constitution defines the minimum protection provided under the California Constitution, the same analysis applies here." *Id.* Therefore, Plaintiff's Bane Act claim fails for the same reasons as her § 1983 excessive force claim.

Accordingly, the Court GRANTS Defendants' Motion as to Plaintiff's Bane Act claim.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS the Motion. Defendants are ORDERED to file a proposed judgment, no later than seven (7) days from the date of this Order, consistent with the conclusions and dispositions described herein.

Initials of Preparer: tg