Tentative Rulings for February 2, 2023
Department 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

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(Tentative Rulings begin at the next page)

Tentative Rulings for Department 503

Begin at the next page

(20) **Tentative Ruling**

Re: ***McReynolds et al. v. Leal et al.***
Superior Court Case No. 21CECG01012

Hearing Date: February 2, 2023 (Dept. 503)

Motion: By Defendants Joshua Leal and American Metals Corp. To Bifurcate Punitive Damages

Tentative Ruling:

To grant. (Civ. Code, § 3295, subd. (d).)

Explanation:

Civil Code section 3295, subdivision (d) provides in relevant part: "The court **shall**, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294." (Emphasis added.)

Our Supreme Court has explained, "As an evidentiary restriction, section 3295(d) **requires** a court, upon application of any defendant, to bifurcate a trial so that the trier of fact is not presented with evidence of the defendant's wealth and profits until after the issues of liability, compensatory damages, and malice, oppression, or fraud have been resolved against the defendant. Bifurcation minimizes potential prejudice by preventing jurors from learning of a defendant's 'deep pockets' before they determine these threshold issues." (*Torres v. Automobile Club of So. California* (1997) 15 Cal.4th 771, 777-778, emphasis added.)

Contrary to the belief of plaintiffs in their oppositions, the motion does not seek to bifurcate the issue of liability for punitive damages. The motion seeks, pursuant to the terms of the statute, to bifurcate the punitive damages portion of the trial only to the extent that plaintiffs would be precluded from introducing evidence of defendants' profits or financial condition until after the trier of fact returns a verdict for either plaintiff awarding damages and finding that a defendant is guilty of malice, oppression or fraud. Section 3295, subdivision (d), is not discretionary.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: jyh on 1/27/2023 .
(Judge's initials) (Date)

(37)

Tentative Ruling

Re: ***Donald Aluisi v. James Jorgensen***
Superior Court Case No. 17CECG01912

Hearing Date: February 2, 2023 (Dept. 503)

Motion: By Plaintiffs Donald Aluisi and Karen Aluisi to (1) Compel Defendant Paul Brar's Responses to Form Interrogatories, Set Two; (2) Compel Defendant David Justice's Responses to Form Interrogatories, Set Two; (3) Compel Defendant Jorgensen Brar Accountancy's Responses to Form Interrogatories, Set Two; (4) Compel Defendant James Jorgensen's Responses to Form Interrogatories, Set Two; and (5) for Monetary Sanctions

Tentative Ruling:

To grant plaintiffs Donald Aluisi and Karen Aluisi's motions to compel defendant Paul Brar's Responses to Form Interrogatories, Set Two; defendant David Justice's Responses to Form Interrogatories, Set Two; defendant Jorgensen Brar Accountancy's Responses to Form Interrogatories, Set Two; and defendant James Jorgensen's Responses to Form Interrogatories, Set Two.

To grant monetary sanctions against defendants Paul Brar, David Justice, Jorgensen Brar Accountancy, and James Jorgensen in the total amount of $3,000. Monetary sanctions are ordered to be paid within 30 calendar days from the date of service of the minute order by the clerk.

Explanation:

Motions to Compel

Defendants have had sufficient time to respond to the discovery propounded by plaintiff, and have not done so. Failing to respond to discovery within the 30-day time limit waives objections to the discovery, including claims of privilege and work product protection. (Code Civ. Proc., § 2030.290, subd. (a) [interrogatories]; Code Civ. Proc., § 2031.300, subd. (a) [production demands]; see *Leach v. Superior Court* (1980) 111 Cal.App.3d 902, 905–906.) Here, defendants were granted an extension and still did not respond to the discovery requests.

Sanctions

Regarding interrogatories, where a party seeks monetary sanctions, the court "shall" impose such a sanction against the unsuccessful party, unless the court finds that party acted with substantial justification or other circumstances would render such sanctions as unjust. (Code Civ. Proc., § 2030.290, subd. (c).) Defendants have agreed to

pay $3,000 in sanctions. The court is granting the amount agreed to by the defendants of $3,000 as sanctions.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: jyh on 1/31/23.
(Judge's initials) (Date)

(34)

Tentative Ruling

Re: ***Hernandez v. City of Fresno***
Superior Court Case No. 20CECG00052

Hearing Date: February 2, 2023 (Dept. 503)

Motion: by Defendants for Summary Judgment, or Alternatively Summary Adjudication

Tentative Ruling:

To deny the motion for summary judgment. To deny the motion for summary adjudication. (Code Civ. Proc. § 437c.)

Explanation:

Burden on Summary Judgment

Summary judgment law turns on issue finding rather than issue determination. (*Diep v California Fair Plan Ass'n* (1993) 15 Cal.App.4th 1205, 1207.) The court does not decide the merits of the issues, but merely discovers, through the medium of affidavits or declarations, whether there are issues to be tried and whether the parties possess evidence that demands the analysis of a trial. (*Melamed v City of Long Beach* (1993) 15 Cal.App.4th 70, 76; *Molko v Holy Spirit Ass'n* (1988) 46 Cal.3d 1092, 1107; *Schwoerer v Union Oil Co.* (1993) 14 Cal.App.4th 103, 110.) In short, the motion is not a substitute for a bench trial.

Summary adjudication is the proper mechanism for challenging a particular, "cause of action, an affirmative defense, a claim for punitive damages, or an issue of duty." (*Paramount Petroleum Corp. v. Superior Court* (2014) 227 Cal.App.4th 226, 242.) However, "[a] motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (Code Civ. Proc., § 437c, subd. (f)(1); see also *Catalano v. Superior Court* (2000) 82 Cal.App.4th 91, 97 [piecemeal adjudication prohibited].)

A summary judgment motion must show that the "material facts" are undisputed. (Code Civ. Proc., § 437c, subd. (b)(1).) The pleadings serve as the "outer measure of materiality" in a summary judgment motion, and the motion may not be granted or denied on issues not raised by the pleadings. (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258; *Nieto v. Blue Shield of Calif. Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 74 [pleadings determine the scope of relevant issues on a summary judgment motion].)

A party moving for summary judgment or summary adjudication must support the motion with a separate statement that sets forth plainly and concisely all material facts that the moving party contends are undisputed, and each of these material facts must be followed by a reference to the supporting evidence. (Code Civ. Proc., § 437c, subds.

(b)(1), (f)(2).) A separate statement is required to afford due process to the opposing party and to permit the judge to expeditiously review the motion for summary judgment or summary adjudication to determine quickly and efficiently whether material facts are disputed. (*Parkview Villas Ass'n, Inc. v State Farm Fire & Cas. Co*. (2005) 133 Cal.App.4th 1197, 1210; *United Community Church v Garcin* (1991) 231 Cal.App.3d 327, 335.) As a result, the separate statement should include only *material* facts—ones that could make a difference to the disposition of the motion. (Cal. Rules of Court, rule 3.1350(f)(3); see also Cal. Rules of Court, rule 3.1350(a)(2) [defining "material facts"].)

Thus, the moving party must go through its own case and the opposing party's case on an issue-by-issue basis. The moving party must identify for the court the matters it contends are "undisputed," and cite the specific evidence (pleadings admissions, or discovery, or declarations) showing there is no controversy as to such matters and that the moving party is entitled to judgment as a matter of law. "This is the Golden Rule of Summary Adjudication: If it is not set forth in the separate statement, *it does not exist*." (*United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 337 [superseded by statute on other grounds]; *Allen v. Smith* (2002) 94 Cal.App.4th 1270, 1282; *Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 173 [failure of defendant's separate statement to address material allegation in complaint was "fatal flaw"].)

In the case at bench, defendants move for summary judgment, of alternatively summary adjudication, of plaintiffs' complaint for damages based on the alleged excessive force used against Oliver Hernandez, Jr. by officers of the Fresno Police Department resulting in his death. Defendants identified four issues in their notice of motion as the basis for summary judgment, or alternatively summary adjudication of the individual issue. The fourth issue, that defendants are entitled to judgment on plaintiffs' claim for wrongful death is not found in the separate statement. (Notice of Motion, p. 2.) For this reason, summary adjudication of this issue is denied. The memorandum identifies punitive damages as an issue for summary adjudication, however it is not identified in the Notice of Motion or separate statement. (Notice of Motion, p. 2; Separate Statement of Undisputed Material Facts, p. 2.) As such the court declines to rule on the issue of punitive damages.

The three issues before the court in the separate statement are as follows:

1. Defendants are entitled to judgment on plaintiffs' first cause of action for negligence under California state law pursuant to Cal. Gov't Code §§ 815.2(a) & 820(a) because Defendant officers used only objectively reasonable force under the totality of the circumstances and their actions were justified under the law.

2. Defendants are entitled to judgment on plaintiff's second cause of action for violation of the Bane Act because Defendants used only objectively reasonable force under the totality of the circumstances and did not act with the specific intent to violate decedent's constitutional right to be free from unreasonable seizures/excessive force; and, if Defendant officers are not liable, the County is not vicariously liable.

3. Defendants are entitled to judgment on plaintiffs' fourth cause of action for battery under California state law pursuant to Cal. Gov't Code §§ 815.2(a) & 820(a) and Cal. Civ.

Code § 43 because Defendant officers used only objectively reasonable force under the totality of the circumstances and their actions were justified under the law.

A single set of twenty two undisputed material facts are listed and apply to each of the three issues.

Defendants premise their argument for judgment in their favor of each issue on the defendant officers using only objectively reasonable force under the totality of the circumstances. Plaintiffs dispute that the force used by defendants against Oliver Hernandez, Jr. was reasonable as a matter of law.

Reasonable Force

Under federal law, in excessive force cases, the courts consider whether a police shooting was a violation of the suspect's Fourth Amendment rights. "Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires 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. Our Fourth Amendment jurisprudence has long recognized that 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. Because '[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,' however, its proper application requires careful attention to the facts and circumstances of each particular case, including 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." (*Graham v. Connor* (1989) 490 U.S. 386, 396, internal citations omitted.)

"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. The Fourth Amendment is not violated by an arrest based on probable cause, even though the wrong person is arrested, nor by the mistaken execution of a valid search warrant on the wrong premises. With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: 'Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' violates the Fourth Amendment. 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 pp. 396–397, internal citations omitted.)

"As in other Fourth Amendment contexts, however, the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional." (*Id*. at p. 397, internal citations omitted.)

"The '"most important" factor under *Graham* is whether the suspect posed an 'immediate threat to the safety of the officers or others."' These factors are non-

exhaustive. Courts still must 'examine the totality of the circumstances and consider whatever specific factors may be appropriate in a particular case, whether or not listed in *Graham*.' 'Other relevant factors may include the availability of less intrusive force, whether proper warnings were given, and whether it should have been apparent to the officer that the subject of the force used was mentally disturbed.' 'With respect to the possibility of less intrusive force, officers need not employ the least intrusive means available[,] so long as they act within a range of reasonable conduct.'" (*Estate of Lopez by and through Lopez v. Gelhaus* (9th Cir. 2017) 871 F.3d 998, 1005–1006, internal citations omitted.)

Also, "We have held that 'summary judgment should be granted sparingly in excessive force cases.' 'This principle applies with particular force where,' as here, 'the only witness other than the officers was killed during the encounter.' 'In such cases, we must ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story - the person shot dead - is unable to testify.' 'Accordingly, we carefully examine all the evidence in the record, such as medical reports, contemporaneous statements by the officer and the available physical evidence, ... to determine whether the officer's story is internally consistent and consistent with other known facts.' 'We must also examine circumstantial evidence that, if believed, would tend to discredit the police officer's story.'" (*Id*. at p. 1006, internal citations omitted.)

"Case law has clearly established that an officer may not use deadly force to apprehend a suspect where the suspect poses no immediate threat to the officer or others. On the other hand, it is not constitutionally unreasonable to prevent escape using deadly force '[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.'" (*Wilkinson v. Torres* (9th Cir. 2010) 610 F.3d 546, 550, internal citations omitted.)

"In assessing reasonableness, the court should give 'careful attention to the facts and circumstances of each particular case, including 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.'" (*Id*. at p. 550, internal citation omitted.)

"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." (*Id*. at pp. 550–551, internal citations omitted.)

" '... Thus, under *Graham*, we must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes "reasonable" action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.'" (*Martinez v. County of Los Angeles* (1996) 47 Cal.App.4th 334, 343, internal citations omitted.)

"The Supreme Court's definition of reasonableness is therefore 'comparatively generous to the police in cases where potential danger, emergency conditions or other

exigent circumstances are present.' In effect, 'the Supreme Court intends to surround the police who make these on-the-spot choices in dangerous situations with a fairly wide zone of protection in close cases....'" (*Id*. at pp. 343-344, internal citations omitted.)

However, while California courts have adopted a similar test to the federal courts in Fourth Amendment cases for determining whether police officers can be held liable for shooting a suspect under state law, the California Supreme Court has made it clear that courts should consider the broad totality of the circumstances leading up to the shooting and not just the moment of the shooting itself when ruling on state law claims.

"Our case law has long recognized that peace officers have a duty to act reasonably when using deadly force." (*Hayes v. County of San Diego* (2013) 57 Cal.4th 622, 637, internal citations omitted.) "The reasonableness of the deputies' preshooting conduct should not be considered in isolation, however; rather, it should be considered as *part of the totality of circumstances* surrounding the fatal shooting of [decedent]." (*Id*. at p. 637, italics in original.)

In *Hayes*, the California Supreme Court explained that, while "Fourth Amendment law protects against an 'unreasonable ... seizure [ ]' and thus tends to focus more narrowly than state tort law on the moment when deadly force is used, placing less emphasis on preshooting conduct… 'The Fourth Amendment's "reasonableness" standard is not the same as the standard of "reasonable care" under tort law, and negligent acts do not incur constitutional liability.' Moreover, *Munoz* 's extension of *Adams*, *supra*, 68 Cal.App.4th 243, 80 Cal.Rptr.2d 196, directly conflicted with our long-standing conclusion that peace officers have a duty to act reasonably when using deadly force, a duty that extends to the totality of circumstances surrounding the shooting, including the officers' preshooting conduct." (*Id*. at p. 638, internal citations omitted.)

Thus, "Law enforcement personnel's tactical conduct and decisions preceding the use of deadly force are relevant considerations under California law in determining whether the use of deadly force gives rise to negligence liability." (*Id*. at p. 639.)

Also, even if the suspect is armed or reasonably suspected to be armed, this fact is not necessarily enough to find that the officers' use of deadly force is reasonable. "When an individual points his gun 'in the officers' direction,' the Constitution undoubtedly entitles the officer to respond with deadly force. In *Scott*, we likewise recognized that officers firing their weapons at a defendant who 'held a "long gun" and pointed it at them' had not been constitutionally excessive." (*George v. Morris* (9th Cir. 2013) 736 F.3d 829, 838, internal citations omitted.)

"In *Glenn v. Washington County*, we found that in a 911 scenario without flight or an alleged crime, the officers' decision to shoot an individual holding a pocket knife, 'which he did not brandish at anyone,' violated the Constitution. Reviewing *Long* and *Scott*, we explained that the fact that the 'suspect was armed with a deadly weapon' does not render the officers' response per se reasonable under the Fourth Amendment." (*Id*. at p. 838, internal citations omitted.)

"This is not to say that the Fourth Amendment always requires officers to delay their fire until a suspect turns his weapon on them. If the person is armed - or reasonably suspected of being armed - a furtive movement, harrowing gesture, or serious verbal threat might create an immediate threat. On this interlocutory appeal, though, we can neither credit the deputies' testimony that Donald turned and pointed his gun at them, nor assume that he took other actions that would have been objectively threatening. Given that version of events, a reasonable fact-finder could conclude that the deputies' use of force was constitutionally excessive." (*Id*. at p. 838.)

"Today's holding should be unsurprising. If the deputies indeed shot the sixty-four-year-old decedent without objective provocation while he used his walker, with his gun trained on the ground, then a reasonable jury could determine that they violated the Fourth Amendment." (*Id*. at p. 839, internal citations omitted.)

Here, defendants contend that they acted reasonably when implementing a plan to take Hernandez into custody after he had locked himself in a bedroom with an axe. After locating Hernandez within the apartment, an officer used a battering ram to force open the door and defendant Officer Garcia deployed a flash-bang device inside the room. (Defendants' UMF No. 11.) Three officers entered the bedroom and found Hernandez sitting in the corner of the room beside a dresser holding a hatchet in his right hand at his side and outstretched leg. (UMF No. 12.) The officers told Hernandez to put down the axe multiple times but he did not drop it. (UMF No. 13.) Defendant Officer Finley deployed three less lethal 40mm sponge rounds in response. (UMF No. 13.) The rounds did not appear to have any effect on Hernandez and Officer Finley deployed three more less lethal rounds. (UMF No. 13.) Hernandez did not drop the axe, rather he raised the axe to shoulder level with the blade pointed at the officers. (UMF No. 14.) Hernandez began to get up. (UMF No. 14.) It appeared to defendant Officer Padilla that Hernandez was going to charge or throw the axe at the officers and he believed Hernandez would kill him or the other officers in the bedroom. (UMF. No. 14.) Officer Padilla fired four shots from his Carbine rifle at Hernandez from his position three to four feet away. (UMF No. 15.) The shots were fatal.

Plaintiffs dispute that the officers' conduct was reasonable. The primary dispute is to the defendants' characterization of Hernandez raising the axe to his shoulder as though he was going to throw the axe or charge at the officers. (See Defendants' UMF Nos. 14 and 15.) Plaintiffs contend the physical evidence does not support that Hernandez had raised the axe as if to throw, rather his right arm was positioned across his chest in a defensive position. Hernandez's positioning his arm to protect himself could allow a reasonable fact-finder to conclude Hernandez was not an immediate threat and support finding the defendants' use of force was excessive and unreasonable.

In support of the dispute as to whether Hernandez was threatening officers with the axe when shot, plaintiffs have produced the declaration of William Harmening, an expert in police practices and use of force. (See, Harmening Decl., ¶ 1.) Mr. Harmening opines that Hernandez's right hand was across his left chest, rather than to the right side of his head as described by Officer Padilla based on a diagram showing the trajectories of three of the bullets and where they struck Hernandez. (*Id*. at ¶ 6, Exh. 2.) Defendants object to Harmening's declaration and the portion cited as evidence of the dispute based on the lack of foundation for his conclusion and the court sustains the objection.

Mr. Harmening's declaration does not explain how the diagram relied upon by Harmening was created or who created the diagram.

Plaintiffs have also produced pages of the coroner's report describing the bullet entry and exit wounds found on Hernandez's body in support of their dispute of Hernandez's act of raising the axe to shoulder height as described by Officer Padilla. (Chandler Decl., Exh. 20.) There is no objection to the report in evidence. The report describes a gunshot wound entrance at Hernandez's right upper arm, fracturing the bone, exiting the inner side of the arm and re-entrance in front of the left shoulder. (Ibid.) The report also describes a gunshot wound to the right wrist that also entered the body at the left shoulder. (Ibid.) The locations of the wounds as described can be understood to be consistent with a person having been shot with their right arm across their chest. Given the standard to liberally construe the declarations of the party opposing summary judgment and resolve any doubts of the existence of a triable issue of material fact in favor of the party opposing summary judgment, the plaintiffs have met their burden in demonstrating there is a dispute of material fact. (*Barber v. Marina Sailing, Inc.* (1995) 36 Cal.App.4th 558, 562; see also *See's Candy Shops, Inc. v. Superior Court* (2012) 210 Cal.App.4th 889, 900 ["Summary adjudication is a drastic remedy and any doubts about the propriety of summary adjudication must be resolved in favor of the party opposing the motion."].)

The Use of Force by Officer Garcia and Officer Finley

The actions of Officer Garcia in using the flash-bang device and Officer Finley in his use of the less lethal sponge rounds are separately argued as reasonable under the standard in *Graham*.

It is undisputed that Officer Garcia deployed the flash-bang device after the door to the bedroom was forced open. (UMF No. 11[1].) Defendants argue in the memorandum that the flash-bang device was placed carefully so there would be no burns or injuries to Hernandez. (Defendants' Memorandum, 15:3-5.) Defendants cite to *Boyd v. Benton County* (9th Cir. 2004) 374 F.3d 773, 778-779, for proposition that where a flash-bang was deployed blindly, without regard for innocent bystanders and causing burns, it was ruled excessive. It would follow that the careful placement of the flash-bang by Garcia was not excessive force. However, the separate statement makes no mention of whether the placement of the flash-bang was careful or its location planned in advance to avoid injury as was described in *Boyd*. (See, *id*. at p. 777-778.) As a result, it would appear the motion failed to establish this material fact and is subject to denial on this basis.

Moreover, had the material fact been established by the defendants, plaintiffs have presented additional facts that the flash-bang device detonated within a few feet of Hernandez and knocked him to the ground where officers found him upon entering

[1] The evidence in support of this material fact includes Exhibit "A3," which is the Declaration of Officer Thakham in the Index of Exhibits. However, the Declaration of Theodore Garcia, found in the Index of Exhibits as A4, includes a designation of "A3" in the title. The court believes the intended reference is to the Declaration of Officer Garcia. Reviewing paragraph five of the Garcia Declaration indicates the he placed the device in the bedroom but there is no indication it was placed carefully or its location determined in advance as was described in *Boyd v. Benton County* (9th Cir. 2004) 374 F.3d 773, 777-778.

the bedroom. (Plaintiff's AMF Nos. 5 and 6.) Defendants dispute that the evidence supports that the flash-bang knocked Hernandez to the ground. Plaintiffs presented evidence that Officer Garcia observed Hernandez standing on a mattress when he initially entered the room (Chandler Decl., Exh. 15, Garcia Depo. 63:12-14) and that the burn mark on the carpet near the mattress was caused by the detonation of the flash-bang (*Id*. at 42:16-43:12; Exh. 24, photo of burn mark on carpet.) Defendants' own facts establish Hernandez was sitting in the corner with his legs outstretched when the officers entered the room following the detonation of the flash-bang. (UMF No. 12.) This evidence taken together supports the reasonable inference that the detonation of the flash-bang caused Hernandez to fall from standing on the mattress to sitting on the floor where officers found him. This is sufficient to raise a question of fact as to whether the deployment of the flash-bang was reasonable.

The reasonableness of Officer Finley's use of the less lethal 40mm sponge rounds, as with the use of deadly force discussed above, takes into consideration the threat perceived by the officer. (*Hudson v. McMillian* (1992) 503 U.S. 1, 7.) It is not disputed that Hernandez was found sitting on the ground with his legs outstretched and the axe in his right hand at his side when Officer Finley initially entered the room. (UMF 11.) After Hernandez did not put down the axe as commanded Officer Finely deployed three less-lethal rounds. (UMF 12.) Officer Finley's declaration described Hernandez as beginning to raise the axe rather than put it down as instructed, prompting him to deploy the initial three rounds. (Index of Exhibits, Exh. A2, Finley Decl., ¶ 7.) After again being told to put down the axe and not putting it down, Finely began firing another three less-lethal rounds. (*Ibid*.)

Plaintiffs dispute Officer Finley's characterization of the use of the weapon as not having an effect on Hernandez. Rather, the plaintiffs characterize the response of Hernandez as that of a man in pain from the use of the weapon against him and responding by attempting to protect his torso with his right arm. (Chandler Decl. Exh. 17, Finley Depo. 50:9-14; AMF 7 ["Oliver was flinching and moving as he was hit with the high velocity projectiles, even one broke a rib."]; AMF 23; AMF 8.) Indeed, Officer Finley in deposition acknowledges that after his fourth round was fired, he hears his fifth and sixth rounds overlapping with the sounds of Officer Padilla's rifle shots. (Chandler Decl., Exh. 17, Finely Depo. 57:19-25.) This is sufficient to raise a question of fact as to whether Hernandez posed a threat requiring the continued use of the less-lethal rounds or was attempting to protect himself.

<u>Specific Intent Requirement of the Bane Act</u>

Defendants contend there is no evidence of specific intent to deprive Hernandez of his right to be free from unreasonable seizure to support Christina Hernandez's claims under the Bane Act as Oliver Hernandez Jr.'s successor-in-interest.

"The essence of a Bane Act claim is that the defendant, by the specified improper means (i.e., 'threats, intimidation or coercion'), tried to or did prevent the plaintiff from doing something he or she had the right to do under the law or to force the plaintiff to do something that he or she was not required to do under the law." (*Shoyoye v. County of Los Angeles* (2012) 203 Cal.App.4th 947, 955–956, citations omitted.) The act of interference with a constitutional right must itself be deliberate or spiteful in order to

support the cause of action. (*Id*. at p. 959.) Whether the defendants "understood they were acting unlawfully [is] not a requirement. Reckless disregard of the 'right at issue' is all that [is] necessary." (*Cornell v. City and County of San Francisco* (2017) 17 Cal.App.5th 766, 804.)

Defendants assert that plaintiffs cannot show that Officers Padilla, Finley or Garcia acted with specific intent to violate his rights because none of the officers had ever met or interacted with Hernandez prior to the incident. (UMF No. 17.) The evidence in support of this fact is each officer's declaration stating he had not met or interacted with Hernandez before the incident. It is unclear how this fact would be material to the issue of intent.

Also presented in the separate statement as a material fact to demonstrate the lack of intent required by for a violation of the Bane Act is simply that statement that the officers did not act with the specific intent to violate Hernandez's constitutional or legal rights. (UMF No. 20.) As evidence in support of the material fact is each officer's declaration repeating this statement as fact. (Index of Evidence, Exh. A1, ¶ 14; Exh. A2, ¶ 10; Exh. A3 [sic], ¶ 9.)

Plaintiffs dispute the assertion that the officers lacked intent to violate his rights, as all that is necessary is "[r]eckless disregard of the 'right at issue.'" (*Cornell v. City and County of San Francisco*, *supra*, 17 Cal. App.5th at p. 804.) Plaintiffs contend the officers violated Hernandez's right to be free from excessive force and the use of force battering and ultimately killing him was done in a reckless manner as he sat helpless and disoriented on the floor.

The additional facts presented in opposition to this motion frame the interaction with police in such a way that a reasonable fact-finder could determine the officers acted with reckless disregard for Hernandez's rights to be free from excessive force to support the cause of actions for a Bane Act violation. Hernandez had been told by officers they were present only to evaluate his mental health. (AMF No. 2.) Hernandez was never advised the officers had obtained a warrant for his arrest during the time they were negotiating with him to exit the apartment for the mental health evaluation and he was never told the officers were entering to arrest him. (AMF No. 3.) The officers approached silently to surprise Hernandez and used a battering ram to force open the door to the bedroom he was in. (AMF 4.) Officer Garcia deployed a flash-bang once the door was forced open and immediately following the detonation the officers rushed in shouting at Hernandez. (AMF Nos. 5, 6.) Officer Finley began firing less than lethal 40mm sponge rounds while Hernandez sat on the floor, legs outstretched in front of him and disoriented from the preceding flash-bang. (AMF Nos. 6, 21.) Hernandez moved his right arm, with his hand still holding the axe, while less-lethal rounds were fired at him and Officer Padilla then fired four lethal rounds from his rifle, striking his upper right arm and his right wrist and both then entering his torso. (AMF Nos. 8, 10.) Seventeen seconds elapsed between the detonation of the flash-bang and the lethal shooting of Hernandez. (AMF No. 9.)

The court disregards defendants' "Response to Plaintiff's Separate Statement of Disputed and Undisputed Material Facts" filed on January 27, 2023, as the summary judgment statute does not provide for this. (*Nazir v. United Airlines, Inc.* (2009) 178

Cal.App.4th 243, 248.) The objections to plaintiffs' evidence in support of the facts disputing the moving defendants' undisputed material facts and the additional material facts submitted in the proper format as required by Rule of Court, rule 3.1354 were considered. Those objections properly made and not specifically ruled upon were to evidence not material to the disposition of the motion. (Code Civ. Proc. §437c, subd. (q).) Objections noted in the separate statement are overruled since they were defective. (Cal. Rules of Court, rule 3.1354.) Failure to object waives the right to challenge the court's ruling based on such evidence. (Code Civ. Proc. § 437c, Subds. (b)(5) and (d).)

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: jyh on 2/1/23.
(Judge's initials) (Date)

(24)

Tentative Ruling

Re: ***Hernandez v. Walmart Transportation LLC***
Superior Court Case No. 19CECG04292

Hearing Date: February 2, 2023 (Dept. 503)

Motion: Application to Appear *Pro Hac Vice* on Behalf of Defendants Wal-Mart Transportation, LLC and Jose Alfredo ORtiz

Tentative Ruling:

To deny.

Explanation:

The hearing was continued from January 11, 2023 to allow the moving party to provide further documentation, to be filed no later than January 25, 2023. Nothing was filed, so the application must be denied.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 2/2/23.
(Judge's initials) (Date)