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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

ESTATE OF JAMES E. ROGERS, by and  
through Angela Crigger, Personal  
Representative, ARIK ROGERS, BRIAN  
ROGERS, and Minor Children M.R., J.R.,  
and O.R., by and through Julia Rogers,  
Plaintiffs,  
v.  
CITY OF SPOKANE, WASHINGTON  
and OFFICER DAN LESSER,  
Defendants.

No. 2:14-cv-00313-SAB

**ORDER DENYING  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT**

Before the Court is Defendants' Motion for Summary Judgment, ECF. No. 33. The motion was heard without oral argument. Plaintiffs are represented by Richard Wall. Defendants are represented by Stewart A. Estes.

This is a civil rights case that involves the use of deadly force. The decedent James E. Rogers was shot and killed by Defendant Dan Lesser, after he had barricaded himself in an overturned vehicle. Defendants maintain that Rogers pointed a gun at Lesser. Plaintiffs dispute this.

Defendants now move for summary judgment, asserting that because Rogers was an armed, suicidal menace, deadly force was justified regardless of whether the gun was pointed directly at Defendant Lesser. ECF No. 51 at 3.

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1 **A. Summary Judgment Motion Standard**

2 Summary judgment is appropriate if the “pleadings, depositions, answers to  
3 interrogatories, and admissions on file, together with the affidavits, if any, show  
4 that there is no genuine issue as to any material fact and that the moving party is  
5 entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). There is no genuine  
6 issue for trial unless there is sufficient evidence favoring the non-moving party for  
7 a jury to return a verdict in that party’s favor. *Anderson v. Liberty Lobby, Inc.*, 477  
8 U.S. 242, 250 (1986). The moving party had the initial burden of showing the  
9 absence of a genuine issue of fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317,  
10 325 (1986). If the moving party meets its initial burden, the non-moving party  
11 must go beyond the pleadings and “set forth specific facts showing that there is a  
12 genuine issue for trial.” *Id.*; *Anderson*, 477 U.S. at 248.

13 In addition to showing there are no questions of material fact, the moving  
14 party must also show it is entitled to judgment as a matter of law. *Smith v.*  
15 *University of Washington Law School*, 233 F.3d 1188, 1193 (9th Cir. 2000). The  
16 moving party is entitled to judgment as a matter of law when the non-moving party  
17 fails to make a sufficient showing on an essential element of a claim on which the  
18 non-moving party has the burden of proof. *Celotex*, 477 U.S. at 323. The non-  
19 moving party cannot rely on conclusory allegations alone to create an issue of  
20 material fact. *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993).

21 When considering a motion for summary judgment, a court may neither  
22 weigh the evidence nor assess credibility; instead, “the evidence of the non-  
23 movant is to be believed, and all justifiable inferences are to be drawn in his  
24 favor.” *Anderson*, 477 U.S. at 255.

25 **B. Facts**

26 The following facts are taken in the light most favorable to Plaintiff, the  
27 non-moving party.

28 1. Rogers was suicidal. He had gone to his place of employment, parked in

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1 the parking lot, and brandished and fired a shotgun.

2         2. The police were called. Rogers left the parking lot, crashed into a wall,  
3 and then proceeded to drive his van down the street where it crashed and landed  
4 on its side.

5         3. Rogers had a loaded weapon inside the van. After the crash, he was  
6 suspended in the driver's seat, presumably secured by his seat belt. He was able to  
7 release the belt and he fell down near the passenger seat/window, which was  
8 against the ground since the van had tipped. His back was against the roof of the  
9 van.

10         4. Trained negotiators tried to communicate with Rogers for over two  
11 hours. He never responded except he did put his thumb up on occasion when  
12 asked and he did move his legs once when asked if he needed medical treatment.

13         5. At one point, Rogers tried to place the shotgun barrel under his chin. He  
14 was unable to do so because of the long barrel and the lack of room in the van. It  
15 also appeared that he may have been attempting to get the gun through the roof as  
16 instructed. Shortly after he manipulated the gun, he was shot.

17         6. Defendant Lesser arrived at the scene after the incident began. He armed  
18 himself with his Colt M4 Commando rifle and Glock .45 handgun. He put on a  
19 ballistic vest. He then assisted a nearby resident who was suffering from a burst  
20 appendix by escorting him to medical attention. He then drove an armored vehicle  
21 to an area east of where Roger's van was located. He positioned the armored  
22 vehicle behind the van and took a position of cover in the vehicle's turret. He then  
23 turned on the bright headlights of the vehicle to illuminate the interior of the van  
24 through the rear windows, and also directed another officer to park a patrol car  
25 next to the armored vehicle so that the patrol car's mounted spot lights could also  
26 be used to illuminate the inside of the van.

27         7. As the police were announcing "your sister Angela is here and you have  
28 seven children at home," Defendant Lesser shot six rounds, hitting Rogers five

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1 times and causing six gunshot wounds.

2 8. Defendant Lesser maintains that Rogers at some point looked at him and  
3 waved. Rogers then picked up a shotgun and began to manipulate it. The shotgun  
4 was initially pointing toward the front of the vehicle and then was turned so it was  
5 pointing upwards. Rogers then turned the shotgun so that it was pointing toward  
6 the rear of the van in Defendant Lesser's direction. Rogers then shouldered the  
7 shotgun and raised the barrel pointing it directly at Defendant Lesser.

8 9. Plaintiffs' expert Chesterene Cwiklik concluded that the shotgun could  
9 not have been pointed at Officer Lesser at the time he fired the shots that killed  
10 Rogers, and Rogers had not been facing Officer Lesser at the time the shots were  
11 fired. ECF No. 47.

12 10. Defendants' expert Matthew Noedel concluded that Rogers was shot  
13 while his left hand was extended toward the rear of the van, holding the front of  
14 the gun at shoulder level. ECF No. 44.

### 15 **C. Section 1983 and Qualified Immunity**

#### 16 **1. Section 1983**

17 To state a claim under § 1983, Plaintiffs must establish two essential  
18 elements: (1) that a right secured by the Constitution or laws of the United States  
19 was violated; and (2) that the alleged violation was committed by a person acting  
20 under the color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Naffe v. Frey*,  
21 789 F.3d 1030, 1035 (9th Cir. 2015).

#### 22 **2. Use of Deadly Force**

23 In evaluating a Fourth Amendment claim of excessive force, courts must ask  
24 "whether the officers' actions are 'objectively reasonable' in light of the facts and  
25 circumstances confronting them." *Graham v. Connor*, 490 U.S. 386, 396–97  
26 (1989); *Glenn v. Washington County*, 673 F.3d 864, 871 (9th Cir. 2011). Courts  
27 must balance the extent of the intrusion on the individual's Fourth Amendment  
28 rights against the government's interests to determine whether the officer's

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1 conduct was objectively reasonable based on the totality of the circumstances.  
2 Price v. Sery, 513 F.3d 962, 968 (9th Cir. 2008). This analysis involves three  
3 steps. First, the court must assess the severity of the intrusion on the individual’s  
4 Fourth Amendment rights by evaluating “the type and amount of force inflicted.”  
5 Miller v. Clark County, 340 F.3d 959, 964 (9th Cir. 2003). Second, the court must  
6 evaluate the government’s interests by assessing (1) the severity of the crime; (2)  
7 whether the suspect posed an immediate threat to the officers’ or public’s safety;  
8 and (3) whether the suspect was resisting arrest or attempting to escape. Id. Third,  
9 the gravity of the intrusion on the individual against the government’s need for  
10 that intrusion is balanced.” Id. The court must only consider the circumstances of  
11 which the officer was aware when he employed deadly force. Hayes v. County of  
12 San Diego, 736 F.3d 1223, 1233 (9<sup>th</sup> Cir. 2013). Ultimately, the court must balance  
13 the force was used by the officers against the need for such force to determine  
14 whether the force used was “greater than is reasonable under the circumstances.”  
15 Santos v. Gates, 287 F.3d 846, 854 (9th Cir. 2002).

16 In deadly force cases, “[w]here the suspect poses no immediate threat to the  
17 officer and no threat to others, the harm resulting from failing to apprehend him  
18 does not justify the use of deadly force to do so.” Tennessee v. Garner, 471 U.S. 1,  
19 11–12 (1985). The parties’ “relative culpability” i.e., which party created the  
20 dangerous situation and which party is more innocent, may also be considered.  
21 Scott v. Harris, 550 U.S. 372, 384 (2007). The mere fact that a suspect possesses a  
22 weapon does not justify deadly force. Haugen v. Brosseau, 351 F.3d 372, 381 (9th  
23 Cir. 2003); see also Curnow v. Ridgecrest Police, 952 F.2d 321, 325 (9th Cir.  
24 1991) (holding that deadly force was unreasonable where the suspect possessed a  
25 gun but was not pointing it at the officers and was not facing the officers when  
26 they shot). On the other hand, threatening an officer with a weapon justifies the  
27 use of deadly force. Hayes, 736 F.3d at 1234; see also Smith v. City of Hemet, 394  
28 F.3d 689, 704 (9th Cir. 2005) (recognizing that “where a suspect threatens an

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1 officer with a weapon such as a gun or a knife, the officer is justified in using  
2 deadly force). That said, “[a] simple statement by an officer that he fears for his  
3 safety or the safety of others is not enough, however; there must be objective  
4 factors to justify such a concern.” Hayes, 736 F.3d at 1234 (quotations omitted).

5 Finally, in police misconduct cases, summary judgment should only be  
6 granted “sparingly” because the reasonableness of force used is ordinarily a  
7 question of fact for the jury. *Espinosa v. City & County of San Francisco*, 598  
8 F.3d 528, 537 (9th Cir. 2010).

### 9 **3. Substantive Due Process**

10 Children have a substantive due process right in their relationship with their  
11 parents that can be vindicated through a Section 1983 action. *Smith v. City of*  
12 *Fontana*, 818 F.2d 1411,1418 (9th Cir. 1987) (overruled on other grounds by  
13 *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999). This right is derived  
14 from the right to be free from State interference with the companionship and  
15 society of one’s parent. *Id.* To violate substantive due process, the alleged conduct  
16 must “shock the conscience” and “offend the community’s sense of fair play and  
17 decency.” *Marsh v. Connty of San Diego*, 680 F.3d 1148, 1154 (9<sup>th</sup> Cir. 2012)  
18 (citing *Rochin v. Calif.*, 342 U.S. 165, 172-73 (1952)). In cases where an officer  
19 encounters fast-paced circumstances presenting competing public safety  
20 obligations, the plaintiff must show that the officer acted with the purpose to harm  
21 that was unrelated to legitimate law enforcement objectives. *Porter v. Osborn*, 546  
22 F.3d 1131, 1137 (9th Cir. 2008).

### 23 **4. Qualified Immunity**

24 Qualified immunity shields government officials from civil damages  
25 liability unless the official violated a statutory or constitutional right that was  
26 clearly established at the time of the challenged conduct. *Reichle v. Howards*, \_\_\_  
27 U.S. \_\_\_, 132 S.Ct 2088, 2093 (2012). “Requiring the alleged violation of law to be  
28 clearly established balances . . . the need to hold public officials accountable when

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1 they exercise power irresponsibly and the need to shield officials from harassment,  
2 distraction, and liability when they perform their duties reasonably.” Wood v.  
3 Moss, \_\_\_ U.S. \_\_\_, 134 S.Ct. 2056, 2067 (2014) (quotations omitted).

4 In determining whether Defendant Lesser is entitled to qualified immunity,  
5 the Court applies a two-step analysis: (1) whether the facts alleged show that the  
6 official’s conduct violated a constitutional right; and (2) whether the right was  
7 clearly established. Saucier v. Katz, 533 U.S. 194, 201 (2001). “To be clearly  
8 established, a right must be sufficiently clear that every reasonable official would  
9 have understood that what he is doing violates that right. In other words, existing  
10 precedent must have placed the statutory or constitutional question beyond  
11 debate.” Reichle, 132 S.Ct. at 2094 (quotations omitted). “This inquiry, it is vital  
12 to note, must be undertaken in light of the specific context of the case, not as a  
13 broad general proposition.” Saucier, 533 U.S. at 201. “If judges thus disagree on a  
14 constitutional question, it is unfair to subject police to money damages for picking  
15 the losing side of the controversy.” Wilson v. Layne, 526 U.S. 603, 618 (1999).  
16 That said, it is not necessary that “the very action in question has previously been  
17 held unlawful, but it is to say that in the light of pre-existing law the unlawfulness  
18 must be apparent.” Hope v. Pelzer, 536 U.S. 730, 739 (2002).

19 “[W]hen properly applied, qualified immunity protects all but the plainly  
20 incompetent or those who knowingly violate the law.” Taylor v. Barkes, \_\_\_ U.S.  
21 \_\_\_, 135 S.Ct. 2042, 2044 (2015). Stated another way, “an officer is entitled to  
22 qualified immunity unless existing case law ‘squarely governs the case here’”  
23 Mendez v. Cnty of Los Angeles, \_\_\_ F.3d \_\_\_ (2016 WL 805719 \*3 (9th Cir. Mar. 2,  
24 2016) (quoting Mullenix v. Luna, \_\_\_ U.S. \_\_\_, 136 S.Ct 305, 309 (2015) (emphasis  
25 in original).

#### 26 **D. Analysis**

27 In reviewing deadly use of force cases, the Ninth Circuit has instructed that  
28 the most important factor in the analysis is whether the individual posed an

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1 “immediate threat to the safety of the officers or others.” Glenn v. Washington  
2 County, 673 F.3d 864, 871 (9th Cir. 2011). In the cases in which the Circuit held  
3 the officers’ use of deadly force was reasonable, it was clear from the facts that the  
4 individual posed an “immediate threat to the safety of the officers or others.” See  
5 Blanford v. Sacramento County, 406 F.3d 1110, 1115–19 (9th Cir. 2005), Long v.  
6 City & County of Honolulu, 511 F.3d 901, 906 (9th Cir. 2007); and Scott v.  
7 Henrich, 39 F.3d 912, 914 (9th Cir.1994).<sup>1</sup>

8 On the other hand, in Glenn v. Washington County, an 18 year old was shot  
9 and killed in his driveway by police officers after his mother called 911 because  
10 her son was distraught, intoxicated, and had threatened to kill himself with a  
11 pocketknife. 673 F.3d at 865. He had also broken household property. Id. Within  
12 four minutes of their arrival, the officers shot him with a beanbag shotgun, and  
13 then shot him 8 times with their service weapons.

14 The Circuit held that when viewing the facts favorably to the plaintiff, the  
15 officer’s use of force was not reasonable. Id. at 872. It also rejected the premise  
16 that when a suspect is armed with a deadly weapon but has not committed a  
17 significant crime or threatened anyone, the officers’ use of force would be  
18 reasonable as a matter of law. Id. at 872-73. Additionally, the fact that the suspect  
19 was suicidal did not justify the use of deadly force. See id. at 872. (“We assume  
20 that the officers could have used some reasonable level of force to try to prevent

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22 <sup>1</sup> In Blanford, the suspect was armed with a 2 ½ ft sword, and when officers  
23 ordered him to put it down, he instead raised it up and growled. 406 F.3d at 1116.  
24 In Long, the suspect, who officers knew had already shot two people, carried a .22  
25 caliber rifle, and, just before being fired upon by officers, raised his rifle to chest  
26 level and shouted “I told you fuckers to get the fuck back. Have some of this.” 511  
27 F.3d at 904-05. In Scott, the suspect held a long gun and pointed it at officers. 39  
28 F.3d at 914.



1 Lukus from taking a suicidal act. But we are aware of no published cases holding  
2 it reasonable to use a significant amount of force to try to stop someone from  
3 attempting suicide. Indeed, it would be odd to permit officers to use force capable  
4 of causing serious injury or death in an effort to prevent the possibility that an  
5 individual might attempt to harm only himself. We do not rule out that in some  
6 circumstances some force might be warranted to prevent suicide, but in cases like  
7 this one the ‘solution’ could be worse than the problem.”).

8 Similarly, the “desire to resolve quickly a potentially dangerous situation is  
9 not the type of governmental interest that, standing alone, justifies the use of force  
10 that may result in serious injury.” *Id.* (citing *Doerle v. Rutherford*, 272 F.3d 1272,  
11 1281 (9th Cir. 2001)). Also, when dealing with an emotionally disturbed  
12 individual who is creating a disturbance or resisting arrest, as opposed to a  
13 dangerous criminal, officers typically use less forceful tactics. *Id.* As the Circuit  
14 explained, this is “because when dealing with a disturbed individual, increasing  
15 the use of force may . . . exacerbate the situation, unlike when dealing with a  
16 criminal, where increased force is more likely to bring a dangerous situation to a  
17 swift end.” *Id.* (quotations omitted).

18 In viewing the facts in the light most favorable to Plaintiffs, as the Court is  
19 required to do, the Court concludes that summary judgment is not appropriate.  
20 There is evidence in the record that contradicts Defendant’s version of the facts,  
21 namely that the gun was pointed at Defendant Lesser. It is undisputed that there  
22 was no warning given before Defendant Lesser employed deadly force. It is  
23 undisputed that Defendant Lesser was aware that Rogers was emotionally  
24 disturbed and it is undisputed that Rogers was not actively resisting arrest, or  
25 attempting to evade arrest by flight. Additionally, there is evidence in the record  
26 for a reasonable jury to conclude that Rogers was trying to be responsive to the  
27 negotiator’s attempts to communicate with him and the act of handling or  
28 manipulating the shotgun in some manner was in response to the requests for him

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1 to put the gun out of the van. Consequently, whether Defendant Lesser’s use of  
2 force was reasonable under these facts is for the jury to decide. See Glenn, at 871  
3 (quoting Smith v. City of Hemet, 394 F.3d 689, 701 (9th Cir. 2005) (“Because the  
4 excessive force inquiry nearly always requires a jury to sift through disputed  
5 factual contentions, and to draw inferences therefrom, we have held on many  
6 occasions that summary judgment or judgment as a matter of law in excessive  
7 force cases should be granted sparingly.”).

8 Similarly, questions of fact preclude summary judgment on Plaintiffs’  
9 substantive due process claim. Finally, Defendant Lesser is not entitled to  
10 qualified immunity. There are genuine issues of fact regarding whether he used  
11 excessive force that are also material to the proper determination of the  
12 reasonableness of his belief in the legality of his actions. See Espinosa, 598 F.3d  
13 at 532. Ultimately the reasonableness of Defendant Lesser’s actions, including  
14 whether he made a reasonable mistake in law or fact, is for the jury to decide. See  
15 Santos, 287 F.3d at 855 n.12 (finding it premature to decide the qualified  
16 immunity issue “because whether the officers may be said to have made a  
17 ‘reasonable mistake’ of fact or law may depend on the jury’s resolution of  
18 disputed facts and the inferences it draws therefrom.”).

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1 Accordingly, **IT IS HEREBY ORDERED:**

2 1. Defendant's Motion for Summary Judgment, ECF No. 33, is **DENIED.**

3 **IT IS SO ORDERED.** The District Court Executive is hereby directed to  
4 file this Order and provide copies to counsel.

5 **DATED** this 23rd day of March, 2016.



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11 Stanley A. Bastian  
12 United States District Judge  
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