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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Kimberly Kennedy,	}	No. CV-17-08206-PCT-SPL
	}	
Plaintiff,	}	ORDER
vs.	}	
	}	
County of Mohave, et al.,	}	
	}	
Defendants.	}	

Decedent Kenneth Jack Kennedy, III was shot and killed during a traffic stop performed by Defendant Deputy Mark Giralde (“Giralde”) and former defendant Sergeant Mike Ramirez (“Ramirez”). (Doc. 87 at 7; Doc. 29 at 7) Plaintiff Kimberly Kennedy (the “Plaintiff”) filed suit against the County of Mohave and Giralde (together, the “Defendants”) alleging causes of action pursuant to 42 U.S.C. § 1983, among other claims. (Doc. 29) The Defendants moved for summary judgement on each of the Plaintiff’s claims (the “Motion”). (Doc. 76) The Motion was fully briefed on January 28, 2019. (Docs. 83, 91) The Court’s ruling is as follows.

I. Legal Standard

A court shall grant summary judgment if the pleadings and supporting documents, viewed in the light most favorable to the non-moving party “show that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23

1 (1986). Material facts are those facts “that might affect the outcome of the suit under the
2 governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine
3 dispute of material fact arises if “the evidence is such that a reasonable jury could return a
4 verdict for the nonmoving party.” *Id.*

5 The party moving for summary judgment bears the initial burden of informing the
6 court of the basis for its motion and identifying those portions of the record, together with
7 affidavits, which it believes demonstrate the absence of a genuine issue of material fact.
8 *Celotex*, 477 U.S. at 323. If the movant is able to do such, the burden then shifts to the
9 non-movant who, “must do more than simply show that there is some metaphysical doubt
10 as to the material facts,” and instead must “come forward with ‘specific facts showing
11 that there is a genuine issue for trial.’” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,
12 475 U.S. 574, 586–87 (1986). A judge’s function’ at summary judgment is not to weigh
13 the evidence and determine the truth of the matter but to determine whether there is a
14 genuine issue for trial. *Cable v. City of Phoenix*, 647 F. App’x 780, 781 (9th Cir. 2016).

15 **II. Background¹**

16 In October 2016,² the decedent was driving a vehicle without operating taillights,
17 and the Plaintiff, the decedent’s wife, was a passenger in the vehicle. (Doc. 87 at 7)
18 Giralde and Ramirez began to follow the decedent’s vehicle to conduct a traffic stop.
19 (Doc. 87 at 7) The decedent pulled off the road into a driveway and shut off the vehicle.
20 (Doc. 87 at 7) Ramirez was the first officer to engage the decedent. Ramirez followed
21 the decedent into the driveway, parked his patrol vehicle behind the decedent’s vehicle,
22 illuminated his red and blue overhead lights, and exited his patrol vehicle. (Doc. 87 at 8)
23 Ramirez then approached the driver’s side window of the decedent’s vehicle and asked
24 for the decedent’s driver’s license and car registration information. (Doc. 87 at 8) When

25 ¹ Unless otherwise noted, the facts that follow are undisputed.

26 ² The Second Amended Complaint states that the decedent was shot and killed
27 sometime between October 28, October 29 or October 31 of 2016. (Doc. 29 at 3, 6) The
28 Defendants’ statement of facts states that the incident occurred on October 28, 2016.
(Doc. 77 at 1) The Plaintiff’s amended statement of facts “admit[s]” that the incident
occurred on October 23, 2016. (Doc. 87 at 7)

1 Giralde pulled into the driveway and parked his patrol car, Ramirez was already standing
2 at the driver's side of the decedent's vehicle. (Doc. 87 at 9)

3 The decedent informed Ramirez that he did not have identification with him. (Doc.
4 87 at 9) While the decedent and Ramirez were talking, Giralde approached the
5 passenger's side of the stopped vehicle and asked the Plaintiff for identification. (Doc. 87
6 at 9) The Plaintiff stated that she did not have identification. (Doc. 87 at 9) At that time,
7 Giralde noticed that the ignition to the decedent's vehicle was broken, which raised
8 Giralde's suspicion that the decedent was driving a stolen vehicle. (Doc. 87 at 9)
9 Meanwhile, the decedent and Ramirez were engaging in a conversation about whether the
10 decedent was required to possess a driver's license "just to travel". (Doc. 87 at 9) Based
11 on the content of the conversation between the decedent and Ramirez, Giralde became
12 concerned that the decedent and the Plaintiff were sovereign citizens, also known as
13 constitutionalists. (Doc. 87 at 10) In his deposition, Giralde testified that he had been
14 trained to believe that sovereign citizens had a reputation for responding to police
15 encounters with deadly force. (Doc. 87 at 10)

16 Ramirez asked the decedent to step out of the vehicle, and the decedent did not
17 follow Ramirez's instruction. (Doc. 87 at 11) Ramirez testified that he told the decedent
18 that the decedent was under arrest for failing to produce identification, and Giralde yelled
19 at the decedent to step out of the vehicle. (Doc. 87 at 11) It is undisputed that the
20 decedent did not follow Ramirez's commands and instead started the vehicle by plunging
21 a screwdriver into the broken ignition. (Doc. 87 at 11–12) Ramirez then instructed the
22 decedent to stop, and Ramirez struck the driver's side window of the decedent's vehicle
23 with a baton. (Doc. 87 at 12)

24 **III. Disputed Facts**

25 The subsequent series of events is disputed between the parties.

26 **Officer's Account:**

27 After Ramirez struck the driver's side window with a baton, the Defendants state
28 that the decedent shifted the vehicle into reverse, hitting both Ramirez's and Giralde's

1 patrol vehicles. (Doc. 77 at 4, 5) Ramirez stepped back from the vehicle when it
2 reversed, and Giralde moved towards his patrol car and unholstered his weapon. (Doc. 77
3 at 5) Next, the Defendants state that the decedent shifted his vehicle into drive and
4 accelerated forward, turning the vehicle towards Giralde. (Doc. 77 at 5) The Defendants
5 state that Giralde fired his weapon through the vehicle's windshield while the vehicle was
6 moving forward. (Doc. 77 at 5) At the time Giralde's first shots were fired, Giralde states
7 that he believed the vehicle would hit him, and Ramirez was standing in an open part of
8 the driveway. (Doc. 77 at 5) The Defendants state that the vehicle never reversed a
9 second time, but continued to move forward towards Giralde until it hit a fence. (Doc. 77
10 at 5)

11 The vehicle was still running at the time it hit the fence. (Doc. 77 at 5) The
12 Defendants state that Giralde then moved toward the vehicle and fired his weapon
13 through the passenger's side window at the driver. (Doc. 77 at 6) Giralde states that he
14 feared that the vehicle would continue to move towards him or reverse backward into
15 Ramirez; however, Giralde admits that he did not know Ramirez's location at the time
16 the shots were fired through the passenger's side window. (Doc. 77 at 6, 34) In his
17 deposition, Giralde also stated that at the time he fired the fatal shots through the
18 passenger's side window, he did not believe that the vehicle could hit him. (Doc. 77 at
19 34)

20 **Plaintiff's Account:**

21 For the purpose of resolving the Motion, the Court finds that the Plaintiff's
22 testimony is unclear and inconsistent. In the Plaintiff's amended statement of facts,³ she
23 states that after Ramirez struck the driver's side window with a baton, the decedent put
24 the car into reverse and the decedent's vehicle moved backward, becoming wedged

25 ³ The Court did not provide the Plaintiff with leave to file an amended
26 controverting statement of facts. However, the Defendants did not move to strike the
27 Plaintiff's amended statement of facts. *Dobrowolski v. City of Mesa*, 2010 WL 11515564,
28 at 4 (D. Ariz. Oct. 27, 2010). Accordingly, the Court will consider the amended
statement of facts. *Branscomb v. Grp. USA, Inc.*, 2010 WL 11453973, at 1 (D. Ariz. July
2, 2010) (stating "the Ninth Circuit Court of Appeals has stated its strong preference for
resolving cases on the merits").

1 between the two patrol vehicles. (Doc. 87 at 2) On Page 3 of the Plaintiff's amended
2 statement of facts, the Plaintiff states that after backing up, the decedent drove his vehicle
3 forward, stopped the vehicle from moving forward, and then put the vehicle in reverse
4 again to move backwards.⁴ (Doc. 87 at 3) On Page 13 of the Plaintiff's amended
5 statement of facts, the Plaintiff states that the decedent's vehicle did not accelerate
6 towards Giralde, but proceeded to "make a series of three-point like turns"⁵ by backing
7 up, moving forward, and reversing again. (Doc. 87 at 13)

8 In her deposition, the Plaintiff agreed that the decedent reversed the vehicle,
9 shifted the vehicle into drive and moved the vehicle forward, reversed the vehicle a
10 second time, and then shifted the vehicle into drive a second time before being fatally
11 shot. (Doc. 77 at 67) Initially, the Plaintiff states that Giralde's first four shots were fired
12 through the vehicle's windshield after the car moved forward the first time and the
13 decedent put the vehicle into reverse the second time. (Doc. 77 at 67, Kennedy
14 Deposition page 120) After a break in the deposition, the Plaintiff changed her testimony
15 to state that Giralde's first four shots were fired through the windshield when the
16 decedent put the vehicle into reverse the first time, before the vehicle ever moved
17 forward. (Doc. 77 at 68) However, in the amended statement of facts, the Plaintiff states
18 that Giralde's first four shots were fired after the decedent's vehicle reversed the first
19 time and stopped. (Doc. 87 at 3)

20 It is undisputed that the Plaintiff could not see anything after the first shots were
21 fired through the windshield because she slid down to the floor of the vehicle and put her
22 head in the seat. (Doc. 87 at 14) The Plaintiff states that Giralde eventually approached
23 the passenger's side window of the decedent's vehicle and fired additional shots at the

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25 ⁴ This is consistent with the Plaintiff's deposition testimony in which the Plaintiff
26 states that the decedent "went backwards, he went forward, and he went backwards
again." (Doc. 87-1 at 17; Doc. 77 at 66)

27 ⁵ The Plaintiff admits that the vehicle moved forward in an attempt to make a
28 three-point turn. (Doc. 87 at 14) By admitting that the vehicle moved forward, the Court
assumes that the Plaintiff means to argue that the decedent's vehicle did not move
forward toward Giralde.

1 decedent. (Doc. 87 at 4) The decedent was killed by a bullet that entered through the
2 passenger’s side window. (Doc. 87 at 6) The decedent’s vehicle rolled forward and hit a
3 pole. (Doc. 87 at 15) The Plaintiff states that the decedent’s vehicle could not have hit
4 Giralde at the time Giralde fired the fatal shots through the passenger’s side window, and
5 Giralde could not see Ramirez and had no reason to believe that Ramirez was in danger.
6 (Doc. 87 at 13, 15)

7 **IV. Analysis**

8 The Plaintiff stipulated to the dismissal of her “Municipal Supervisory Liability”
9 claim. (Doc. 79) Each of the remaining claims will be addressed in turn.

10 **A. Count I - 42 U.S.C. § 1983 –Wrongful Death or Excessive Force**

11 1. Excessive Force Claim

12 The Plaintiff alleges a claim against the Defendants under 42 U.S.C. §1983 for
13 “Wrongful Death or Excessive Force”, but the substance of the Plaintiff’s claim is for
14 excessive force. (Doc. 29 at 8) The first step in any action under 42 U.S.C. § 1983 is to
15 identify the constitutional right allegedly violated. *Rosales v. City of Phoenix*, 202 F.
16 Supp. 2d 1055, 1059–60 (D. Ariz. 1999). The Plaintiff states that Giralde’s excessive use
17 of force violated the decedent’s Fourth Amendment, Fifth Amendment, Thirteenth
18 Amendment and Fourteenth Amendment rights. (Doc. 29 at 9) For an excessive force
19 claim, the reasonableness of a particular use of force must be judged from the perspective
20 of a reasonable officer on the scene, and the relevant question is whether the officer’s
21 actions are objectively reasonable in light of the facts and circumstances confronting
22 them, without regard to their underlying intent or motivation. *Graham v. Connor*, 490
23 U.S. 386, 396–97 (1989). The Ninth Circuit Court of Appeals has held repeatedly that
24 the reasonableness of force used is ordinarily a question of fact for the jury. *See Liston v.*
25 *County of Riverside*, 120 F.3d 965, 976–77 (9th Cir. 1997) (“It is for the finder of fact to
26 determine the reasonableness of the force used in this case, and that can be done only
27 upon a fully developed record.”); see also *Alexander v. County of Los Angeles*, 64 F.3d
28 1315, 1322 (9th Cir. 1995).

1 The Court finds that there are genuine disputes of material fact that preclude
2 summary judgment on Plaintiff's §1983 excessive force claim because, if a jury were to
3 credit the Plaintiff's version of events, a jury could reasonably find that Giralde subjected
4 the decedent to excessive force in firing the fatal shots through the passenger's side
5 window. The Court finds that there is a genuine dispute as to whether (i) the decedent's
6 vehicle was driving in a direction toward Giralde at the time the first round of shots was
7 fired through the vehicle's windshield, (ii) Giralde reasonably feared for his safety and
8 the safety of other officers at the time of the shooting, and (iii) the fatal shots fired
9 through the passenger's side window of the vehicle constituted excessive force. The
10 Court finds that the facts surrounding these specific issues are material to resolving this
11 case on the merits. Because there is a genuine dispute of material fact as to the amount of
12 force used and the reasonableness of that force, the Motion will be denied as to the
13 Plaintiff's §1983 excessive force claim.

14 2. Qualified Immunity

15 The Defendants argue that they are entitled to summary judgment on Count 1 on
16 the basis of qualified immunity. (Doc. 76 at 9–10) “The doctrine of qualified immunity
17 protects government officials ‘from liability for civil damages insofar as their conduct
18 does not violate clearly established statutory or constitutional rights of which a
19 reasonable person would have known.’” *Estate of Lopez by & through Lopez v. Gelhaus*,
20 871 F.3d 998, 1005 (9th Cir. 2017) (citing *Pearson v. Callahan*, 555 U.S. 223, 231
21 (2009)). “Qualified immunity gives government officials breathing room to make
22 reasonable but mistaken judgments about open legal questions. When properly applied, it
23 protects ‘all but the plainly incompetent or those who knowingly violate the law.’”
24 *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (quoting *Malley v. Briggs*, 475 U.S. 335,
25 341 (1986)). In determining whether an officer is entitled to qualified immunity, the
26 Court must consider (1) whether there has been a violation of a constitutional right, and
27 (2) whether that right was clearly established at the time of the officer's alleged
28 misconduct.” *Lal v. California*, 746 F.3d 1112, 1116 (9th Cir. 2014) (citing *Pearson*, 555

1 U.S. at 231).

2 To find a clearly established right, the court must consider the right at issue in a
3 particularized sense, rather than “as a broad general proposition.” *Cruz v. City of Tucson*,
4 2015 WL 11111305, at 3 (D. Ariz. July 14, 2015) (citing *Dunn v. Castro*, 621 F.3d 1196,
5 1200–01 (9th Cir. 2010)). This is because “the right allegedly violated must be defined at
6 the appropriate level of specificity before a court can determine if it was clearly
7 established.” *Cruz v. City of Tucson*, 2015 WL 11111305 at 3. Once a qualified-immunity
8 defense is raised, the plaintiff bears the burden of proving the violation of a constitutional
9 right and that the right was clearly established. *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1157
10 (9th Cir. 2000). It is well settled that the decedent had an established Fourth Amendment
11 right against the use of unnecessary excessive force by a police officer. Accordingly, the
12 Court shifts its analysis to whether the decedent’s Fourth Amendment rights were
13 violated.

14 Excessive force claims are governed by an “objective reasonableness standard,”
15 which requires a “careful balancing of the nature and quality of the intrusion on the
16 individual’s Fourth Amendment interests against the countervailing governmental
17 interests at stake.” *Graham*, 490 U.S. at 388. Courts must judge reasonableness “from
18 the perspective of a reasonable officer on the scene, and consider several factors when
19 evaluating the strength of the government’s interest in the force used, such as: (1) “the
20 severity of the crime at issue,” (2) “whether the suspect poses an immediate threat to the
21 safety of the officers or others,” and (3) “whether [the suspect] is actively resisting arrest
22 or attempting to evade arrest by flight.” *Id.* at 396. The most important factor is whether
23 the suspect posed an immediate threat to the safety of the officers or others. *George v.*
24 *Morris*, 736 F.3d 829, 838 (9th Cir. 2013). Courts still must “examine the totality of the
25 circumstances and consider whatever specific factors may be appropriate in a particular
26 case, whether or not listed in *Graham*.” *Bryan v. MacPherson*, 630 F.3d 805, 826 (9th
27 Cir. 2010).

28 In applying the *Graham* factors, the Court finds that there are genuine disputes as

1 to the material facts governing whether the decedent posed an immediate threat to the
2 safety of Giralde and Ramirez at the time each round of shots was fired. Taking the facts
3 in the light most favorable to the Plaintiff, there is a genuine dispute as to whether the
4 decedent's vehicle was moving towards Giralde at the time Giralde's first shots were fired
5 through the windshield. Separately, in his deposition, Giralde stated that the decedent's
6 vehicle could not hit him at the time the fatal shots were fired through the passenger's side
7 window. If a jury concludes that the vehicle was not moving forward towards Giralde at
8 the time of the shooting or that the vehicle did not pose an immediate danger to Giralde's
9 safety, then a reasonable jury could find that the decedent did not pose an immediate
10 threat to Giralde or Ramirez and that Giralde's use of deadly force was not objectively
11 reasonable. Therefore, for the purpose of resolving the Motion, the Court declines to
12 grant the Defendants summary judgement on Count 1 on the basis of qualified immunity.

13 **B. Count II - 42 U.S.C. § 1983 – Survival Action**

14 Under Arizona law, a survival action is a personal injury action that survives to
15 permit a decedent's estate to recover damages that would have been personally awarded
16 to the decedent had he survived. Ariz. Rev. Stat. § 14–3110. The Plaintiff asserts her
17 survival action on the basis of excessive force. (Doc. 29 at 10) For the same reasons that
18 the Court finds that summary judgment is inappropriate on the Plaintiff's excessive force
19 claim, the Court finds that summary judgment cannot be granted on the Plaintiff's
20 survival action claim.

21 **C. Count III – Deprivation of Right to Familial Relationship**

22 In order to establish a claim under 42 U.S.C. § 1983 for deprivation of a familial
23 relationship, the Plaintiff must prove that the Defendants' use of force shocks the
24 conscience. *Gonzalez v. City of Anaheim*, 747 F.3d 789, 797 (9th Cir. 2014) (citing
25 *Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir. 2008)). This would require the Plaintiff
26 to establish that Giralde acted "to cause harm unrelated to the legitimate object of arrest."
27 *Porter*, 546 F.3d at 1139. Even viewing the facts in a light most favorable to the
28 Plaintiff, the Court finds this standard has not been met. The Plaintiff does not plead any

1 facts stating that Giralde’s behavior shocks the conscience, and there is no indication in
2 the record that Giralde had any improper or ulterior motives when he shot the decedent.
3 Thus, the Court finds that summary judgment is appropriate on the Plaintiff’s 42 U.S.C.
4 § 1983 claim for deprivation of a familial relationship.

5 **D. Count V – Negligence**

6 To succeed on a negligence claim, a plaintiff must show “(1) a duty requiring the
7 defendant to conform to a certain standard of care; (2) a breach by the defendant of that
8 standard; (3) a causal connection between the defendant’s conduct and the resulting
9 injury; and (4) actual damages.” *Lewis v. Dirt Sports LLC*, 259 F. Supp. 3d 1039, 1045
10 (D. Ariz. 2017) (citing *Gipson v. Kasey*, 150 P.3d 228, 230 (2007)). “The first element,
11 whether a duty exists, is a matter of law for the court to decide. The other elements,
12 including breach and causation, are factual issues usually decided by the jury.” *Lewis*,
13 259 F. Supp. 3d at 1045.

14 The Defendants argue that the Plaintiff’s negligence claim must fail because
15 Giralde intentionally shot the decedent, and the Plaintiff cannot establish a negligence
16 claim based on an intentional act. (Doc. 76 at 12–13) The Plaintiff fails to identify the
17 specific act or acts performed by Giralde that were negligent. The Plaintiff also fails to
18 plead that the Defendants owed a duty to conform their conduct to a certain standard of
19 care or that the Defendants breached any such duty. (Doc. 29 at 13–14) However, the
20 factual issues identified herein preclude an award of summary judgment on the Plaintiff’s
21 negligence claim. Specifically, in taking the facts in the light most favorable to the
22 Plaintiff, a reasonable jury could find that Giralde was negligent in either firing the first
23 round of shots through the vehicle’s windshield or firing the second round of shots
24 through the passenger’s side window. Accordingly, the Court finds that summary
25 judgment is inappropriate on Count 5.

26 **E. Count VI – Negligent Infliction of Emotional Distress**

27 A claim for negligent infliction of emotional distress requires that the emotional
28 distress inflicted must be manifested as a physical injury. *Leon v. Arizona*, 2012 WL

1 5936689, at 4 (D. Ariz. Nov. 26, 2012) (citing *Rowland v. Union Hills Country Club*, 757
2 P.2d 105, 108 (App. 1988)). Furthermore, a plaintiff must have been in the zone of
3 danger so that the negligent defendant created an unreasonable risk of bodily harm to her.
4 *Rowland*, 757 P.2d at 108 (quoting *Keck v. Jackson*, 593 P.2d 668 (1979)). As
5 supporting evidence for her emotional distress claim, the Plaintiff provides a declaration
6 stating that she suffers from severe emotional distress in the form of anxiety, nightmares
7 and crying spells. (Doc. 87-14 at 2) However, the Plaintiff fails to provide any evidence
8 that her emotional distress manifested itself in the form of a requisite physical injury.
9 The Defendants argue that the Plaintiff's claim must fail because Giralde shot the
10 decedent intentionally, not negligently. (Doc. 76 at 12–13) The Defendants' argument is
11 misguided, as the Plaintiff's claim for negligent infliction of emotional distress focuses
12 on Giralde's actions causing harm to the Plaintiff, and not Giralde's intentional shooting
13 of the decedent. However, the Court finds that the record is devoid of any information
14 demonstrating that the Plaintiff incurred the requisite physical injury. *Washington v. City*
15 *of N. Las Vegas*, 161 F. App'x 637, 640 (9th Cir. 2005) (stating that a claim for negligent
16 infliction of emotional distress requires a showing that a defendant's negligence resulted
17 in physical injury or illness). Accordingly, summary judgment is appropriate on Count
18 6.

19 **F. Count VII – Intentional Infliction of Emotional Distress**

20 To succeed on an intentional infliction of emotional distress claim, a plaintiff must
21 prove that a “defendant’s acts are so outrageous in character and so extreme in degree as
22 to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly
23 intolerable in a civilized community.” *Hulstedt v. City of Scottsdale*, 884 F. Supp. 2d 972,
24 1018 (D. Ariz. 2012) (citing *Patton v. First Fed. Sav. and Loan Ass’n of Phoenix*, 578
25 P.2d 152, 155 (1978)). The tort of intentional infliction of emotional distress requires
26 that (i) the conduct by the defendant must be “extreme” and “outrageous”; (ii) the
27 defendant must either intend to cause emotional distress or recklessly disregard the near
28 certainty that such distress will result from his conduct; and (iii) severe emotional distress

1 must indeed occur as a result of defendant's conduct. *Dougall v. City of Tucson*, 2017
2 WL 1210340, at 7 (D. Ariz. Mar. 31, 2017) (citing *Citizen Publ'g Co. v. Miller*, 115 P.3d
3 107, 110 (Ariz. 2005)). As supporting evidence for her emotional distress claims, the
4 Plaintiff provides a declaration stating that she suffers from severe emotional distress in
5 the form of anxiety, nightmares and crying spells. (Doc. 87-14 at 2) The Court finds that
6 there are genuine disputes as to the facts surrounding whether the decedent's vehicle was
7 moving towards Giralde at the time the first round of shots were fired through the
8 vehicle's windshield and whether or not the deadly force used by Giralde was justified
9 given his beliefs about whether he or Ramirez were in danger at the time he fired the
10 shots through the passenger's side window. In taking the facts in the light most favorable
11 to the Plaintiff, the Court finds that a reasonable jury could find that Giralde's conduct
12 when shooting through the passenger's side window was extreme and outrageous. Thus,
13 the disputed facts addressing the Defendants' liability for intentional infliction of
14 emotional distress are a question for a jury to resolve. Accordingly, the Court finds that
15 summary judgment is inappropriate on Count 7.

16 **G. Count VIII – Battery/Assault**

17 An actor is subject to liability to another for battery if the actor intentionally
18 engages in an act that results in harmful or offensive contact with the person of another.”
19 *Hulstedt*, 884 F. Supp. 2d at 1016 (citing *Duncan v. Scottsdale Medical Imaging, Ltd.*,
20 205 Ariz. 306, 309 (2003)). Police officers in Arizona are protected by the state
21 justification statutes, which provide that officers are not subject to civil liability for
22 “engaging in conduct otherwise justified pursuant to the provisions of this chapter.”
23 A.R.S. § 13–413. Under the statutes, an officer cannot be liable for using deadly force
24 when the officer reasonably believes “that the person is likely to endanger human life or
25 inflict serious bodily injury to another unless apprehended without delay.” A.R.S. § 13–
26 410(C)(2)(c). As discussed, the Court finds that there are genuine disputes as to the facts
27 surrounding whether the decedent's vehicle was moving towards Giralde at the time the
28 first round of shots were fired through the vehicle's windshield. There is a more distinct

1 issue of fact regarding whether or not the deadly force used by Giralde was justified
2 given his beliefs about whether he or Ramirez were in danger at the time Giralde fired his
3 weapon through the passenger's side window. Therefore, the Court finds that summary
4 judgement is inappropriate on Count 8.

5 **H. Punitive Damages**

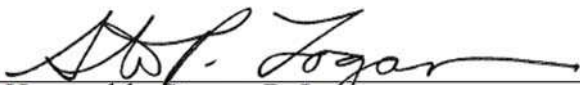
6 In order for a plaintiff to recover punitive damages, the plaintiff must establish that
7 a defendant acted with an "evil mind," which is a state of mind characterized by an intent
8 to injure or a conscious disregard of an "unjustifiable substantial risk of significant harm"
9 to others. *Matthews v. Greyhound Lines, Inc.*, 882 F. Supp. 146, 149 (D. Ariz. 1995);
10 *Lewis*, 259 F. Supp. 3d at 1047. A plaintiff must prove this evil mind by clear and
11 convincing evidence, although circumstantial evidence may be used to meet this burden.
12 *Matthews*, 882 F. Supp. at 149. Because the Court finds that summary judgement is
13 inappropriate on the only remaining claim that requests an award of punitive damages
14 (Count 2), the Court declines to award summary judgment on the availability of punitive
15 damages at this time.

16 Accordingly,

17 1. **IT IS ORDERED** that Defendants' Motion for Summary Judgment (Doc.
18 76) is granted in part as to Counts 3 and 6; and

19 2. **IT IS FURTHER ORDERED** that Defendants' Motion for Summary
20 Judgment (Doc. 76) is denied in part as to Counts 1, 2, 5, 7, and 8.

21 Dated this 22nd day of July, 2019.

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26 Honorable Steven P. Logan
27 United States District Judge
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