UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

YOUNG HAN, individually, and as successor-in-interest to Decedent JOSEPH HAN; NAM HAN; DAVID HAN,

Plaintiffs,

v.

CITY OF FOLSOM, a municipal corporation; SAMUEL L. SPIEGEL, in his capacity as Chief of Police for the CITY OF FOLSOM; PAUL BARBER, individually and in his capacity as a police officer for the CITY OF FOLSOM; DAREN PROCIW, individually and in his official capacity as a police officer for the CITY OF FOLSOM; RON PETERSON, individually and in his capacity as a sergeant of police for the CITY OF FOLSOM, and DOES 1-25, inclusive,

Defendants.

No. 2:10-cv-00633-MCE-GGH

MEMORANDUM AND ORDER

Plaintiffs Young Han, Nam Han, and David Han ("Plaintiffs") are survivors of Decedent Joseph Han ("Decedent"). In the present action, Plaintiffs allege state claims for wrongful death and negligent infliction of emotional distress against the City of Folsom ("City"), the City's Chief of Police ("Spiegel"), Officer Paul Barber ("Officer

Barber"), Officer Daren Prociw ("Officer Prociw"), and Sergeant Ron Peterson ("Sergeant Peterson") (collectively "Defendants"). The action arises from the shooting of Decedent after Defendants responded to a call for service at the home of Decedent and Plaintiffs. Presently before the Court is Defendants' Motion for Summary Judgment (ECF No. 37), pursuant to Federal Rule of Civil Procedure 56, which Plaintiffs timely opposed (ECF No. 42). For the following reasons, Defendants' Motion is GRANTED.[1]

BACKGROUND[2]

On April 12, 2009, Plaintiffs Young and Nam Han (Decedent's parents) called 911 to request police assistance with their 23-year old son and possibly place him on a "5150 hold," a 72-hour hold pursuant to section 5150.2 of the Welfare and Institutions Code.[3] Defendants Barber, Prociw, and Peterson responded to the call. Plaintiffs informed the officers that Decedent needed psychiatric help, was acting out of the ordinary, had confined himself to his room and not eaten for days, claimed that he was God, and would shout and curse at his friends and family members when they attempted to speak to him in his room. Additionally, Plaintiffs told the officers that Decedent had a 3 to

[1] Because oral argument would not have been of material assistance, the Court ordered this matter submitted on the briefs. E.D. Cal. Local Rule 230(g).

[2] The following recitation of facts is taken, at times verbatim, from Plaintiffs' Opposition to Defendants' Motion for Summary Judgment (ECF No. 42), Plaintiffs' Response to Defendant's Undisputed Facts (ECF No. 42-3), and Plaintiffs' complaint (ECF No. 1). Because Plaintiffs oppose the entry of summary judgment in Defendants' favor, the facts are construed in the light most favorable to Plaintiffs where there are factual disputes. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

[3] Section 5150 of the Welfare and Institutions Code states in pertinent part:

> When any person, as a result of mental disorder, is a danger to others, or to himself or herself, or gravely disabled, a peace officer, member of the attending staff, as defined by regulation, of an evaluation facility designated by the county, designated members of a mobile crisis team provided by Section 5651.7, or other professional person designated by the county may, upon probable cause, take, or cause to be taken, the person into custody and place him or her in a facility designated by the county and approved by the State Department of Mental Health as a facility for 72-hour treatment and evaluation.

4-inch camping knife in his room, and that they did not know how he would respond to police presence. However, they related to the officers that Decedent was not suicidal and had not threatened anyone. Based on this information, the officers determined that they could not force Decedent to go to the hospital, but they offered to talk with him. Plaintiffs agreed to have the officers talk with him in his room, and Plaintiffs informed the officers that no one else was inside the home.

Decedent's brother then led the officers to Decedent's bedroom door. Officer Barber arrived at the door first and found that it was closed but not locked. After he called out Decedent's first name and announced that they were the police, he opened the door and stepped into the doorway. At this point, both Decedent's brother and Officer Barber saw Decedent holding a knife. Decedent's brother recounts that when the door was opened, Decedent was standing in front of his couch. Decedent then moved towards the door, where Officer Barber was standing, while yelling at the officers to get out of his room. After telling Decedent to drop the knife (UF ¶ 7), Officer Barber discharged his Taser. Decedent was not immobilized, presumably because only one barb connected with Decedent. At this point, Officer Barber drew his firearm and shot Decedent.[4] Officer Barber then retreated from the bedroom to the bathroom down the hallway, and Decedent immediately closed the door.

Sergeant Peterson, the third officer on the scene, forced the door open with his gun drawn. Decedent had not moved from his position near the doorway (David Han Dep., ECF No. 17-7, 7:2-10), and he continued to hold the knife. Officer Prociw deployed his Taser, and Decedent fell to the ground before standing back up still holding the knife in his hand. Sergeant Peterson told him to drop the knife at least twice, but Decedent failed to drop the knife and moved toward Sergeant Peterson. Sergeant Peterson moved back and shot Decedent, and both of them fell into the hallway where

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[4] It is unclear if Officer Prociw deployed his Taser at this point, or if he deployed it once Sergeant Peterson entered Decedent's room. However, the exact chronology of the second Taser is not relevant to the Court's ruling.

the officers recovered the knife and handcuffed Decedent. Decedent later died at the hospital from the gunshot wounds.

Based on these facts, Plaintiffs brought federal and state claims against the City of Folsom, the Folsom Chief of Police, and the individual officers. Defendants subsequently moved for summary judgment, and, on November 9, 2011, this Court granted summary judgment in favor of Defendants on all of Plaintiffs' claims. ECF No. 24. Plaintiffs appealed. On January 8, 2014, the Ninth Circuit upheld this Court's ruling with the exception of Plaintiffs' state claims for wrongful death and negligent infliction of emotional distress. ECF No. 32. In its ruling, the Ninth Circuit explained that, based on the California Supreme Court's decision in Hayes v. County of San Diego, 305 P.2d 252 (Cal. 2013), "state negligence law . . . is broader than federal Fourth Amendment law" and that law enforcement's preshooting tactics were relevant "under California law in determining whether the use of deadly force gives rise to negligent liability." Id. at 263. Because this Court analyzed the state claims under the same standard as the federal claims, the Ninth Circuit reversed on the two state claims and remanded back to this Court for further proceedings consistent with its decision. As such, the only claims before the Court are the state claims for wrongful death and negligent infliction of emotional distress. Defendants move for summary judgment on Plaintiffs' remaining state law claims. ECF No. 37.

STANDARD

The Federal Rules of Civil Procedure provide for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). One of the principal purposes of Rule 56 is to dispose of factually unsupported claims or defenses. Celotex, 477 U.S. at 325.

Rule 56 also allows a court to grant summary judgment on part of a claim or defense, known as partial summary judgment. See Fed. R. Civ. P. 56(a) ("A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought."); see also Allstate Ins. Co. v. Madan, 889 F. Supp. 374, 378–79 (C.D. Cal. 1995). The standard that applies to a motion for partial summary judgment is the same as that which applies to a motion for summary judgment. See Fed. R. Civ. P. 56(a); State of Cal. ex rel. Cal. Dep't of Toxic Substances Control v. Campbell, 138 F.3d 772, 780 (9th Cir.1998) (applying summary judgment standard to motion for summary adjudication).

In a summary judgment motion, the moving party always bears the initial responsibility of informing the court of the basis for the motion and identifying the portions in the record "which it believes demonstrate the absence of a genuine issue of material fact." Celotex, 477 U.S. at 323. If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586–87 (1986); First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253, 288–89 (1968).

In attempting to establish the existence or non-existence of a genuine factual dispute, the party must support its assertion by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits[,] or declarations . . . or other materials; or showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 251–52 (1986); Owens v. Local No. 169, Assoc. of W. Pulp and Paper Workers, 971 F.2d 347, 355 (9th Cir. 1987). The opposing party must also demonstrate that the dispute about a material fact "is 'genuine,' that is, if the

evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248. In other words, the judge needs to answer the preliminary question before the evidence is left to the jury of "not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." Id. at 251 (quoting Improvement Co. v. Munson, 81 U.S. 442, 448 (1871)). As the Supreme Court explained, "[w]hen the moving party has carried its burden under Rule [56(a)], its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586. Therefore, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Id.

In resolving a summary judgment motion, the evidence of the opposing party is to be believed, and all reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party. Anderson, 477 U.S. at 255. Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. Richards v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff'd, 810 F.2d 898 (9th Cir. 1987).

ANALYSIS

Defendants contend that their conduct leading up to and including the use of deadly force was reasonable and that there is no dispute of material fact as to Plaintiffs' claims for wrongful death and intentional infliction of emotional distress. Plaintiffs, on the other hand, argue that Defendants' actions in approaching Decedent were unreasonable and created the dangerous situation that resulted in the use of deadly force. For the following reasons, the Court finds that Defendants' behavior both before and at the time of the shooting was reasonable as a matter of law.

The California Supreme Court "has long recognized that peace officers have a duty to act reasonably when using deadly force." Hayes v. Cnty. of San Diego, 57 Cal. 4th 622, 629 (2013). The cause of action is grounded in the tort of negligence and the corresponding duty of police officers to act reasonably when using deadly force. Id. As the Court explained, "[t]he reasonableness of an officer's conduct is determined in light of the totality of circumstances," which includes preshooting circumstances. Id. at 629-30. Those preshooting circumstances might show that an otherwise reasonable use of deadly force was in fact unreasonable, such as where officers negligently provoke a dangerous situation in which the subsequent use of deadly force was justified. Id. at 630.

However, officers are afforded discretion in performing their duties. As explained by the California Supreme Court in Hayes:

> [A]s long as an officer's conduct falls within the range of conduct that is reasonable under the circumstances, there is no requirement that he or she choose the 'most reasonable' action or the conduct that is the least likely to cause harm and at the same time the most likely to result in the successful apprehension of a violent suspect, in order to avoid liability for negligence.

57 Cal. 4th at 632 (quoting Brown v. Ransweiler, 171 Cal. App. 4th 516, 537-38 (2009)). Further, the California Supreme Court cautioned in Hayes that it was not suggesting that "a particular preshooting protocol (such as a background check or consultation with psychiatric experts) is always required." 57 Cal. 4th at 632. "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." Graham v. Connor, 490 U.S. 386, 396 (1989). "Summary judgment is appropriate when the trial court determines that, viewing the facts most favorably to the plaintiff, no reasonable juror could find negligence." Id.

In its original decision on summary judgment, this Court held that the officers' use of force at the time of the two shootings was reasonable as a matter of law (ECF No. 24 at 25, 33), and the Ninth Circuit affirmed that decision (ECF No. 32). Thus, the key

question before the Court now is whether the officers acted reasonably in their interactions with Decedent under the totality of the circumstances, including their actions leading up to the use of deadly force.

In arguing that the officers' actions were unreasonable, Plaintiffs present the expert testimony of Lou Reiter ("Reiter"). Reiter Dep., Ex. A, ECF No. 42-1. Reiter opined in his deposition that instead of entering Decedent's bedroom, the officers should have positioned themselves somewhere outside of the bedroom, potentially down the hallway or at the foot of the stairs on the first floor. Id. at 9:5–11:4. Reiter contends that announcing themselves at a safe distance away from his bedroom would have given them a tactical advantage and also allowed Decedent to identify himself and his location rather than be surprised by the entrance of officers in his bedroom. Id. That positioning, in Reiter's opinion, would have allowed the officers sufficient distance between themselves and Decedent to have a dialogue "that [would have] defuse[d] any kind of agitation [Decedent] might have [had]." Id. at 10:4–9.

Reiter suggests that there were other tactical maneuvers or decisions that could have been made in approaching Decedent's bedroom, but he concedes that it was reasonable for the officers to enter the threshold of Decedent's bedroom to see whether he was there. Id. at 9:17–21. Indeed, at that point, the officers had no advance knowledge that the person on the other side of the bedroom door would be a threat to their safety. The officers' only information at the point of entry into the bedroom is that Decedent had not been eating, had not come out of his room for several days, and had been acting out of the ordinary. Although the officers were told he had a knife in his bedroom, they had no reason to believe that they would be confronted with violence on the other end of Decedent's door because Decedent's family informed them that he was not suicidal and had not threatened others. Still, Plaintiffs dispute that the officers' actions were reasonable and rely heavily on two cases to support their argument: Hayes and Grudt v. City of Los Angeles, 2 Cal. 3d 575 (1970). Both cases are distinguishable from the present action.

In Grudt, the California Supreme Court held that it was improper for the trial court to remove the issue of negligence from a jury in a deadly force case alleging wrongful death under California law. 2 Cal. 3d at 587. After seeing Grudt almost hit two women in a crosswalk with his vehicle, two plainclothes officers in an unmarked vehicle decided to stop Grudt for questioning. Id. at 581. Since they did not have police lights and sirens in their unmarked vehicle, the officers drove beside Grudt's vehicle in an effort to get him to pull over. Instead of immediately stopping his vehicle, Grudt continued driving and only pulled over once he was confronted at an intersection with another unmarked police vehicle with two other plainclothes officers. Id. Then, one of the officers exited his vehicle, loaded his double-barrel shogun, and tapped on the driver side window of Grudt's car. Id. Upon seeing the officer "lift[] his shotgun in the air, lean[] forward and point[] to his badge," Grudt allegedly started to drive away in the direction of another officer standing in front of Grudt's vehicle. Id. at 582. Both officers immediately discharged their weapons at Grudt, who died within seconds of the shooting. Id. The California Supreme Court concluded that, even if a jury believed that Grudt was accelerating at the time of the shooting, other evidence raised a genuine issue of material fact as to whether the officers acted reasonably in their actions prior to the shooting. Id. Specifically, the Court found that a jury could find that Grudt believed he was being robbed and that the officers were negligent "when they originally decided to apprehend Grudt, when they approached his vehicle with drawn weapons, and when they shot him to death." Id.

The present case bears little resemblance to Grudt. Unlike Grudt, the officers in this action announced themselves as police before ever drawing their weapons, and they were all wearing their police uniforms. Instead of approaching Decedent with guns drawn, they attempted to converse with him, and even attempted to subdue him with non-lethal force before resorting to shooting. There is no plausible argument in the present case that Decedent mistook the officers for robbers or that their actions were overly aggressive as in Grudt.

The facts in Hayes, though slightly aligned with those of the present case, are also distinguishable. In Hayes, the Ninth Circuit reversed the district court's grant of summary judgment in another deadly force case alleging wrongful death under California law. In Hayes, two officers responded to a domestic disturbance call at Hayes' residence and were informed by his girlfriend that Hayes was suicidal but had not harmed her or others. Id. at 1227. The officers decided to conduct a welfare check on Hayes inside the house and entered the home with their guns holstered. The Ninth Circuit opinion details the circumstances leading up to the shooting of Hayes:

> Once in the living room, Deputy King saw Hayes in an adjacent kitchen area, approximately eight feet away from him. Because Hayes's right hand was behind his back when Deputy King first saw him, Deputy King testified that he ordered Hayes to "show me his hands." While taking one to two steps towards Deputy King, Hayes raised both his hands to approximately shoulder level, revealing a large knife pointed tip down in his right hand. Believing that Hayes represented a threat to his safety, Deputy King immediately drew his gun and fired two shots at Hayes, striking him while he stood roughly six to eight feet away. Deputy Geer simultaneously pulled her gun as well, firing two additional rounds at Hayes.
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> Deputy King testified that only four seconds elapsed between the time he ordered Hayes to show his hands and the time the first shot was fired. When asked why he believed Hayes was going to continue at him with the knife, Deputy King testified: "Because he wasn't stopping." Neither deputy had ordered Hayes to stop. While stating that such a command would have only taken "a split second," Deputy King testified that "I didn't believe I had any time."

Id. at 1227–28.

In reversing summary judgment for the officers, the Ninth Circuit found that, viewing the facts in the light most favorable to the plaintiff, Hayes appeared to be complying with the officer's order to show his hands when he raised his hands and revealed the knife. Id. at 1233. Furthermore, the undisputed fact that Hayes was moving toward the officers with the knife in hand was not enough to find that the use of deadly force was reasonable as a matter of law, especially since he was "still six to eight

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feet away from [the officer] at the time he was shot" and "had not been told to stop." Id. at 1234.

There are several facts that distinguish the case at hand from Hayes. Here, Decedent approached the officers with the knife while yelling for them to get out of his bedroom. In contrast, Hayes made no such aggressive statements to the officers. In fact, Hayes's girlfriend alleged that Hayes told the officers: "You want to take me to jail or you want to take me to prison, go ahead." Id. at 1228. Additionally, unlike Hayes, the officer in the present case exhausted various non-lethal uses of force prior to shooting: Officer Barber told Decedent to put down the knife, and he used a Taser before resorting to deadly force. Finally, the distance between the officer and Decedent was constrained in a small bedroom, while in Hayes there the officer and Hayes were separated in two different rooms by at least six to eight feet.

Additionally, Plaintiffs' expert Reiter further takes issue with the fact that the officers did not retreat from the bedroom after seeing Decedent with the knife. Reiter states that, after seeing Decedent with the knife, the officers should have "redeployed, reassessed, and made additional options on how to handle this emotionally disturbed person who had a knife and was acting irrationally." Id. at 12:1-16. However, "the fact that an expert disagrees with the officer's action does not render the officer's action unreasonable." Reynolds v. Cnty. of San Diego, 84 F.3d 1162, 1169 (9th Cir. 1996). Moreover, Plaintiffs cannot avoid summary judgment "by simply producing an expert's report that an officer's conduct leading up to a deadly confrontation was imprudent, inappropriate, or even reckless." Espinosa v. City & Cnty. of San Francisco, 598 F.3d 528, 548 (9th Cir. 2010).

Reiter is critical of the officers' decision to stay and attempt to calm down Decedent rather than retreating to the hallway. But officers are not required to have perfect 20/20 vision, and the officers' actions must be viewed "from the perspective of a reasonable officer on the scene." Graham, 490 U.S. at 396. Instead of retreating, Officer Barber made the split-second decision to persuade Decedent to drop the knife.

Aside from Reiter's suppositions that other actions could have been taken, there is no evidence that Officer Barber acted unreasonably in making the ultimate decision to stay. See Lopez v. City of Los Angeles, 196 Cal. App. 4th 675, 720 (finding that an expert's contrary opinion did not make officer's decision not to retreat unreasonable where there was no evidence "from the perspective of a reasonable officer on the scene, retreat was either required or desirable") (citation omitted). Viewing the facts in the light most favorable to Plaintiffs, the officers' actions were reasonable as a matter of law.

Next, once Officer Barber shot Decedent and Decedent closed the door behind him, Plaintiffs argue it was unreasonable for Sergeant Peterson to kick down the closed bedroom door and then take several steps into the room.[5] Plaintiffs claim that there are disputed issues of material fact regarding these actions that preclude summary judgment. First, they claim that the jury should determine whether it was reasonable for Sergeant Peterson to compress Decedent's "zone of comfort" by entering his room with a drawn firearm and precipitating the confrontational reaction. ECF No. 42 at 13. Plaintiffs support their argument with their expert's deposition testimony that there was no reason the officers could not have waited outside the room and tried to talk to Decedent from there before re-entering the room. Reiter Depo., Ex. A, ECF No. 42-1, at 25:1-3.

As stated above, the fact that an expert considers alternative actions to be more appropriate in hindsight does not render an officers' behavior unreasonable. Reynolds, 84 F.3d at 1169. That is particularly true in this case where the expert himself agrees that at some point the officers were "going to have to get into the room" because they needed to determine if Decedent "in fact was injured or not." Reiter Depo. at 24:21-25:5. Indeed, although the expert finds fault with the speed with which Sergeant Peterson kicked in the door, he concedes that getting into Decedent's room had to occur

[5] Defendants claim that Sergeant Peterson kicked in Decedent's bedroom door because he believed Officer Barber was trapped inside the room with Decedent. However, because the Court must draw inferences from the facts in the light most favorable to Plaintiffs, the Court analyzes the reasonability of Sergeant Peterson's entrance into the bedroom on its face rather than based on his alleged motives. See Matsushita, 475 U.S. at 587.

eventually to determine if Decedent required medical attention. Id. Next, the expert states that rather than stepping into the bedroom to locate Decedent, Sergeant Peterson should have repositioned himself outside the room from a more tactical vantage point with the other officers. Id. Again, the expert may disagree with Sergeant Peterson's decision, but his disagreement alone is not enough to find that the officers' conduct was unreasonable at the time. See Reynolds, 84 F.3d at 1169.

Finally, Plaintiffs argue that Defendants should have taken into consideration Decedent's diminished mental capacity in their approach to the situation. That argument also fails as a matter of law. Plaintiff's expert suggests that Defendants could have slowed down and taken more time in contacting Decedent to account for his mental instability. However, other than this testimony, Plaintiffs offer no evidence or case law that Defendants acted unreasonably in entering Decedent's bedroom: first by Officer Barber to check on his well-being, and then by Sergeant Peterson in response to shots being fired in the bedroom. Furthermore, Defendants initially went into Decedent's bedroom at the request of his family, and, at that point, even his own family was unaware of the extent of his mental instability. See David Han Depo. at 4:6-9 ("I didn't know how he was really going to act right now because, like, before this all happened, he would never have done anything like that."). To request the officers to predict Decedent's violent reaction to their presence in his bedroom would impermissibly require them to have the "20/20 vision of hindsight." See Graham, 490 U.S. at 396.

Based on the totality of the circumstances, as described above, no reasonable juror could find that Defendants' preshooting conduct was unreasonable. Thus, Defendants are entitled to summary judgment as to Plaintiffs' wrongful death claim. Additionally, because unreasonable conduct is an essential finding for negligence, Plaintiffs' claim for negligent infliction of emotional distress similarly fails. See Burgess v. Superior Court, 2 Cal. 4th 1064, 1072 (1992) (stating that emotional distress is analyzed as the tort of negligence).

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CONCLUSION

For the foregoing reasons, Defendants' Motion for Summary Judgment (ECF No. 37) is GRANTED.

IT IS SO ORDERED.

Dated: April 28, 2015

MORRISON C. ENGLAND, JR, CHIEF JUDGE
UNITED STATES DISTRICT COURT