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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ESTATE OF ROBERT CLIFFORD, et
al.,

Plaintiffs,

v.

PLACER COUNTY, et al.,

Defendants.

No. CIV. S-11-2591 LKK/CKD

ORDER

Plaintiffs Estate of Bobby S. Clifford (Estate) and Linda K. Clifford bring this § 1983 action for damages against defendants Placer County, the Placer County Sheriff's Department, and Placer County Sheriff's Deputy David Clark (Clark). The action arises from the shooting death of Bobby S. Clifford (Clifford) by defendant Clark. Plaintiffs raise seven claims under 42 U.S.C. § 1983 based on alleged violations of federal constitutional rights (First, Second, Third, Fifth, Sixth, Seventh and Eighth Causes of Action), one claim under 42 U.S.C. § 1985 for conspiracy to violate Clifford's constitutional rights (Fourth Cause of Action), and four pendent state law claims (Ninth through Twelfth Causes of Action). The action is proceeding on plaintiffs'

1 second amended complaint, filed February 7, 2012 (ECF No. 15),
2 and is before the court on defendants' motion for summary
3 judgment and, in the alternative, for summary adjudication.¹

4 Defendants contend that the Estate lacks capacity to sue and
5 should be dismissed. Plaintiffs have not responded to this
6 argument. Under California law, which controls the determination
7 of capacity to sue and be sued in this § 1983 action, see Fed. R.
8 Civ. P. 17(b)(3), defendants are correct. See Smith v. Cimmet,
9 199 Cal.App.4th 1381, 1390-91 (Cal.App. 1 Dist. 2011). The Estate
10 will be dismissed.²

11 In opposition to the motion, plaintiff concedes that
12 defendants are entitled to summary judgment on the Monell claims,
13 medical claims, conspiracy claims, and claims against Placer
14 County. See Pl.'s Opp. (ECF No. 38) at 18 n.3. Accordingly,
15 defendants' motion for summary judgment will be granted as to
16 plaintiff's third, fourth and seventh claims for relief. The
17 claims remaining for resolution are those raised against
18 defendant Clark.

19 **I. FACTS**

20 **A. Undisputed Facts³**

21 On August 1, 2011, at approximately 10:30 p.m. Clark was on
22 duty and in a parking lot at Sierra College and Douglas Boulevard

23 ¹ The motion came on for hearing before the undersigned on May 5, 2014.
24 Orestes A. Cross, Esq., appeared as counsel for plaintiffs. Deputy County
Counsel Valerie Floss appeared as counsel for defendants.

25 ² For the remainder of this order plaintiff will be used in the singular to
26 refer to the remaining plaintiff, Linda Clifford, who sues here both in her
individual capacity with right of survivorship and as personal representative
of the Estate.

27 ³ The undisputed facts are facts admitted by plaintiff in response to
28 defendants' statement of undisputed facts and some contained in dispatch
records.

1 in Granite Bay, California. Resp. to Defs.' Proposed Statement
2 of Undisputed Material Facts (ECF No. 39) at 1. Clark was aware
3 of prior reports of a burglary and drug deals in this parking
4 lot. Id. at 2.

5 "Clark observed a vehicle in the middle of the parking lot,
6 not next to any particular business." Id. Clark went into a
7 convenience store in the parking lot. Id. After he exited the
8 store, he "parked his patrol car behind the parked vehicle,
9 reported to dispatch that he was conducting a vehicle check, and
10 activated his spotlight on the car." Id. at 3. Clifford was in
11 the parked vehicle. Id. When Clark parked behind Clifford's
12 car, there was nothing in front of the car blocking its path.
13 Id.

14 There was a gun on the passenger seat of the vehicle an
15 arm's length away from Clifford. Id. at 6. After Clark
16 observed the gun, he requested back up and informed dispatch that
17 he had a person at gunpoint. Id. at 7. Subsequently, Clark
18 fired one series of four shots in rapid succession. Id. at 8.
19 Clark estimates that not later than one minute after shooting
20 Clifford he radioed that shots had been fired and a code 3 for an
21 ambulance. Id. at 9. Clark also estimates that his entire
22 encounter with Clifford lasted less than five minutes. Id.

23 Dispatch records show an initial report of a vehicle check
24 by Clark at approximately 10:32 p.m. on August 1, 2011. Defs.
25 Ex. C (ECF No. 21-6) at 39. About a minute later, at
26 approximately 10:33 p.m. a 10-35 radio transmission is recorded.
27 Id. Seventeen seconds later there is a transmission of "one at
28 gunpoint." Id. At approximately 10:34 p.m. the dispatch record

1 shows "Comment: Roseville PD enrt C/3." Id. At approximately
2 10:35 p.m., a transmission of "gun on the front seat and
3 uncompliant person"⁴ is recorded. Id. Dispatch records include,
4 at approximately 10:36 p.m. the comment "Units are Code 3." Id.
5 Approximately thirty seconds later a transmission of "shots fired
6 - start and ambulance code 3" is recorded. Id.

7 By 10:40 p.m., Roseville Police Department officers had
8 started first aid on Clifford. Id. at 10. Clifford was
9 pronounced dead at 10:59 p.m. at Sutter Roseville Medical Center.
10 Id. at 11.

11 A toxicology report included with the Coroner's Report
12 showed Clifford had a blood alcohol level of 0.223 and 8.0 ng/mL
13 of methamphetamine. Defs. Ex. F (ECF No. 21-6) at 64, 70, 77.
14 The report indicates that the specimens were collect at 9:15 a.m.
15 on August 3, 2011, approximately 33 hours and 45 minutes after
16 Clifford died. Id. at 56, 64.

17 Prior to approaching Clifford's vehicle on August 1, 2011,
18 Clark did not know Clifford or his mother, plaintiff Linda
19 Clifford. Id.

20 **B. Clark's Assertions Concerning the Shooting⁵**

21 _____
22 ⁴ Clark also avers in his declaration that he radioed to dispatch that "he had
23 an uncompliant person." Clark Decl. at ¶ 11. Plaintiff objects to the
24 statement that Clark used his radio as irrelevant, and that Clifford was
25 uncompliant as hearsay. Those objections are not properly before the court on
26 this motion for summary judgment. See Fed. R. Civ. P. 56(c)(2).

27 ⁵ Plaintiff contests Clark's description of events on the ground that it is
28 uncorroborated. Plaintiff argues that because Clark is the sole surviving
witness to the deadly force incident at issue pursuant to Scott v. Henrich, 39
F.3d 912, 915 (9th Cir. 1994), his statements must be corroborated by other
evidence in order to support summary judgment. Plaintiff reads Scott too
broadly. Scott teaches that where the defendant officer is the only surviving
witness of a deadly force incident, the court "must carefully examine all the
evidence in the record, such as medical reports, contemporaneous statements by
the officer and the available physical evidence, as well as any expert

1 The court has reviewed Clark's August 2, 2011 interview with
2 investigators after the shooting (ECF No. 21-6) and his February
3 10, 2014 declaration filed in support of defendants' motion for
4 summary judgment (ECF No. 21-4), both of which have been tendered
5 by defendants. The court has also reviewed the transcript of
6 Clark's March 17, 2014 videotaped deposition, tendered by
7 plaintiff. In one or more of these documents, Clark reports the
8 following:

9 At his deposition, Clark testified that he went to the
10 parking lot to refill his water at the convenience store. Clark
11 Dep. at 38:11-16; Clark Decl. at ¶ 4. He was on "routine patrol"
12 and there had been no call to the parking lot. Clark Dep. at
13 38:10-16. Before entering the convenience store he "heard some
14 very loud music." Clark Decl. at ¶ 4. He saw a couple of cars
15 parked in the parking lot and could not tell which one the music
16 was coming from. Clark Dep. at 43:11-15. After refilling his
17 water and exiting the store, he again heard the music. Clark
18 Decl. at ¶ 4. He scanned the parking lot "to try and figure out
19 where this loud music was coming from." Clark Dep. at 41:21-22.
20 He got in his patrol car and drove toward a car in the middle of
21 the parking lot. Id. at 46:3. He determined that the first car

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24 testimony proffered by the plaintiff, to determine whether the officer's story
25 is internally consistent and consistent with other known facts. . . . In
26 other words, the court may not simply accept what may be a self-serving
27 account by the police officer. It must also look at the circumstantial
28 evidence that, if believed, would tend to discredit the police officer's
story, and consider whether this evidence could convince a rational factfinder
that the officer acted unreasonably." Id. (internal citations omitted). The
court treats the following facts as subject to the heightened scrutiny
required by Scott.

1 was empty and as he got closer to the second car he could tell it
2 was coming from that car. Defs. Ex. A (ECF No. 21-4) at 12.⁶

3 Clark was aware of reports of an auto burglary in this
4 parking lot and a report from the manager of the adjacent
5 Walgreens who "suspected that cars were pulling up to each other
6 in the parking lot and made [sic] hand to hand drug
7 transactions." Clark Decl. at ¶ 3. At his deposition, he
8 testified that he approached Clifford's car because the music was
9 "very, very loud" and "it was not normal for cars to be blasting
10 their music and drawing attention to themselves like that."
11 Clark Dep. at 48:2-9. In view of the loud music and the prior
12 reports, he believed he had to determine what was going on with
13 Clifford's car. Clark Dep. at 46:22-48:9.⁷

14 After Clark shined his spotlight on Clifford's vehicle,
15 Clifford turned down the music volume, "opened his driver's side
16 door and stepped out with his left foot." Clark Decl. at ¶ 7.
17 Clark approached the car and ordered Clifford to stay in his car
18 or to get back in the vehicle. Clark Dep. at 68:2-9. He did
19 not, at that point, verbally identify himself as a deputy
20 sheriff. Defs. Ex. A (ECF No. 21-6) at 9. In addition to his
21 gun, Clark had pepper spray and a taser on his belt. Clark Dep.
22 at 54:14-55:1. Clark observed that Clifford "was real slow with
23 his movements and was not alert, and . . . Clifford's eyes were
24 bloodshot and glossy." Clark Decl. at ¶ 8. Clifford had no

25
26 ⁶ At his deposition, Clark testified that before he got in his car he "could
tell basically where the music was coming from." Clark Dep. at 46:4-6.

27 ⁷ At his initial interview, Clark told investigators that after learning of
the other crimes he thought he needed "to kind of make an extra patrol into
28 that parking lot and look for cars that might be fitting the description of,
you know, doing the drug deals." Defs. Ex. A (ECF No. 21-6) at 10.

1 shirt on and "looked very disheveled." Id. Clifford did not
2 comply with the command right away. Clark Dep. at 68:21. Clark
3 testified at his deposition that Clifford

4 just was swaying a little bit. Looked a
5 little disheveled as I got closer to him. He
6 seemed really slow with his movements and his
7 responses as far as trying to position
8 himself back into the car, almost like he
9 wasn't able to do it without help, or he
10 didn't have the weight or the momentum to get
11 himself out of the car.

12 Id. at 68:25-69:6. Clark thought Clifford "seemed impaired."

13 Id. at 69:8; Clark Decl. at ¶ 8. Clifford did not respond to
14 Clark's verbal commands, and Clark estimates it took him 30
15 seconds or more to get back in the car. Clark Dep. at 71:5-17.

16 Later in the deposition, Clark testified that Clifford was "very
17 slow to comply" with the initial command, he "appeared very
18 disheveled and, you know, his eyes were blood shot" and "his
19 movement was real slow." Id. at 74:13-15. He "wasn't quick with
20 his movements and he was swaying within the seat." Id. at 74:23-
21 24.

22 Clifford did not respond to Clark's initial question about
23 why he was playing the music so loud. Id. at 75:8-11. Clark
24 repeated the question and got "some type of unintelligible
25 response." Id. at 76:3-10. Clark then asked Clifford if he had
26 identification and Clifford "said yeah." Id. at 76:12-13.

27 Clifford reached toward the glove compartment of the vehicle and
28 opened the glove compartment. Clark Decl. at ¶9; Defs. Ex. A
(ECF No. 21-6) at 14. As he did, Clark observed a gun on the
front passenger seat. Resp. to Defs.' Proposed Statement of

1 Undisputed Material Facts (ECF No. 39) at 6. Clark drew his gun
2 and ordered Clifford to keep his hands on the steering wheel.
3 Id. at 7.

4 According to Clark, Clifford slowly brought his hands back
5 in the "general direction of the steering wheel" and "briefly"
6 placed his hands on the wheel. Clark Dep. at 84:1-4, 85:24-86:1.
7 Clifford then kept taking his hands on and off the steering
8 wheel, looking toward the gun, and "moving, swaying in the seat."
9 Id. at 86:22-24. Clark continued to tell Clifford not to reach
10 for the gun and that he would be shot if he did so. Id. at 87:1-
11 3. Clifford kept taking his hands on and off the wheel and began
12 to ask Clark who he was. Id. at 87:5-6. At that point, Clark
13 verbally identified himself as a Placer County Sheriff's Deputy.
14 Id. at 87:8-9; Defs. Ex. A (ECF No. 21-6) at 9. Although he
15 believed Clifford knew he was a sheriff's deputy, he gave him the
16 "benefit of the doubt" and shined his flashlight on his badge.
17 Clark Dep. at 94:6; Defs. Ex. A (ECF No. 21-6) at 15.

18 Clark states that he radioed one, two, or three times for
19 immediate back up. Clark Dep. at 89:6-15, 92:7-8; Defs. Ex. A
20 (ECF No. 21-6) at 15. He was not sure whether his transmissions
21 were received. Id.

22 At his deposition, Clark testified that the "majority of the
23 time" Clifford's hands were hovering in front of the steering
24 wheel, but he was "clearly not following the simple directions of
25 keep the hands on the steering wheel." Clark Dep. at 92:10-93:1.
26 Clark felt Clifford "was testing to see how far he could get and
27 what kind of reaction [Clark] was going to have based on him
28 taking his hands off and on the steering wheel." Id. at 92:12-

1 15. Clark reported that at some point during the exchange,
2 Clifford's "demeanor changed" and he started to yell, become
3 hostile, and "more aggressive in his movements." Id. at 96:14-
4 18.

5 Clifford continued to question Clark and twice demanded to
6 see his badge. Clark Dep. at 95:23-96:6. At some point, perhaps
7 between these inquiries, Clark radioed that had "one in gunpoint,
8 gun in the car, and that he was not compliant." Id. at 99:23-
9 100:2. Clark testified that he was shining his flashlight in
10 Clifford's eyes so that Clifford couldn't have good vision. Id.
11 at 100:7-9. Clifford tried to lift himself above the door frame
12 to get the flashlight out of his eyes. Id. at 100:9-10.
13 Clifford was "looking and . . . moving forward and he makes a
14 reach towards the gun." Id. at 100:11-12. Clark avers in his
15 declaration that this was a "controlled - full arm's reach for
16 the gun" whereupon Clark fired his gun, shooting Clifford. Clark
17 Decl. at ¶ 13.⁸

18 C. Plaintiff's Expert Declarations

19 Defendants filed their motion for summary judgment on
20 February 14, 2014. The court heard oral argument on May 5, 2014.
21 On the same day, the United States Supreme Court issued Tolan v.
22 Cotton, 572 U.S. ___, 134 S.Ct. 1861 (2014) (per curiam). By
23 order filed May 7, 2014, the parties were granted an additional
24 period of fifteen days in which to file supplemental briefs
25 addressing the application, if any, of Tolan to the motion at
26 bar.

27 ⁸ In his deposition, Clifford described the movement as toward the gun as
28 different from Clifford's earlier movements, "a little bit quicker, and it was
deliberate." Clark Dep. at 101:15-102:2.

1 On May 13, 2014, defendants filed a supplemental brief.
2 On May 22, 2014, plaintiff filed a supplemental brief accompanied
3 by two expert declarations. On the same day, defendants filed a
4 response to plaintiff's supplemental brief, requesting that the
5 two expert declarations be stricken or, in the alternative, that
6 defendants be granted an opportunity to respond to the evidence
7 and argument thereon. Plaintiff responded to defendants' request
8 the day it was filed. By order filed May 23, 2014, the court
9 denied defendants' request to strike the expert declarations and
10 granted defendants fifteen days to respond thereto. Defendants
11 filed their response on June 6, 2014. Defendants argue that the
12 expert evidence does not create a triable issue of material fact
13 and that the conclusions of one of the experts are inadmissible.

14 The court has reviewed the two expert declarations. For the
15 reasons discussed below, the court finds that inconsistencies in
16 Clark's description of Clifford's appearance and behavior create
17 a credibility question that must be resolved by a jury. While
18 one of plaintiff's experts also recognizes and relies on those
19 inconsistencies in his report, see Ex. A to Streed Decl. at 18,
20 expert testimony is not necessary on that precise question. Even
21 if the court were to consider the expert opinions at this stage
22 of these proceedings, they do not materially affect the
23 disposition of this motion. The court makes no findings at this
24 time on their admissibility at a subsequent stage of these
25 proceedings.

26 **III. STANDARDS FOR A MOTION FOR SUMMARY JUDGMENT**

27 Summary judgment is appropriate "if the movant shows that
28 there is no genuine dispute as to any material fact and the

1 movant is entitled to judgment as a matter of law." Fed. R. Civ.
2 P. 56(a); Ricci v. DeStefano, 557 U.S. 557, 586 (2009) (it is the
3 movant's burden "to demonstrate that there is 'no genuine issue
4 as to any material fact' and that the movant is 'entitled to
5 judgment as a matter of law'"); Walls v. Cent. Contra Costa
6 Transit Auth., 653 F.3d 963, 966 (9th Cir. 2011) (per curiam)
7 (same).

8 Consequently, "[s]ummary judgment must be denied" if the
9 court "determines that a 'genuine dispute as to [a] material
10 fact' precludes immediate entry of judgment as a matter of law."
11 Ortiz v. Jordan, 562 U.S. ___, 131 S. Ct. 884, 891 (2011)
12 (quoting Fed. R. Civ. P. 56(a)); Comite de Jornaleros de Redondo
13 Beach v. City of Redondo Beach, 657 F.3d 936, 942 (9th Cir. 2011)
14 (en banc) (same), cert. denied, 132 S. Ct. 1566 (2012).

15 Under summary judgment practice, the moving party bears the
16 initial responsibility of informing the district court of the
17 basis for its motion, and "citing to particular parts of the
18 materials in the record," Fed. R. Civ. P. 56(c)(1)(A), that show
19 "that a fact cannot be . . . disputed." Fed. R. Civ. P.
20 56(c)(1); Nursing Home Pension Fund, Local 144 v. Oracle Corp.
21 (In re Oracle Corp. Securities Litigation), 627 F.3d 376, 387
22 (9th Cir. 2010) ("The moving party initially bears the burden of
23 proving the absence of a genuine issue of material fact") (citing
24 Celotex v. Catrett, 477 U.S. 317, 323 (1986)).

25 A wrinkle arises when the non-moving party will bear the
26 burden of proof at trial. In that case, "the moving party need
27 only prove that there is an absence of evidence to support the
28 non-moving party's case." Oracle Corp., 627 F.3d at 387.

1 If the moving party meets its initial responsibility, the
2 burden then shifts to the non-moving party to establish the
3 existence of a genuine issue of material fact. Matsushita Elec.
4 Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986);
5 Oracle Corp., 627 F.3d at 387 (where the moving party meets its
6 burden, "the burden then shifts to the non-moving party to
7 designate specific facts demonstrating the existence of genuine
8 issues for trial"). In doing so, the non-moving party may not
9 rely upon the denials of its pleadings, but must tender evidence
10 of specific facts in the form of affidavits and/or other
11 admissible materials in support of its contention that the
12 dispute exists. Fed. R. Civ. P. 56(c)(1)(A).

13 The court's function on a summary judgment motion is not to
14 make credibility determinations or weigh conflicting evidence
15 with respect to a disputed material fact. See T.W. Elec. Serv. v.
16 Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987).

17 "In evaluating the evidence to determine whether there is a
18 genuine issue of fact," the court draws "all reasonable
19 inferences supported by the evidence in favor of the non-moving
20 party." Walls, 653 F.3d at 966. Because the court only considers
21 inferences "supported by the evidence," it is the non-moving
22 party's obligation to produce a factual predicate as a basis for
23 such inferences. See Richards v. Nielsen Freight Lines, 810 F.2d
24 898, 902 (9th Cir. 1987). The opposing party "must do more than
25 simply show that there is some metaphysical doubt as to the
26 material facts Where the record taken as a whole could
27 not lead a rational trier of fact to find for the nonmoving
28

1 party, there is no 'genuine issue for trial.'" Matsushita, 475
2 U.S. at 586-87 (citations omitted).

3 **IV. ANALYSIS**

4 **A. Qualified Immunity**

5 Defendants seek summary judgment on plaintiff's first,
6 second, and eighth causes of action on the grounds of qualified
7 immunity. The first and second causes of action allege
8 violations of Clifford's Fourth Amendment rights. The first
9 cause of action claims unlawful seizure/detention of Clifford;
10 the second cause of action claims unlawful use of excessive and
11 deadly force. The eighth cause of action is a survival action
12 for pain and suffering incurred by Clifford before he died.

13 The doctrine of qualified immunity protects a government
14 official from liability for civil damages except where the
15 official violates a constitutional right that "'was "clearly
16 established" at the time of the challenged conduct.'" Wood v.
17 Moss, 134 S.Ct. 2056 (2014) (quoting Ashcroft v. al-Kidd, 563
18 U.S. ___, 131 S.Ct. 2074, 2080 (2011)). The qualified immunity
19 inquiry has two prongs: (1) whether the officer's conduct
20 violated a constitutional right and (2) whether "the right at
21 issue was clearly established at the time of the incident such
22 that a reasonable officer would have understood her conduct to be
23 unlawful in the situation." Torres v. City of Madera, 648 F.3d
24 1119, 1123 (9th Cir. 2011) (quoting Saucier v. Katz, 533 U.S. 194,
25 201-02 (2001)). The court has discretion to consider the two
26 factors in either order. See Pearson v. Callahan, 555 U.S. 223,
27 236 (2009). At summary judgment, resolution of the qualified
28 immunity defense turns whether the undisputed facts and the

1 inferences to be drawn therefrom, viewed in the light most
2 favorable to the non-moving party, show a violation of clearly
3 established federal constitutional rights. See Tolan v. Cotton,
4 134 S.Ct. 1861, 1866 (2014). In Tolan, the United States Supreme
5 Court reminded us that their

6 qualified-immunity cases illustrate the
7 importance of drawing inferences in favor of
8 the nonmovant, even when, as here, a court
9 decides only the clearly-established prong of
10 the standard. In cases alleging unreasonable
11 searches or seizures, we have instructed that
12 courts should define the "clearly
13 established" right at issue on the basis of
14 the "specific context of the case." Saucier,
15 supra, at 201, 121 S.Ct. 2151; see also
16 Anderson v. Creighton, 483 U.S. 635, 640-641,
17 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987).
18 Accordingly, courts must take care not to
19 define a case's "context" in a manner that
20 imports genuinely disputed factual
21 propositions. See Brosseau, supra, at 195,
22 198, 125 S.Ct. 596 (inquiring as to whether
23 conduct violated clearly established law "
24 'in light of the specific context of the
25 case' " and construing "facts ... in a light
26 most favorable to" the nonmovant).

27 Tolan v. Cotton, id.

28 **1. First Cause of Action**

Clark contends that neither his initial approach to Clifford
nor his subsequent detention of Clifford violated the Fourth
Amendment's limits on detention. He also contends that at the
time of the events at bar it was not clearly established that a
peace officer would violate the Fourth Amendment by questioning
an occupant of a parked vehicle and detaining a person
"reasonably suspected of playing loud music and subsequently

1 suspected of driving under the influence." Defs.' Mem. of Points
2 and Authorities (ECF No. 21-1) at 27.

3 Plaintiff contends Clark's testimony that there was loud
4 music coming from the car and that he suspected Clifford was
5 under the influence of drugs or alcohol because of Clifford's
6 behavior is uncorroborated and therefore, pursuant to Scott v.
7 Henrich, insufficient to establish either fact. This contention
8 without merit. As discussed above, under Scott the court is
9 required to "carefully examine all the evidence in the record,
10 such as medical reports, contemporaneous statements by the
11 officer and the available physical evidence, as well as any
12 expert testimony proffered by the plaintiff, to determine whether
13 the officer's story is internally consistent and consistent with
14 other known facts." Scott, 39 F.3d at 915.

15 Here, Clark was interviewed the day after the shooting and
16 told the interviewer that Clifford's car

17 stereo was blasting loud enough to where, uh,
18 it was a nuisance in my opinion and it was -
19 if the car was driving and I would have
20 noticed the same volume on the stereo, I
21 would have pulled the car over. Um, it
22 caught my attention as I went into the store
23 to get my water, and I was like okay, I need
24 to find out where that stereo noise is coming
25 from. Coming back out from getting my water,
26 go get in the car and scan the parking lot,
27 see okay, there's two cars. The first car
28 was empty and the second car, as I'm getting
closer I can tell that it was coming from
that car.

26 Defs.' Ex. A (ECF No. 21-6) at 12. In addition, the toxicology
27 report on Clifford included findings of a blood alcohol level of
28 0.223 and 8.0 ng/ml of methamphetamine. Defs.' Ex. F (ECF No.

1 21-6) at 65; Streed Exp. Rep. (ECF No. 48-1) at 15. Clark's
2 stated reasons for approaching the car and detaining Clifford are
3 "internally consistent and consistent with other known facts."
4 Scott, 39 F.3d at 915.

5 Clark is entitled to qualified immunity on this claim. When
6 he approached the car, Clark had a reasonable suspicion that loud
7 music was coming from the car, and once he observed Clifford, he
8 had a reasonable suspicion that Clifford was under the influence
9 of drugs or alcohol. Even though "it is difficult to imagine a
10 less threatening offense than playing one's car stereo at an
11 excessive volume", U.S. v. Grigg, 498 F.3d 1070, 1077 (9th Cir.
12 2007), it is nonetheless an infraction under the Placer County
13 noise ordinance. Once Clark observed Clifford, he had a
14 reasonable suspicion that plaintiff was under the influence of
15 drugs or alcohol. He is therefore entitled to qualified immunity
16 on this claim. See Ramirez v. City of Buena Park, 560 F.3d 1012,
17 1020-21 (9th Cir. 2009) (officer entitled to qualified immunity
18 for detaining individual suspected of being under influence of
19 controlled substance).

20 **2. Second and Eighth Causes of Action**

21 Plaintiff's second claim is that his rights under the Fourth
22 Amendment were violated by use of excessive and deadly force.
23 Clark seeks summary judgment on this claim on the ground of
24 qualified immunity, and contends the same analysis applies to
25 plaintiff's eighth cause of action. The court turns first to
26 whether the evidence, viewed in the light most favorable to
27 plaintiff, could, if proved, establish a violation of the Fourth
28 Amendment by use of excessive and unnecessary deadly force.

1 An objectively unreasonable use of force is
2 constitutionally excessive and violates the
3 Fourth Amendment's prohibition against
4 unreasonable seizures. Graham v. Connor, 490
5 U.S. 386, 394-96, 109 S.Ct. 1865, 104 L.Ed.2d
6 443 (1989); Tekle v. United States, 511 F.3d
7 839, 844 (9th Cir.2007). Determining the
8 reasonableness of an officer's actions is a
9 highly fact-intensive task for which there
10 are no per se rules. Scott, 550 U.S. at 383,
11 127 S.Ct. 1769. We recognize that "police
12 officers are often forced to make split-
13 second judgments—in circumstances that are
14 tense, uncertain, and rapidly evolving—about
15 the amount of force that is necessary in a
16 particular situation," Graham, 490 U.S. at
17 397, 109 S.Ct. 1865, and that these judgments
18 are sometimes informed by errors in
19 perception of the actual surrounding facts.

20 Not all errors in perception or judgment,
21 however, are reasonable. While we do not
22 judge the reasonableness of an officer's
23 actions "with the 20/20 vision of hindsight,"
24 id. at 396, 109 S.Ct. 1865, nor does the
25 Constitution forgive an officer's every
26 mistake. See Maryland v. Garrison, 480 U.S.
27 79, 87 n. 11, 107 S.Ct. 1013, 94 L.Ed.2d 72
28 (1987). Rather, we adopt "the perspective of
a reasonable officer on the scene ... in
light of the facts and circumstances
confronting [her]." Graham, 490 U.S. at 396,
109 S.Ct. 1865... .

Standing in the shoes of the "reasonable
officer," we then ask whether the severity of
force applied was balanced by the need for
such force considering the totality of the
circumstances, including (1) the severity of
the crime at issue, (2) whether the suspect
posed an immediate threat to the safety of
the officers or others, and (3) whether the
suspect was actively resisting arrest or
attempting to evade arrest by flight. Graham,
490 U.S. at 396, 109 S.Ct. 1865; Blanford v.
Sacramento Cnty., 406 F.3d 1110, 1115 (9th
Cir.2005).

1 Torres, 648 F.3d at 1123-24; see also Gonzalez v. City of
2 Anaheim, 747 F.3d 789, 793-94 (9th Cir. 2014) (en banc).

3 "The immediacy of the threat posed by the suspect is the
4 most important factor." Gonzalez, 747 F.3d at 793 (citing Mattos
5 v. Agarano, 661 F.3d 433, 441 (9th Cir.2011) (en banc)). In
6 addition, "the 'alternative methods of capturing or subduing a
7 suspect' available to the officers" are "also relevant to
8 reasonableness." Gonzalez, 747 F.3d at 794 (quoting Smith v.
9 City of Hemet, 394 F.3d at 703).

10 The reasonableness test outlined in Graham applies equally
11 to the use of deadly force. See Price v. Sery, 513 F.3d 962, 968
12 (9th Cir. 2008) (discussing Scott v. Harris, 550 U.S. 372 (2007)).
13 Moreover,

14 "the mere fact that a suspect possesses a
15 weapon does not justify deadly force." Haugen
16 v. Brosseau, 351 F.3d 372, 381 (9th
17 Cir.2003), rev'd on other grounds, 543 U.S.
18 194, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004)
19 (citing Harris v. Roderick, 126 F.3d 1189,
20 1202 (9th Cir.1997) (holding, in the Ruby
21 Ridge civil case, that the FBI's directive to
22 kill any armed adult male was
23 constitutionally unreasonable even though a
24 United States Marshal had already been shot
25 and killed by one of the males)); Glenn, 673
26 F.3d at 872 (suspect's mere "possession of a
27 knife" is "not dispositive" on immediate-
28 threat issue); Curnow, 952 F.2d at 324-25
(holding that deadly force was unreasonable
where the suspect possessed a gun but was not
pointing it at the officers and was not
facing the officers when they shot).

26 Hayes v. County of San Diego, 736 F.3d 1223, 1233 (9th Cir. 2013).

1 “‘Because [the excessive force inquiry] nearly always
2 requires a jury to sift through disputed factual contentions, and
3 to draw inferences therefrom, . . . summary judgment should be
4 granted sparingly in excessive force cases.’” Glenn v.
5 Washington County, 673 F.3d 864, 871 (9th Cir. 2011) (quoting
6 Smith v. City of Hemet, 394 F.3d at 701). “This principle
7 applies with particular force where the only witness other than
8 the officers was killed during the encounter.” Gonzalez, 747
9 F.3d at 795 (citing Glenn v. Washington County, 673 F.3d at
10 871); see also Torres v. City of Madera, 648 F.3d 1119, 1125 (9th
11 Cir. 2011)(summary judgment should be granted sparingly in
12 excessive force cases).

13 Clark approached Clifford’s car because loud music was
14 coming from the car. At most, this was an alleged violation of a
15 Placer County noise ordinance, a very minor infraction. Clark
16 described Clifford as “real slow . . . with his movements,” not
17 “real alert,” “very disheveled” with “real glossy” eyes, non-
18 responsive to initial directives from Clark, almost incapable of
19 getting himself back into the car, and then “incoherent” and
20 “unintelligible” in responses he did make. Clark’s observations
21 of Clifford gave rise to a suspicion that Clifford was under the
22 influence of drugs or alcohol and, in fact, toxicology reports
23 showed that Clifford’s blood alcohol level was 0.223 after his
24 death.

25 Clark’s description of events also raises conflicting
26 questions about whether Clifford knew Clark was a police officer.
27 Clark’s marked patrol car was parked behind Clifford’s car with
28 the spotlight shining directly on Clifford’s car. Clark Decl.

1 (ECF No. 21-4) at ¶ 5. Clark states that Clifford did appear to
2 respond to an order to produce identification, compare id. at ¶ 9
3 with Defs. Ex. A (ECF No. 21-6) at 14, which leads to an
4 inference Clifford knew Clark was a police officer. However,
5 Clark did not verbally identify himself as a police officer when
6 he initially approached the car, and did not do so until Clifford
7 asked who Clark was after Clark had pulled his gun and was
8 pointing it at Clifford. Defs. Ex. A (ECF No. 21-6) at 9. Clark
9 reported that Clifford repeatedly asked who Clark was and to see
10 his badge and Clark acknowledged he had thought it was possible
11 Clifford had not seen his full uniform. Id. at 15. Clark also
12 testified that he was shining his flashlight directly in
13 Clifford's eyes to adversely affect his vision, thus raising at
14 least an inference that Clifford could not see well and was in
15 fact confused about who Clark was and what was occurring.

16 The foregoing gives rise to a reasonable inference that
17 Clifford was too impaired and confused to make a controlled reach
18 for the gun on the passenger seat. The mere fact that Clifford
19 had a gun in the car, without more, did not justify the use of
20 deadly force. See Hayes v. County of San Diego, 736 F.3d at
21 1233.

22 The key question here is "whether a reasonable jury would
23 necessarily find that" Clark "perceived an immediate threat of
24 death or serious physical injury at the time he shot" Clifford
25 such that the use of deadly force was reasonable. Gonzalez, 747
26 F.3d at 794. Clark's description of events, if believed, is of a
27 "tense, uncertain, and rapidly evolving" situation during which
28 Clifford refused to comply with orders to keep his hands on the

1 steering wheel and became more hostile and aggressive before
2 deliberately and in a controlled manner reaching for the gun.
3 Clark avers that Clifford made a controlled full arm's length
4 reach for the gun after failing to comply with repeated orders to
5 keep his hands on the steering wheel and not reach for the gun.
6 If this is true, no reasonable jury would conclude that Clark
7 violated Clifford's Fourth Amendment rights and, in any event,
8 this court would find Clark entitled to qualified immunity.

9 Clark's description of Clifford as significantly impaired,
10 moving slowly, and confused about what was going on, together
11 with the toxicology report showing Clifford's blood alcohol level
12 at .223, however, raise serious questions about whether Clifford
13 was capable of making a controlled reach for the gun. These
14 questions, in turn, give rise to a question about Clark's
15 credibility which must be resolved by a jury. If a jury believes
16 that Clifford was too impaired to make a controlled reach for the
17 gun it could disbelieve Clark's asserted reason for shooting
18 Clifford. And if the jury disbelieved Clark's testimony that
19 Clifford made a controlled reach for the gun, it could disbelieve
20 some or all of Clark's testimony concerning events leading up to
21 the shooting. See Enying Li v. Holder, 738 F.3d 1160, 1164 (9th
22 Cir. 2013) (it is the "general law of the Ninth Circuit" that "a
23 witness 'deemed unbelievable as to one material fact may be
24 disbelieved in all other respects.'")(internal citation omitted).

25 Viewed in the light most favorable to plaintiff and drawing
26 all reasonable inferences therefrom, a reasonable jury could
27 conclude that Clifford was too impaired to make a controlled
28 reach for the gun and that Clark's asserted reason for shooting

1 Clifford is not credible. If it so concluded, the jury could
2 also find that Clark's used of deadly force was unreasonable and
3 excessive and violated the Fourth Amendment.

4 The second prong of the qualified immunity analysis requires
5 the court to decide whether it would have been clear to a
6 reasonable officer in Clark's position that his use of deadly
7 force was unlawful in the situation he faced. The question of
8 whether a defendant is entitled to qualified immunity is a
9 question of law for the court. Torres, 548 F.3d at 1210.
10 However, the court only resolves that question of law if all
11 material facts are undisputed and, taken in the light most
12 favorable to the plaintiff, the facts show the defendant did not
13 violate clearly established federal constitutional rights. Id.

14 At all times relevant to this action, it was clearly
15 established that the use of deadly force was reasonable only if
16 an officer "'has probable cause to believe that the suspect poses
17 a significant threat of death or serious physical injury to the
18 officer or others.'" Long v. City and County of Honolulu, 511
19 F.3d 901, 906 (9th Cir. 2007)(quoting Scott v. Henrich, 39 F.3d at
20 194, in turn quoting Tennessee v. Garner, 471 U.S. at 3 (1985)).
21 The same credibility question that precludes summary judgment on
22 the merits of plaintiff's second and eighth claims preclude a
23 finding that Clark is entitled to qualified immunity on these
24 claims.

25 For all of the foregoing reasons, defendants' motion for
26 summary judgment will be denied as to plaintiff's second and
27 eighth causes of action.

28

1 **B. Fifth Cause of Action**

2 Plaintiff's fifth cause of action is a wrongful death claim
3 under § 1983 that by shooting and killing Clifford defendant
4 deprived "plaintiffs and the decedent of certain constitutionally
5 protected rights" including but not limited to freedom from
6 unlawful searches and seizures, deprivation of life and liberty
7 without due process, and freedom from excessive force. Defendant
8 seeks summary judgment on this claim on the ground that a
9 wrongful death action under § 1983 is not the appropriate vehicle
10 for recovery for violation of the decedent's constitutional
11 rights. Plaintiff does not oppose this part of the motion.
12 Plaintiff's fifth claim will therefore be dismissed.

13 **C. Sixth Cause of Action**

14 Plaintiff's sixth cause of action is for loss of familial
15 relationship. The claim is governed by the substantive due
16 process clause of the Fourteenth Amendment. Defendants seek
17 summary judgment on this claim on the ground that "Such a claim
18 requires the plaintiffs to prove that the officers' use of force
19 'shock[ed] the conscience.' Porter v. Osborn, 546 F.3d 1131, 1137
20 (9th Cir.2008)." Gonzalez, 747 F.3d at 797. Deliberate
21 indifference may shock the conscious if the actor has time to
22 deliberate before committing the conscious-shocking action. See
23 County of Sacramento v. Lewis, 523 U.S. 833, 849-50 (1998). To
24 determine whether this standard applies "the 'critical
25 consideration [is] whether the circumstances are such that
26 'actual deliberation is practical.'" Porter, 546 F.3d at 1137
27 (internal citations omitted). Otherwise liability only lies when
28 the officer acts with a "purpose to harm." Porter, id.

1 In Porter, the Ninth Circuit held that the “purpose to harm”
2 standard applied to a claim against a police officer who shot and
3 killed an individual during a “rapidly escalating confrontation”
4 that began when officers “were responding to a call about an
5 apparently abandoned vehicle.” Porter, 546 F.3d at 1133. In
6 contrast, the deliberate indifference standard applies in
7 “situations that evolve in a time frame that permits the officer
8 to deliberate before acting and those that escalate so quickly
9 that the officer must make a snap judgment.” Id. at 1137.

10 Here, the “purpose to harm” standard and the “deliberate
11 indifference” standard focus on the officer’s state of mind.
12 While there are questions that require trial over the
13 reasonableness of Clark’s actions, the evidence, even viewed in
14 the light most favorable to plaintiff, does not support a finding
15 that Clark had a sufficiently culpable state of mind under either
16 standard to support plaintiff’s Fourteenth Amendment claim.
17 Defendant Clark is entitled to summary judgment on this claim.

18 **D. State Law Claims**

19 **1. Wrongful Death -- Negligence**

20 Defendants seek summary judgment on plaintiff’s negligence
21 claim on the ground that Clark acted reasonably in using deadly
22 force. The reasonableness standard that applies to this claim is
23 the same as the reasonableness standard that applies to
24 plaintiff’s Fourth Amendment excessive force claim. See Hernandez
25 v. City of Pomona, 46 Cal.4th 501, 513-14 (2009). The credibility
26 question that precludes summary judgment for Clark on plaintiffs’
27
28

1 Fourth Amendment excessive force claim precludes summary judgment
2 on this claim.⁹

3 **2. Intentional Infliction of Emotional Distress**

4 Clark seeks summary judgment on plaintiff's claim for
5 intentional infliction of emotional distress on the grounds that
6 (1) Clark's conduct was not directed to plaintiff; (2) the
7 conduct was privileged; and (3) the conduct was not extreme or
8 outrageous. Plaintiff only challenges that portion of the
9 argument that contends the conduct was privileged under
10 California Penal Code § 196, which protects reasonable use of
11 force.

12 California law "limits claims of intentional infliction of
13 emotional distress to egregious conduct *toward plaintiff*
14 proximately caused by defendant.'" Christensen v. Superior
15 Court, 54 Cal.3d 868, 905 (1991) (internal citation omitted).
16 "The only exception to this rule is that recognized when the
17 defendant is aware, but acts with reckless disregard, of the
18 plaintiff and the probability that his or her conduct will cause
19 severe emotional distress to that plaintiff." Id. There is no
20 evidence that Clark was aware of Clifford's mother, and she was
21 not present at the shooting. For this reason, Clark is entitled
22 to summary judgment on this claim.

23 **3. Assault and Battery**

24 Clark seeks summary judgment on plaintiff's eleventh and
25 twelfth causes of action on the grounds that his use of force was
26 reasonable and that both claims "are disposed of in light of the

27 ⁹ Defendants also seek summary adjudication of this claim on the grounds that
28 it is not asserted as a survival claim and because plaintiff does not assert a
statutory basis of liability. Neither of these contentions has merit.

1 Fourth Amendment excessive force analysis."^{10,11} As with the
2 negligence claim, the state law battery claim "is a counterpart
3 to a federal claim of excessive use of force. In both, a
4 plaintiff must prove that the peace officer's use of force was
5 unreasonable." Brown v. Ransweiler, 171 Cal.App.4th 516, 527
6 (2009). The credibility question that precludes summary judgment
7 for Clark on plaintiffs' Fourth Amendment excessive force claim
8 precludes summary judgment on plaintiff's battery claim.

9 Clark's contention that he is entitled to immunity under
10 California Penal Code § 196 is governed by "whether the
11 circumstances 'reasonably create[d] a fear of death or serious
12 bodily harm to the officer or to another.'" Brown, 171
13 Cal.App.4th at 816 (quoting Martinez v. County of Los Angeles, 47
14 Cal.App.4th 334, 349 (1996)). Again, the same credibility
15 question precludes summary judgment on this claim on the ground
16 of state law immunity.

17 In accordance with the above, IT IS HEREBY ORDERED that:

18 1. Defendants' motion for summary judgment is granted in
19 part and denied in part, as follows:

20 a. Summary judgment is granted for defendants on
21 plaintiffs' first, third, fourth, fifth, sixth, seventh, and
22 tenth causes of action;

23 b. Summary judgment is granted in favor of defendants
24 Placer County and Placer County Sheriff's Office;

25 ¹⁰ Defendants do not brief the assault claim separately from the battery claim.


26 ¹¹ Defendants assert a variety of other grounds, including that the two causes
27 of action are personal to Clifford but not raised as survival claims. At
28 most, dismissal on this basis would require leave to amend. Where, as here,
plaintiff has given sufficient notice of the basis of the claim the court
construes eleventh and twelfth causes of action as properly pleaded.

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c. The Estate of Robert (Bobby) S. Clifford is dismissed as a plaintiff; and

d. Summary judgment is denied for defendant Clark on plaintiff's second, eighth, ninth, eleventh and twelfth causes of action.

DATED: August 27, 2014.


LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT