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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ESTATE OF ANDY LOPEZ, et al.,
Plaintiffs,
v.
ERICK GELHAUS, et al.,
Defendants.

Case No. 13-cv-5124-PJH

**ORDER GRANTING IN PART AND
DENYING IN PART MOTION FOR
SUMMARY JUDGMENT**

Defendants' motion for summary judgment came on for hearing before this court on December 9, 2015. Plaintiffs Estate of Andy Lopez, Rodrigo Lopez, and Sujay Cruz ("plaintiffs") appeared through their counsel, Arnaldo Casillas. Defendants Erick Gelhaus and County of Sonoma ("defendants") appeared through their counsel, Steven Mitchell. Having read the papers filed in conjunction with the motion and carefully considered the arguments and the relevant legal authority, and good cause appearing, the court hereby rules as follows.

BACKGROUND

On October 22, 2013, at approximately 3:15pm, 13-year-old Andy Lopez ("Andy") was walking along a sidewalk in Sonoma County, carrying a toy rifle. See Second Amended Complaint ("SAC"), ¶ 20. According to defendants, the rifle was designed to look like a real AK-47 assault rifle, and the orange tip used to distinguish toy rifles had been removed. See Dkt. 63 at 6-7.

Two Sonoma County Sheriff's deputies, Erick Gelhaus and Michael Schemmel, were patrolling the area at the time. Though the deputies had not received any reports

1 about an individual carrying a weapon, they noticed Andy on their own, and decided to
2 approach him. SAC, ¶¶ 23-24.

3 The deputies stopped their patrol car and activated its siren and emergency lights.
4 Dkt. 63 at 4. At that time, Andy was approximately 35-40 feet away from the deputies,
5 with his back facing towards them. SAC, ¶¶ 24-25. Either one or both of the officers (the
6 parties dispute this fact) drew their weapons and pointed them at Andy, and at least one
7 of the deputies shouted out a command to Andy (defendants claim that Gelhaus gave a
8 command to “drop the gun!”). See SAC, ¶¶ 24, 26; Dkt. 63 at 5. In response, Andy
9 turned towards the deputies. SAC, ¶ 27. There is no dispute that, up until this point,
10 Andy was holding the rifle in one hand, at his side, pointing down. Dkt. 63 at 5.
11 Defendants claim that, as Andy turned towards the deputies, they observed the barrel of
12 the rifle “come up and towards them,” while plaintiffs allege that “[t]he toy gun was at his
13 side.” See Dkt. 63 at 5; SAC, ¶ 27. As Andy turned, Gelhaus fired his pistol, hitting Andy
14 and sending him to the ground. SAC, ¶ 30. Gelhaus continued to fire at Andy while he
15 lay on the ground, and Andy ultimately died while on the sidewalk. SAC, ¶¶ 30, 34.

16 Andy’s parents, Rodrigo Lopez and Sujay Cruz, filed this suit on November 4,
17 2013, on behalf of themselves and the Estate of Andy Lopez. The operative second
18 amended complaint was filed on June 20, 2014, and asserts five causes of action: (1)
19 unreasonable seizure under section 1983 against defendant Gelhaus, (2) municipal
20 liability for unconstitutional customs/practices under section 1983 against defendant
21 Sonoma County, (3) interference with familial integrity (styled as a substantive due
22 process violation) under section 1983 against defendants Gelhaus and Sonoma County,
23 (4) wrongful death against defendants Gelhaus and Sonoma County, and (5) a
24 “survivorship” claim against defendants Gelhaus and Sonoma County.

25 DISCUSSION

26 A. Legal Standard

27 A party may move for summary judgment on a “claim or defense” or “part of . . . a
28 claim or defense.” Fed. R. Civ. P. 56(a). Summary judgment is appropriate when there

1 is no genuine dispute as to any material fact and the moving party is entitled to judgment
2 as a matter of law. Id.

3 A party seeking summary judgment bears the initial burden of informing the court
4 of the basis for its motion, and of identifying those portions of the pleadings and discovery
5 responses that demonstrate the absence of a genuine issue of material fact. Celotex
6 Corp. v. Catrett, 477 U.S. 317, 323 (1986). Material facts are those that might affect the
7 outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A
8 dispute as to a material fact is “genuine” if there is sufficient evidence for a reasonable
9 jury to return a verdict for the nonmoving party. Id.

10 Where the moving party will have the burden of proof at trial, it must affirmatively
11 demonstrate that no reasonable trier of fact could find other than for the moving party.
12 Soremekun v. Thrifty Payless, Inc., 509 F.3d 978, 984 (9th Cir. 2007). On an issue
13 where the nonmoving party will bear the burden of proof at trial, the moving party may
14 carry its initial burden of production by submitting admissible “evidence negating an
15 essential element of the nonmoving party’s case,” or by showing, “after suitable
16 discovery,” that the “nonmoving party does not have enough evidence of an essential
17 element of its claim or defense to carry its ultimate burden of persuasion at trial.” Nissan
18 Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc., 210 F.3d 1099, 1105-06 (9th Cir. 2000);
19 see also Celotex, 477 U.S. at 324-25 (moving party can prevail merely by pointing out to
20 the district court that there is an absence of evidence to support the nonmoving party’s
21 case).

22 When the moving party has carried its burden, the nonmoving party must respond
23 with specific facts, supported by admissible evidence, showing a genuine issue for trial.
24 Fed. R. Civ. P. 56(c), (e). But allegedly disputed facts must be material – the existence
25 of only “some alleged factual dispute between the parties will not defeat an otherwise
26 properly supported motion for summary judgment.” Anderson, 477 U.S. at 247-48.

27 When deciding a summary judgment motion, a court must view the evidence in the
28 light most favorable to the nonmoving party and draw all justifiable inferences in its favor.

1 Id. at 255; Hunt v. City of Los Angeles, 638 F.3d 703, 709 (9th Cir. 2011).

2 B. Legal Analysis

3 As an initial matter, at the hearing, plaintiff's counsel conceded that summary
4 judgment was warranted as to the second cause of action and as to the third cause of
5 action to the extent asserted against Sonoma County. Thus, as to those two claims,
6 defendants' motion is GRANTED.

7 The court will address the remaining claims in the order in which they are asserted
8 in the SAC, starting with the first cause of action, brought under section 1983 against
9 defendant Gelhaus. The complaint alleges that defendant Gelhaus, by shooting and
10 killing Andy, used excessive force and thereby violated his Fourth Amendment right to be
11 free of unreasonable seizures.

12 The legal standard applicable to this claim is one of "reasonableness." See, e.g.,
13 Graham v. Connor, 490 U.S. 386, 395 (1989); Tennessee v. Garner, 471 U.S. 1, 7
14 (1985). The use of force is reasonable under the Fourth Amendment if it would seem
15 justified to a reasonable officer in light of the surrounding circumstances; however, the
16 use of deadly force is not justified "unless it is necessary to prevent escape and the
17 officer has probable cause to believe that the suspect poses a significant threat of death
18 or serious physical injury to the officer or others." Garner, 471 U.S. at 3. The inquiry is
19 an objective one, with the question being "whether the officers' actions are 'objectively
20 reasonable' in light of the facts and circumstances confronting them." Graham, 490 U.S.
21 at 397.

22 The key question on this motion is whether it was objectively reasonable for
23 defendant Gelhaus to believe that Andy posed a "significant threat of death or serious
24 physical injury to the officer or others" at the time of the shooting. Defendants argue that,
25 because Andy was carrying what appeared to be an AK-47 assault rifle, and because he
26 failed to drop the rifle when ordered to do so and instead started turning his body towards
27 the deputies, with the barrel of the rifle "com[ing] up and towards them," it was
28 reasonable to believe that Andy posed a significant threat to them.

1 Defendants further argue that it is “well established that an officer is justified in
2 using deadly force where a suspect threatens him with a weapon such as a knife or gun.”
3 Dkt. 63 at 12. While that statement of the law is correct, defendants have not established
4 that Andy actually threatened the officers with the rifle¹ that he was holding. In fact,
5 defendants do not allege that Andy ever pointed the rifle at either officer or at anyone
6 else. Instead, defendants use carefully-phrased language to describe Andy’s actions,
7 saying only that Andy “turned and began to point the AK-47 towards the deputies, or that
8 Andy was “bringing the barrel of the AK-47 weapon up and around in their direction,” or
9 that he was “in the process of pointing [it] at the deputies.” See Dkt. 63 at 1, 13, 17
10 (emphasis added). In defendant Gelhaus’ declaration, he states that, as Andy turned
11 around, “the barrel of the weapon [was] coming up.” Dkt. 64, ¶ 8. In contrast, each of
12 this circuit’s cases cited in defendants’ motion involves a more direct threat.

13 In Billington v. Smith, the suspect was “locked in hand-to-hand combat” with a
14 police detective, and the detective “was losing.” 292 F.3d 1177, 1185 (9th Cir. 2002).
15 The suspect “actively, violently, and successfully resisted arrest and physically attacked
16 Detective Smith and tried to turn Smith’s gun against him.” Id. “No one who saw the fight
17 disputes that [the suspect] was the aggressor, and that he kept beating Detective Smith
18 even when Detective Smith tried to retreat.” Id. The suspect “was trying to get the
19 detective’s gun, and he was getting the upper hand,” and on those facts, the court found
20 that he posed an imminent threat of injury or death. Id.

21 In Reynolds v. County of San Diego, the suspect had a knife and was ordered to
22 drop it, which he did. 84 F.3d 1162, 1164 (9th Cir. 1996). However, as an officer
23 approached, the suspect “suddenly sat up and grabbed the knife.” Id. at 1165. The
24 officer attempted to disarm him with a kick, but missed, so he then pressed his knee into
25 the suspect’s back and pressed his gun on the suspect’s neck, telling him to again drop
26 the knife. The suspect refused to comply, and instead “twisted his body and made a
27

28 ¹ For now, the court will put aside the issue of whether it was reasonable to believe that the rifle possessed by Andy was an actual AK-47, rather than a toy rifle.

1 sudden, backhanded, upward swing toward [the officer] with his right hand, which was
2 holding the knife.” Id. It was then that the officer fired on the suspect, killing him. The
3 court found that, by “suddenly swinging at [the officer] with the knife,” the suspect
4 threatened the officer’s life “or at least put him in fear of great bodily injury.” Id. at 1168.

5 In Scott v. Heinrich, officers responded to a call about a man who was firing a gun
6 and reportedly “acting strange or crazy.” 39 F.3d 912, 914 (9th Cir. 1994). Officers
7 banged on and kicked the suspect’s door, and when it opened, the suspect “stood in the
8 doorway,” holding a “long gun” and “pointed it at them.” Id. The officers fired upon the
9 suspect, killing him. The court found that the officers’ use of force “fully complied with the
10 requirements of the Fourth Amendment.” Id. at 916.

11 In Garcia v. United States, a group of Mexican citizens was attempting to cross the
12 border into the United States. 826 F.2d 806, 807 (9th Cir. 1987). A border patrolman
13 stopped one of them, and after the suspect resisted, the patrolman threw him to the
14 ground and handcuffed him. Id. at 808. A group of five to seven people, including the
15 plaintiff (Garcia), approached the officer with sticks and rocks, and Garcia “drew closer,
16 brandishing the stick and rock with upraised arms.” When Garcia was three to five feet
17 away, the officer shot him in the abdomen. The court found that Garcia’s “felonious and
18 deadly assault” gave the officer probable cause to believe that Garcia posed a “threat of
19 serious physical harm” to him. Id. at 812.

20 Finally, in Lal v. California, the suspect fled his home after police responded to his
21 wife’s report of a domestic disturbance. 746 F.3d 1112, 1114 (9th Cir. 2014). The
22 suspect led police on a high-speed chase, and repeatedly said that he wanted to kill
23 himself or have police kill him. Id. After the chase ended, the suspect “picked up a big
24 rock that he smashed against his forehead three or four times, causing considerable
25 bleeding,” and then “attempted to pull a four-foot long metal pole out of the ground and
26 impale himself on it.” Id. The suspect then began walking towards two officers, “carrying
27 a rock in his hand,” and then “threw several softball sized rocks” at them, missing, but
28 shattering the spotlight on their patrol car. The officers asked for assistance from any

1 agency that could provide non-lethal assistance, and were told that a K-9 unit was on its
2 way. The suspect then “began walking towards the patrol cars while continuing to throw
3 rocks,” and as he approached two officers, “he held a large rock about the size of a
4 football above his head.” He refused to comply with an order to drop the rock, and
5 instead “kept advancing at an irregular pace, forcing the officers to back up.” One officer
6 warned “we are going to have to shoot you if you don’t drop that rock,” but the suspect
7 continued to advance, and when he came “within a few feet” of the officers, they both
8 fired.

9 The court noted that it was undisputed that, at the time of the shooting, the
10 suspect was only one yard away from the officers and was holding a football-sized rock
11 over his head. And in light of his prior actions – “the high speed chase, hitting himself
12 with a stone, throwing rocks at the officers – the officers reasonably believed that Lal
13 would heave the rock at them.” Id. at 1117.

14 In each of these cases, the suspect either directly attacked an officer, or
15 brandished some sort of weapon directly at the officers. Although the “weapons” in
16 Garcia (a stick and a rock) and Lal (a rock) were less dangerous than the perceived
17 AK-47 carried by Andy, they were still used to directly threaten an officer before deadly
18 force was used. Defendants cannot point to any similarly-threatening behavior on Andy’s
19 part.

20 Defendants argue that, even if hindsight shows that Andy did not actually pose a
21 threat, it was still reasonable for Gelhaus to believe that he posed a threat at the time of
22 the shooting. For support, defendants cite to the Ninth Circuit’s decision in Blanford v.
23 Sacramento County, 406 F.3d 1110 (9th Cir. 2005).

24 In Blanford, police responded to a call regarding a man carrying a sword and
25 “behaving erratically.” 406 F.3d at 1112. Officers told the suspect to drop the sword, but
26 he did not comply (though later it was learned that he was wearing headphones, and thus
27 could not hear the officers’ command), and instead “raised the sword and growled.” The
28 suspect then moved towards a private residence (which turned out to be his parents’

1 house), attempted to open the front door, and then started to go around the house
2 towards a back gate. At that point, officers believed that he “posed an immediate and
3 unacceptable risk of harming whoever was in the house or yard should he be allowed to
4 escape beyond the gate,” and fired upon him.

5 While Blanford, like the present case, arguably involves no direct threat to the
6 officers (depending on the circumstances behind the raising of the sword and the
7 “growling”), it does involve a report of “erratic” behavior, as well as a potential threat to
8 others by attempting to enter the back gate of a house while carrying a sword. The only
9 similarity between this case and Blanford is that, in hindsight, neither suspect posed an
10 actual threat. But unlike the suspect in Blanford, there were no reports of Andy acting
11 erratically. Nor was Andy attempting to enter a private home, which could have made it
12 reasonable to believe that he posed a threat to those inside. Thus, there is no basis for
13 applying Blanford to this case.

14 Beyond the above-mentioned Ninth Circuit cases, defendants cite to unpublished
15 Ninth Circuit cases, as well as cases from outside of this circuit, in support of their
16 argument that the suspect need not possess an actual weapon in order to pose a threat
17 justifying deadly force. Indeed, a number of the cited cases involve objects that were
18 mistaken for guns or other weapons. In Bowles v. City of Porterville (an unpublished
19 Ninth Circuit case), the suspect “pivoted and pointed a metallic object,” which turned out
20 to be a cologne bottle, at an officer. 571 Fed. Appx. 538 (9th Cir. 2014). In Penley v.
21 Eslinger, an Eleventh Circuit case, a fifteen-year-old boy had a plastic gun that was
22 modified to look like a real gun, and pointed it at officers at least three times before being
23 shot. 605 F.3d 843 (11th Cir. 2010). Finally, in Bell v. City of East Cleveland, an
24 unpublished Sixth Circuit case described by defendants as being “directly on point,” a boy
25 around the age of 14 pointed a BB gun at an officer before being shot, and the court
26 specifically noted that “he was pointing the gun at Officer Rodgers when Officer Rodgers
27 shot him.” 125 F.3d 855 (6th Cir. 1997). Though defendants are correct that a suspect
28 need not possess an actual weapon in order to make a threat justifying the use of deadly

1 force, defendants must still establish that it was reasonable to believe that Andy posed a
2 “significant threat” in order to obtain summary judgment, and these three cases provide
3 no basis for finding such a threat in the absence of a suspect pointing a perceived
4 weapon at officers.

5 Defendants do cite one case in which no weapon, real or perceived, was pointed
6 at officers, and at the hearing, they urged that the court follow that decision. See
7 Anderson v. Russell, 247 F.3d 125 (4th Cir. 2001). In Anderson, two police officers were
8 providing security at a shopping mall, and were told by a patron about a man (Anderson)
9 who appeared to have a gun under his sweater. The officers observed Anderson, saw a
10 bulge near his waistband, and believed it to be a gun. Unbeknownst to the officers, the
11 bulge was actually a Walkman radio, which Anderson was listening to with headphones
12 that were covered by a hat.

13 When Anderson exited the mall, the officers approached him with guns drawn and
14 instructed him to raise his hands. While Anderson initially complied with the order, he
15 then lowered them without explanation to the officers, attempting to turn off his Walkman.
16 Believing that he was reaching for the reported weapon, one of the officers (Russell)
17 opened fire.

18 At trial, the jury found that the officers had used excessive force, and that the
19 officers were not entitled to qualified immunity. The officers then moved for judgment as
20 a matter of law, which the district court granted as to qualified immunity, but denied as to
21 the excessive force claim, finding that “the evidence is much, much too conflicting on
22 whether, in fact, the circumstances presented as a matter of law made the use of force
23 constitutional.” 247 F.3d at 128-29 (internal citation omitted). The Fourth Circuit affirmed
24 the entry of judgment in the officers’ favor, but did so on different grounds than the district
25 court, finding that there was no “legally sufficient evidentiary basis for a rational jury to
26 find for [plaintiff] on the issue of excessive force.” Id. at 130. The court emphasized that,
27 immediately before the officer fired, the suspect “was reaching toward what Russell
28 believed to be a gun,” and that “[a]ny reasonable officer in Russell’s position would have

1 imminently feared for his safety and the safety of others.” Id. at 131. The court further
2 noted that “an officer does not have to wait until a gun is pointed at the officer before the
3 officer is entitled to take action.” Id.

4 While Anderson provides stronger support for defendants’ position than any of the
5 other cited cases, the court declines to follow it in the present case for at least two
6 reasons. First, while the court does not question the ultimate result reached by the
7 Anderson court, it does question the basis for holding that “because Russell had sound
8 reason to believe that Anderson was armed, Russell acted reasonably by firing on
9 Anderson as a protective measure before directly observing a deadly weapon.” 247 F.3d
10 at 131. The Ninth Circuit has held that the mere possession of a weapon is not sufficient
11 to justify the use of deadly force, “otherwise, that a person was armed would always end
12 the inquiry.” Glenn v. Washington County, 673 F.3d 864, 872 (9th Cir. 2011). In fact, the
13 Ninth Circuit in Washington criticized the district court for adopting reasoning similar to
14 the Fourth Circuit in Anderson – with the Ninth Circuit stating that the “district court
15 mischaracterized our case law as establishing that ‘when a suspect was armed with a
16 deadly weapon, the officers’ use of force was reasonable as a matter of law.’” 673 F.3d
17 at 872-73. The Washington court then cited a number of the cases discussed above
18 (including Blanford and Scott), noting that, in each case, the court “engaged in a context-
19 specific analysis rather than resting our holding on the single fact that the suspect was
20 armed.” Id. at 873.

21 This “context-specific analysis” provides the second reason for distinguishing
22 Anderson from the present case. In an unpublished case cited by defendants, the Sixth
23 Circuit attempted to articulate a method for applying the required “context-specific
24 analysis.” The court reviewed a number of police-shooting cases in which summary
25 judgment was granted (including Anderson and Bell), and found that, in each case, “the
26 operative fact was a suspect either pointing a weapon at an officer, ‘coming at’ an officer,
27 or making a sudden movement that an officer reasonably perceived as reaching for a
28 weapon.” Edgerson v. Matatall, 529 Fed. Appx. 493, 498 n.1 (6th Cir. 2013). Indeed,

1 while Anderson did not involve a suspect pointing a weapon at an officer or otherwise
2 “coming at” him, it did involve a “sudden movement that an officer reasonably perceived
3 as reaching for a weapon,” while in the present case, Andy was already holding a
4 weapon pointed down at his side, and merely turned around in response to an officer’s
5 command, with no “sudden movement” towards the weapon.

6 While defendants cite testimony that the barrel of Andy’s gun “began” to come up,
7 or was “in the process” of being pointed at the deputies, the court is obligated to view that
8 evidence in a light most favorable to the non-moving parties. And in that light, the court
9 can conclude only that the rifle barrel was beginning to rise; and given that it started in a
10 position where it was pointed down at the ground, it could have been raised to a slightly-
11 higher level without posing any threat to the officers. In contrast, each of the cases cited
12 by defendants involves a suspect who either (1) physically assaulted an officer, (2)
13 pointed a weapon (or an object believed to be a weapon) at officers or at others, (3)
14 made a sudden movement towards what officers believed to be a weapon, or (4)
15 exhibited some other threatening, aggressive, or erratic behavior. Because this case
16 involves none of those facts, defendants have not shown that summary judgment is
17 warranted, as there remains a triable issue of fact as to whether defendant Gelhaus’ use
18 of deadly force was reasonable. While the court is certainly mindful of the fact that
19 “police officers are often forced to make split-second judgments – in circumstances that
20 are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in
21 a particular situation,” (Graham, 490 U.S. at 396-97), in this case, the court finds that the
22 question of reasonableness is best resolved by a jury, not by the court on summary
23 judgment.

24 Defendants separately argue that the doctrine of qualified immunity warrants
25 summary judgment on plaintiff’s first cause of action. The defense of qualified immunity
26 protects “government officials . . . from liability for civil damages insofar as their conduct
27 does not violate clearly established statutory or constitutional rights of which a
28 reasonable person would have known.” Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

1 The rule of qualified immunity “provides ample protection to all but the plainly
2 incompetent or those who knowingly violate the law”; defendants can have a reasonable,
3 but mistaken, belief about the facts or about what the law requires in any given situation.
4 Malley v. Briggs, 475 U.S. 335, 342 (1986). “Therefore, regardless of whether the
5 constitutional violation occurred, the [official] should prevail if the right asserted by the
6 plaintiff was not ‘clearly established’ or the [official] could have reasonably believed that
7 his particular conduct was lawful.” Romero v. Kitsap County, 931 F.2d 624, 627 (9th Cir.
8 1991). Qualified immunity is particularly amenable to summary judgment adjudication.
9 Martin v. City of Oceanside, 360 F.3d 1078, 1081 (9th Cir. 2004).

10 A court considering a claim of qualified immunity must determine whether the
11 plaintiff has alleged the deprivation of an actual constitutional right and whether such right
12 was clearly established such that it would be clear to a reasonable officer that his conduct
13 was unlawful in the situation he confronted. See Pearson v. Callahan, 555 U.S. 225,
14 235-36 (2009) (overruling the sequence of the two-part test that required determination of
15 a deprivation first and then whether such right was clearly established, as required by
16 Saucier v. Katz, 533 U.S. 194 (2001)). The court may exercise its discretion in deciding
17 which prong to address first, in light of the particular circumstances of each case. Id.
18 (noting that while the Saucier sequence is often appropriate and beneficial, it is no longer
19 mandatory).

20 Regarding the first prong, the threshold question must be: Taken in the light most
21 favorable to the party asserting the injury, do the facts alleged show that the defendant’s
22 conduct violated a constitutional right? Saucier, 533 U.S. at 201; see Martin, 360 F.3d at
23 1082 (in performing the initial inquiry, court is obligated to accept plaintiff’s facts as
24 alleged, but not necessarily his application of law to the facts; the issue is not whether a
25 claim is stated for a violation of plaintiff’s constitutional rights, but rather whether the
26 defendants actually violated a constitutional right). “If no constitutional right would have
27 been violated were the allegations established, there is no necessity for further inquiries
28 concerning qualified immunity.” Saucier, 533 U.S. at 201.

1 The inquiry of whether a constitutional right was clearly established must be
2 undertaken in light of the specific context of the case, not as a broad general proposition.
3 Saucier, 533 U.S. at 202. The relevant, dispositive inquiry in determining whether a right
4 is clearly established is whether it would be clear to a reasonable defendant that his
5 conduct was unlawful in the situation he confronted. Id.; see, e.g., Pearson, 555 U.S. at
6 243-44 (concluding that officers were entitled to qualified immunity because their conduct
7 was not clearly established as unconstitutional as the “consent-once-removed” doctrine,
8 upon which the officers relied, had been generally accepted by the lower courts even
9 though not yet ruled upon by their own federal circuit). If the law did not put the
10 defendant on notice that his conduct would be clearly unlawful, summary judgment based
11 on qualified immunity is appropriate. Saucier, 533 U.S. at 202.

12 “If there are genuine issues of material fact in issue relating to the historical facts
13 of what the official knew or what he did, it is clear that these are questions of fact for the
14 jury to determine.” Sinaloa Lake Owners Ass’n v. City of Simi Valley, 70 F.3d 1095, 1099
15 (9th Cir. 1995). If the essential facts are undisputed, or no reasonable juror could find
16 otherwise, however, then the question of qualified immunity is appropriately one for the
17 court. Id. at 1100 (citing Hunter v. Bryant, 502 U.S. 224, 227-28 (1991)). Or the court
18 may grant qualified immunity by viewing all of the facts most favorably to plaintiff and
19 then finding that under those facts the defendants could reasonably believe they were not
20 violating the law. See, e.g., Marquez v. Gutierrez, 322 F.3d 689, 692-93 (9th Cir. 2003);
21 Estate of Ford v. Ramirez-Palmer, 301 F.3d 1043, 1051-53 (9th Cir. 2002).

22 During the pendency of this motion, the Supreme Court issued another opinion
23 explaining how to determine whether a constitutional right is “clearly established.” See
24 Mullenix v. Luna, 136 S.Ct. 305 (2015). In Mullenix, two police officers were involved in a
25 high-speed car chase of a suspect. During the chase, the suspect called the police
26 dispatcher, claiming to have a gun and threatening to shoot the officers if they did not
27 abandon the chase. As the two officers continued the chase, other officers set up tire
28 spikes at three locations. Another officer (Mullenix) was poised to set up a fourth spike

1 strip, but then decided to take another tactic – shooting at the suspect’s car from a
2 vantage point on a highway overpass. As the suspect approached the overpass,
3 Mullenix fired six shots, killing the suspect.

4 The suspect’s estate brought suit against Mullenix under section 1983, and
5 Mullenix moved for summary judgment based on qualified immunity. The district court
6 denied the motion, and the Fifth Circuit affirmed, holding that Mullenix was not entitled to
7 qualified immunity because “the law was clearly established such that a reasonable
8 officer would have known that the use of deadly force, absent a sufficiently substantial
9 and immediate threat, violated the Fourth Amendment.” 773 F.3d 725.

10 The Supreme Court found that the Fifth Circuit’s statement of “clearly established”
11 law was too general, and did not take into account the specific context of the case.
12 Rather than asking the broad, generalized question of whether an officer may use deadly
13 force “against a fleeing felon who does not pose a sufficient threat of harm to the officer
14 or others,” the relevant inquiry must account for the specific factual circumstance
15 confronted by the officer. The Court then seemingly re-framed the question, asking
16 whether it was clearly established that the officer acted unreasonably when he
17 “confronted a reportedly intoxicated fugitive, set on avoiding capture through high-speed
18 vehicular flight, who twice during his flight had threatened to shoot police officers, and
19 who was moments away from encountering an officer.” *Id.* at 309. Applying that test, the
20 Court reversed the Fifth Circuit’s determination that Mullenix was not entitled to qualified
21 immunity.

22 As applied to this case, the court agrees that a conclusory formulation of the
23 qualified immunity question – such as asking whether it was clearly established that it is
24 unreasonable to use deadly force on a suspect who does not pose a significant threat –
25 strips the qualified immunity doctrine of all meaning. Thus, taking into account the
26 specific context of the case and the specific circumstances faced by defendants, the
27 relevant question is whether the law was clearly established such that an officer would
28 know that the use of deadly force is unreasonable where the suspect appears to be

1 carrying an AK-47², but where officers have received no reports of the suspect using the
2 weapon or expressing an intention to use the weapon, where the suspect does not point
3 the weapon at the officers or otherwise threaten them with it, where the suspect does not
4 “come at” the officers or make any sudden movements towards the officers, and where
5 there are no reports of erratic, aggressive, or threatening behavior. Based on the review
6 of the cases above, the court finds that it was clearly established, and thus, qualified
7 immunity does not shield Gelhaus from liability. Accordingly, defendants’ motion for
8 summary judgment as to the first cause of action is DENIED.

9 As mentioned above, plaintiffs have conceded that summary judgment is
10 warranted as to the second cause of action, and also warranted as to the third cause of
11 action to the extent asserted against Sonoma County. Thus, the court will address the
12 remainder of the third cause of action, a substantive due process claim under section
13 1983 asserted against defendant Gelhaus.

14 In their motion, defendants cited Ninth Circuit authority holding that Fourteenth
15 Amendment due process claims are subject to a higher standard than Fourth
16 Amendment excessive force claims, and that only conduct that “shocks the conscience”
17 is cognizable as a due process violation. Porter v. Osborn, 546 F.3d 1131, 1137 (9th Cir.
18 2008); see also County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998). In
19 determining whether a use of force shocks the conscience, “a court must first ask
20 whether the circumstances are such that actual deliberation by the officer is practical.”
21 Wilkinson v. Torres, 610 F.3d 546, 554 (9th Cir. 2010). If deliberation is practical, then an
22 officer’s “deliberate indifference” may be sufficient to shock the conscience. Id. If
23 deliberation is impractical, however, then the officer’s conduct “may only be found to
24 shock the conscience if he acts with a purpose to harm unrelated to legitimate law
25 enforcement objectives.” Id.; see also Gonzalez v. City of Anaheim, 747 F.3d 789, 797-

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27 ² As before, the court need not reach the issue of whether it was reasonable for the
28 officers to believe that the toy rifle carried by Andy was an actual AK-47, because even
assuming the reasonableness of that belief, qualified immunity is still not warranted.

1 98 (9th Cir. 2014).

2 Plaintiffs' opposition did not address the "shocks the conscience" standard, and
3 thus did not address the issue of whether defendant Gelhaus had time to deliberate
4 before shooting. Defendants presented evidence that only twenty seconds elapsed
5 between the initial siren chirp and the shots being fired, and plaintiffs did not present any
6 competing evidence. At the hearing, plaintiffs addressed the "deliberation" question for
7 the first time, suggesting that, because the other officer on the scene (Schemmel) did not
8 fire his weapon, defendant Gelhaus must have had time to deliberate.

9 Based on the evidence presented, the court finds that defendant Gelhaus did not
10 have time to deliberate, and thus, the "purpose to harm" standard applies. The Ninth
11 Circuit has previously held that even a five-minute encounter can trigger that higher
12 standard, if it involves a "quickly evolving and escalating" situation requiring "repeated
13 split-second decisions." Porter, 546 F.3d at 1139. In fact, in the seminal case that set
14 forth the distinction between situations where there was time to deliberate and those
15 where deliberation was not possible, the Supreme Court used a custodial prison situation
16 as the prime example of a scenario where officials would have time to deliberate,
17 contrasting it to a police chase requiring split-second judgment. See Lewis, 523 U.S. at
18 852-54. The Court reasoned that, in a custodial prison situation, it made sense to apply a
19 lower standard of liability, based on the "luxury enjoyed by prison officials of having time
20 to make unhurried judgments, upon the chance for repeated reflection, largely
21 uncomplicated by the pulls of competing obligations." Id. at 853.

22 In this case, the court finds that the officers did not have time for "repeated
23 reflection," as even plaintiffs' own complaint alleges that "[f]rom the time that the deputies
24 called out to Andy Lopez until the time that Gelhaus fired his first shot, only three
25 seconds elapsed." SAC, ¶ 37. Even assuming that deputy Schemmel also had his gun
26 drawn and made the decision not to fire, the fact that Schemmel made a different split-
27 second decision than Gelhaus does not mean that either deputy had time to deliberate.
28 Thus, the court finds that the "purpose to harm" standard must apply.

1 The next question then becomes whether plaintiffs have raised a triable issue of
2 fact as to whether defendant Gelhaus acted “with a purpose to harm unrelated to
3 legitimate law enforcement objectives.” The Ninth Circuit has explained that such a
4 purpose may be found where, for example, “an officer uses force to bully a suspect or
5 ‘get even.’” Wilkinson, 610 F.3d at 554.

6 In this case, plaintiffs have presented no evidence that defendant Gelhaus acted
7 with a purpose “unrelated to legitimate law enforcement objectives.” In fact, plaintiffs’
8 own opposition brief notes that Gelhaus testified that he did not know Andy prior to the
9 shooting. Dkt. 76 at 3. In the absence of any evidence that Gelhaus acted with a
10 purpose to harm that was unrelated to law enforcement objectives, the court finds that
11 summary judgment must be GRANTED as to plaintiffs’ third cause of action, to the extent
12 asserted against defendant Gelhaus.

13 Turning to plaintiffs’ fourth cause of action, a state-law wrongful death claim
14 against defendants Gelhaus and Sonoma County, the central dispute between the parties
15 revolves around the applicable legal standard. In their motion, defendants argue that the
16 same “reasonableness” standard applicable to the federal Fourth Amendment claim
17 (brought under section 1983) also applies to the state law claim. Plaintiffs’ opposition
18 argues that the state law claim is governed by a different, broader standard that takes
19 into account the totality of the circumstances, as opposed to the federal law’s more
20 narrow focus on the moment when deadly force is used.

21 Despite this dispute, the parties appear to agree that, if summary judgment is
22 denied as to the Fourth Amendment claim (under the “reasonableness” standard), then it
23 should also be denied as to the state law claim. Indeed, any difference between the two
24 standards comes into play only if summary judgment were to be granted as to the Fourth
25 Amendment claim, with plaintiffs maintaining that they would still have a viable state law
26 claim. Because the court has denied summary judgment under the Fourth Amendment’s
27 “reasonableness” standard, it need not reach the issue of which standard applies to the
28 state law claim. Defendants’ motion for summary judgment as to the fourth cause of

1 action is thus DENIED.

2 Finally, plaintiffs' fifth cause of action is styled as a "survivorship" claim asserted
3 by the Estate of Andy Lopez. "In a survival action, a decedent's estate may recover
4 damages on behalf of the decedent for injuries that the decedent has sustained." Davis
5 v. Bender Shipbuilding & Repair Co., 27 F.3d 426, 429 (9th Cir. 1994). In contrast, a
6 wrongful death claim (such as the fourth cause of action) must be brought by the
7 decedent's dependents, and is limited to "claims for personal injuries they have suffered
8 as a result of a wrongful death." Id.

9 The practical effect of this distinction is that a survival action, unlike a wrongful
10 death action, allows for recovery of damages suffered by the decedent himself, including
11 those suffered before his death. The Ninth Circuit has recently clarified that a survival
12 action allows recovery of non-economic damages, including pain and suffering, under
13 section 1983, despite California's disallowance of such damages. See Chaudhry v. City
14 of Los Angeles, 751 F.3d 1096, 1103 (9th Cir. 2014).

15 However, a survival action is not an independent cause of action, it is a procedural
16 vehicle to ensure that "a cause of action for or against a person is not lost by reason of
17 the person's death, but survives subject to the applicable limitations period." Cal. Civ.
18 Proc. § 337.20. In other words, pursuant to California's survivorship statute, when Andy
19 died, his right to assert a Fourth Amendment excessive force claim survived his death
20 and may be asserted by his estate. In this case, the practical effect of the survivorship
21 statute is to allow the Estate of Andy Lopez to assert Andy's Fourth Amendment
22 excessive force claim, which is accomplished by the first cause of action. That claim
23 stands in contrast to the fourth cause of action, which is a wrongful death claim brought
24 by Andy's parents, and seeks damages for the harm suffered by Andy's parents, not the
25 harm suffered by Andy.

26 Because the first cause of action already provides a mechanism to seek damages
27 for the harm suffered by Andy, including pre-death pain and suffering, the fifth cause of
28 action is duplicative. For that reason, defendants' motion for summary judgment as to

1 the fifth cause of action is GRANTED.

2 **CONCLUSION**

3 For the foregoing reasons, defendants' motion for summary judgment is
4 GRANTED in part and DENIED in part. As to the first cause of action, the motion is
5 DENIED. As to the second cause of action, the motion is GRANTED. As to the third
6 cause of action, the motion is GRANTED as to Sonoma County, and also GRANTED as
7 to defendant Gelhaus. As to the fourth cause of action, the motion is DENIED. As to the
8 fifth cause of action, the motion is GRANTED.

9 On October 5, 2015, the court approved the parties' stipulation to forego a second
10 settlement conference and to instead participate in private mediation no later than
11 December 1, 2015. The docket does not indicate whether the mediation has been
12 concluded. Accordingly, in light of this order ruling on dispositive motions, and given the
13 April 11, 2016 trial date, the parties shall participate in a further mediation session before
14 March 17, 2016. Or, if they prefer, the court will re-refer the case to Magistrate Judge
15 Ryu for a further settlement conference. The parties shall advise the court of their
16 decision no later than **January 27, 2016**.

17 **IT IS SO ORDERED.**

18 Dated: January 20, 2016



19 _____
20 PHYLLIS J. HAMILTON
21 United States District Judge
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