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3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON
5 AT TACOMA

6 PATRICK W. NELSON and COLETTE
7 RAPP,

8 Plaintiffs,

9 v.

10 NICHOLAS WEBER and MICHAEL
11 POSTON,

12 Defendants.

CASE NO. C16-5680 BHS

ORDER ADOPTING AND
MODIFYING REPORT AND
RECOMMENDATION

13 This matter comes before the Court on the Report and Recommendation (“R&R”) of the Honorable J. Richard Creatura, United States Magistrate Judge, Dkt. 112, and Plaintiff Patrick Nelson (“Nelson”) and Collette Rapp’s (“Plaintiffs”) objections to the R&R, Dkt. 113.

14 On Febraury 13, 2020, Judge Creatura issued the R&R recommending that the Court grant Defendants Nicholas Weber (“Weber”) and Michael Poston’s (“Poston”) (collectively “Defendants”) motion for summary judgment. Dkt. 112. On February 27, 2020, Plaintiffs filed objections. Dkt. 113. On March 12, 2020, Defendants responded. Dkt. 114.

15 The district judge must determine de novo any part of the magistrate judge’s disposition that has been properly objected to. The district judge may accept, reject, or

1 modify the recommended disposition; receive further evidence; or return the matter to the
2 magistrate judge with instructions. Fed. R. Civ. P. 72(b)(3).

3 In this case, Plaintiffs assert two claims for excessive force. First, Plaintiffs argue
4 that Weber used excessive force by using his vehicle to ram Plaintiffs' vehicle. Judge
5 Creatura concludes that Defendants are entitled to qualified immunity because there was
6 no clearly established law holding that Weber used his vehicle to ram Plaintiffs' vehicle
7 was a constitutional violation. Dkt. 112 at 11–14. The Court agrees because Plaintiffs
8 have failed to cite any authority to establish that Weber's use of his vehicle to stop
9 Plaintiffs' vehicle was an unlawful seizure. Plaintiffs' objections are the same arguments
10 that Judge Creatura rejected as relating to cases involving officers shooting at suspects
11 fleeing in vehicles and address the issue at too high a level of generality. Dkt. 112 at 14.
12 Therefore, the Court adopts the R&R on this issue.

13 Second, Plaintiffs argue that Weber violated their rights by shooting Nelson after
14 the collision. Judge Creatura concludes that Plaintiffs have failed to establish a violation
15 of their constitutional rights because the undisputed facts establish that Nelson made a
16 furtive movement immediately before Weber starting shooting. Dkt. 112 at 15–19.
17 Although Nelson declares that he raised his hands to protect himself after Weber started
18 shooting, Plaintiffs offer no evidence to dispute Weber's testimony that he saw Nelson's
19 right shoulder move backward and left shoulder move forward as if Nelson was reaching
20 for a weapon below Weber's line of sight. The Court agrees with Judge Creatura that
21 given the totality of the circumstances, Weber reasonably perceived an imminent threat
22 of harm. Weber was pursuing Nelson as a suspect in the burglary of a gun store, some of

1 the weapons from that burglary had not yet been recovered, and knew that Nelson had
2 prior violent felonies as well as a felony for attempting to elude. Therefore, the Court
3 adopts the R&R on this issue.

4 Finally, the Court recognizes that some jurists could agree with Plaintiffs that
5 either (1) questions of fact exist as to Weber's credibility on events immediately after the
6 car collision given his injuries and the deployed air bag or (2) Weber violated Nelson's
7 rights because the shoulder movement did not rise to the level of an imminent threat.
8 Thus, the Court also grants Defendants' motion as to qualified immunity on this claim
9 because Plaintiffs have failed to show that the law was clearly established at the time of
10 shooting such that Nelson's shoulder movement did not rise to the level of an imminent
11 threat in the totality of the circumstances.

12 Therefore, the Court having considered the R&R, Plaintiff's objections, and the
13 remaining record, does hereby find and order as follows:

- 14 (1) The R&R is **ADOPTED** and **MODIFIED**;
- 15 (2) Defendants' motion for summary judgment, Dkt. 89, is **GRANTED** as
16 stated herein; and
- 17 (3) The Clerk shall enter a JUDGMENT and close the case.

18 Dated this 28th day of May, 2020.

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21 BENJAMIN H. SETTLE
22 United States District Judge