UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MEMORANDUM

Case No.	EDCV 15-2416 DSF (DTBx)	Date	12/14/16
Title	Duane Bowen v. City of Murrieta, et al.		

Present: The Honorable	DALE S. FISCHER, United States District Judge

Debra Plato	Not Present
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs	Attorneys Present for Defendants
Not Present	Not Present

Proceedings: (In Chambers) Order GRANTING Defendants City of Murrieta and Edwardo Vazquez's Motion for Summary Judgment (Dkt. 39)

I. INTRODUCTION

Defendant Edwardo Vazquez, a member of Defendant City of Murrieta's police department, shot and injured Plaintiff Duane Bowen in connection with a police chase that ensued after a bank robbery. In his Second Amended Complaint, Bowen brings § 1983 claims against both Vazquez and the City, tort claims against Vazquez, and seeks punitive damages. Defendants move for summary judgment on all claims.[1]

II. LEGAL STANDARD

"A party may move for summary judgment, identifying each claim or defense – or the part of each claim or defense – on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ.

[1] At the hearing, Plaintiff's counsel agreed there was no opposition to Defendants' motion with regard to the state law claims. Defendants' motion as to those claims is GRANTED.

P. 56(a). "This burden is not a light one." In re Oracle Corp. Sec. Litig., 627 F.3d 376, 387 (9th Cir. 2010). But the moving party need not disprove the opposing party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Rather, if the moving party satisfies this burden, the party opposing the motion must set forth specific facts, through affidavits or admissible discovery materials, showing that there exists a genuine issue for trial. Id. at 323-24; Fed. R. Civ. P. 56(c)(1).

The "mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). An issue of fact is a genuine issue if it reasonably can be resolved in favor of either party. Id. at 250-51. "[M]ere disagreement or the bald assertion that a genuine issue of material fact exists" does not preclude summary judgment. Harper, 877 F.2d at 731. "The mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury . . . could find by a preponderance of the evidence that the [non-movant] is entitled to a verdict . . . ." Anderson, 477 U.S. at 252. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Id. at 248.

"[A] district court is not entitled to weigh the evidence and resolve disputed underlying factual issues." Chevron Corp. v. Pennzoil Co., 974 F.2d 1156, 1161 (9th Cir. 1992). "A district court's ruling on a motion for summary judgment may only be based on admissible evidence." In re Oracle Corp. Sec. Litig., 627 F.3d 376, 385 (9th Cir. 2010). A party seeking to admit evidence bears the burden of proof to show its admissibility. Id. Courts need not scour the record to determine if evidence is admissible. Id. at 385-86. If an opposing party objects to the admissibility of proffered evidence, the onus is on the proponent to direct the Court to the documents and evidentiary principles that it claims make the evidence admissible. Id.

III. FACTS

Steve Whiddon, an undercover Murrieta police officer, received notice of a bank robbery in the area where he was driving. SUF 1-3. At approximately 2:00 pm, Whiddon saw an SUV carrying two adult males that matched the description of the suspects' vehicle, and began to follow from a distance. SUF 4-7, 13. Bowen was driving the SUV. SUF 7, 20. At this point, Bowen and the other man appeared calm and Whiddon – driving an unmarked pickup truck – did not activate his lights or siren. SUF 7, 9; Def. Ex. J (Whiddon Decl. at ¶ 2).

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After Bowen made a left turn, Bowen's driving started to become erratic. SUF 7, 15-18. Bowen passed a slow-moving truck by driving on the wrong side of the road. SUF 17-18. It appeared Bowen saw a marked police vehicle with lights activated. SUF 19. Bowen ran a stop sign. SUF 20. Whiddon then activated his lights and siren, and informed dispatch he was pursuing the SUV. SUF 21. Bowen ran a red light, causing numerous vehicles to slam on their brakes to avoid a collision. SUF 22. Bowen accelerated to about 75 miles per hour on a surface road, ran another stop sign, and again drove into oncoming traffic, causing three vehicles to swerve to avoid a head-on collision. SUF 23-25.

By now, Whiddon noticed several patrol cars were in pursuit. SUF 26. Bowen again drove on the wrong side of the road – this time to avoid a spike strip set up by police stopped at an intersection with their lights activated. SUF 28-29. Vazquez saw Bowen approach this intersection and saw Bowen drive on the wrong side of the road, forcing other drivers to swerve out of the way. SUF 70-71. Bowen's right rear tire was caught by a spike, but he continued driving – running a stop sign, then running a red light at approximately 80 miles per hour, and then driving in between two lanes of backed up traffic, causing people on the right up against the curb and on the left into the median. SUF 29-30, 32-33. Vazquez saw Bowen cut a corner through an occupied gas station at about 50-60 miles per hour; Bowen "launched" and "got airborne" driving through the gas station, close to pedestrians and cars. SUF 34-35, 63, 72. After exiting the gas station, Bowen again drove on the wrong side of the road almost causing another head-on collision, and then sped to 80 miles per hour on another surface street. SUF 36.

Bowen made a left turn through another red light at about 70 miles per hour, lost control of the SUV, and slid across two lanes, into the lane for oncoming traffic. SUF 37-39, 73. There is some dispute about what transpired next. It is undisputed that Bowen regained control of the SUV, made a U-turn, and was now 30 yards away from and directly perpendicular to the driver side of Whiddon's truck. SUF 40-43. Bowen disputes Whiddon's testimony that Bowen then accelerated and rammed the driver's side door of Whiddon's truck, and continued to accelerate in contact with Whiddon's truck until it spun out of the way. SUF 44, 49. Bowen claims any impact was the result of losing control of his vehicle. Pl. Sep. Stmt. Undisputed Fact (PSSUF) 44, 49. This makes little sense, given it is undisputed Bowen *regained control*, made a U-turn, and was now *30 yards away from Whiddon and aimed directly at his driver-side door*. See SUF 40-43. Further, the testimony cited does not controvert Whiddon's testimony. See Pl. Ex. A (Bowen Depo. at 117:23-118:21). Bowen states he was coming *out* of his spin, "kept going," bumped Whiddon's door, "pushed him out of the way . . . and kept going." Id. at 117:23-118:3. While Bowen stated that he was "spinning out of control" and "couldn't stop," he also testified that when he came in contact with Whiddon's car, he

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kept the accelerator down, and hit him "the only way [he] could push him away" and "pushed him out of the way." Id. at 118:4-15. Finally, Bowen also testified that when he came *out* of the spin, Whiddon's car was blocking the road, and that although he did not *turn* to hit Whiddon, he went *straight* and hit Whiddon – which is consistent with Whiddon's testimony. Def. Ex. B (Bowen Depo. at 145:16-22); see also id. at 145:21-24 ("He pulled across the road and blocked it and I hit him . . . *I just didn't stop*"). Even viewing the facts in the light most favorable to Bowen, it is undisputed that he regained control of the SUV at some distance from Whiddon, continued to accelerate and make contact with Whiddon's truck, drove straight pushing Whiddon's truck out of the way, and continued fleeing.[2] Bowen does not dispute that this encounter resulted in Whiddon striking his head against his window and separating his shoulder. See PSSUF 45.[3] Nor does he dispute Whiddon's statement that he considered shooting Bowen at this moment, but was being jostled too much from the impact and did not want to risk shooting the passenger, who appeared terrified. PSSUF 46-48.[4]

After pushing Whiddon out of the way, Bowen again sped off with Whiddon and other marked police cars following. Pl. Ex. A (Bowen Dep. at 118:7-11); SUF 50. Whiddon attempted to intervene before Bowen reached a busy intersection by bumping Bowen's SUV; this caused Bowen to spin 360 degrees, but he was able to speed off again. SUF 52-53. As Whiddon's truck was alongside Bowen, Bowen jerked the SUV to the left and sideswiped Whiddon's truck,[5] causing Whiddon to slow down so that

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[2] For the same reasons, Bowen's cited testimony also fails to contradict Vazquez's testimony that he saw Bowen strike Whiddon's driver-side door twice. See PSSUF 74. Even accepting Bowen's version that the impact was unintentional, Bowen does not dispute that his lack of control over the vehicle and continued flight resulted in such impact.

[3] Bowen's response renders these facts undisputed. See Fed. R. Civ. P. 56(e)(2); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986).

[4] See supra note 3.

[5] To dispute what Whiddon presents as a second altercation, Bowen cites the same testimony he relied on to dispute the prior altercation, which occurred after a high-speed left turn from Winchester *onto Diaz*. See Pl. Ex. A (Bowen Depo. at 117:16-118:21). This does not contradict Whiddon's testimony regarding what Bowen did after Whiddon attempted to intervene while driving *on Diaz* and approaching Rancho California Road, namely that: Bowen spun around, Bowen regained control and sped off, Whiddon came alongside Bowen, and Bowen jerked his SUV to the left and sideswiped the passenger side of Whiddon's truck. See Def. Ex. J (Whiddon Decl. at ¶ 6). Regardless, Bowen does not appear to dispute that Bowen and

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Vazquez was now directly behind Bowen. SUF 55. Vazquez also attempted to intervene by bumping the SUV from behind, but this was unsuccessful. SUF 78. After Bowen ran another red light, he paused at the entrance to a commercial business park, sped through the parking lot toward some buildings, crashed into a parked car, and exited the SUV. SUF 56, 58, 79, 81.[6]

Vazquez was familiar with this business park and knew the buildings would be occupied. SUF 82-83. Bowen does not dispute that Vazquez perceived that Bowen was running toward an occupied office and that Vazquez did not know whether Bowen was armed. SUF 86, 91. Bowen also does not object to Vazquez's testimony that during this entire incident, he was concerned about prior *armed* bank robberies that had occurred in the area over the past several months, and so was concerned Bowen was armed. Def. Ex. K (Vazquez Decl., ¶¶ 2-3).[7] Bowen fails to directly contradict Vazquez's testimony that he could not see Bowen's hands and that Bowen's hands were down in front of him as he ran.[8] Bowen disputes whether Vazquez feared Bowen would harm the building's occupants or create a hostage situation, given Vazquez shot towards that building; he also disputes why he was running from the vehicle. PSSUF 83-85.

Defendants provide declarations from two independent witnesses on the scene. Both witnesses agree, and Bowen does not dispute,[9] that Bowen sped into the parking lot

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Whiddon's vehicles again made contact as the result of him sideswiping Whiddon's truck. See SUF 55.

[6] By the time Bowen entered the parking lot, Vazquez had also seen the passenger throw a bag out the window. SUF 57, 80.

[7] Because Bowen does not object to Vazquez's separate declaration, nor argue that Vazquez's declaration in any way contradicts Vazquez's deposition testimony, the Court considers this evidence. Neither party directs the Court to evidence regarding whether a weapon was found on Bowen, the other suspect, or in the vehicle.

[8] Bowen only cites the undisputed evidence that Vazquez was 15-18 feet away from Bowen when he fired the shots. See PSSUF 85 (citing SUF 88). It is unclear how this fact about the distance between the men creates a triable issue regarding Vazquez's testimony that, from his vantage, he could not see Bowen's hands because they were down in front of him as he ran.

[9] It is unclear how the video evidence contradicts the independent witnesses' testimony regarding Bowen speeding into the parking lot. Compare PSSUF 95, 102 with Def. Ex. A. And Bowen does not dispute Vazquez's testimony that Bowen sped through the parking lot. See SUF 81.

at a high or reckless rate of speed. Def. Ex. H (Vickers Decl. at ¶ 3); Def. Ex. I (Osuna Decl. at ¶ 4). The witnesses agree there was a time after Bowen ran from the vehicle and before he was shot when his hands were not in the air. Mr. Vickers states that Bowen ran away from the vehicle, shots were fired, and only then did Bowen stop running and raise his hands; Mr. Vickers does "not believe [Bowen] had his hands in the air as he ran away from the vehicle." Def. Ex. H (Vickers Decl., ¶¶ 4-5). Ms. Osuna, on the other hand, says she *did see* Bowen's hands in the air – at least initially. Def. Ex. I (Osuna Decl. at ¶ 5). Ms. Osuna saw Bowen exit the vehicle and start running with his hands up. Id. But she also saw Bowen reach down towards his pants on at least two occasions, and believes his hands were lower, reaching towards his waist – covered by his untucked shirt – when he was shot. Id.[10]

In response to the other testimony about this moment, Bowen argues that he "ran away from the police vehicle and not specifically toward anything," that "[a]s soon as Bowen exits his vehicle, he takes two or three steps to avoid being ran over, raises his hands in the air and surrenders" and then gets shot. See PSSUF 84, 89, 101, 110-111, 129 (citing only Def. Ex. I (Osuna Decl. at ¶ 5) and Pl. Ex. A (Bowen Depo. at 180:2-13)). But Ms. Osuna testified that Bowen ran from the car initially with his hands in the air *and* twice reached down towards his waist – and she believed his hands were down when he was shot. Def. Ex. I (Osuna Decl. at ¶ 5).[11] In the deposition testimony cited, Bowen states that as soon as he exited the SUV he had his hands up, and he took one, two, or three steps or "went a couple feet, maybe" and was "trying to get out of the way from getting run over." Pl. Ex. A (Bowen Depo. at 180:2-13).

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[10] Bowen's objection to the relevance of this testimony is OVERRULED. Whether Bowen's waistband was visible is relevant to the totality of the circumstances reviewed to determine if Vazquez acted lawfully. See Deorle v. Rutherford, 272 F.3d 1272, 1281 n.18 (9th Cir. 2001) ("[The plaintiff] was wearing no shirt or shoes, only a pair of cut-off jeans shorts. There was nowhere for him to secrete any weapons."); see also Def. Ex. C (Vazquez Depo. at 104:24-105:11) (discussing experience finding weapons in waistband, pocket, and front of shirt).

[11] Bowen does not create a triable issue on whether he reached towards his waist while running from the vehicle. See PSSUF 109. The video evidence cited does not contradict Osuna's statements, which imply that Bowen had enough time to exit with hands raised, but then reach down before Vazquez fired. See Def. Ex. A. Notably, that Bowen had time to put his hands down, and that his hands were down at some point before Vazquez fired or he felt the shot, are both consistent with Bowen's other statements. See Def. Ex. D (Stites Decl.) (hands went up when he heard shots); Def. Ex. B (Bowen Depo. at 130:1-7) (ran for 10 feet); SUF 93 (hands up when he exited and when he felt himself get shot).

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The video footage of the incident is inconclusive regarding the position of Bowen's hands. See Def. Ex. A. However, it does show Bowen quickly exiting the vehicle and taking some number of steps towards the buildings – directly in front of Vazquez's approaching patrol car – before the sound of gunshots and appearance of debris from Vazquez's windshield. Def. Ex. A. This contradicts Bowen's version that he got out of the car and surrendered, stepping only to get out of the way. See Scott v. Harris, 550 U.S. 372, 380 (2007) ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.").[12]

Considering the evidence in the light most favorable to Bowen, the Court accepts Bowen's version that he ran from the vehicle with hands raised.[13] It remains undisputed, however, that Bowen was running in the direction of the buildings and that Vazquez believed he may have been armed, given the underlying crime and recent bank robberies in that area. The witness testimony that Bowen's hands were down sometime between Bowen's exiting and shots being fired is also undisputed – and indeed, consistent with some of Bowen's own statements.

The parties do not dispute that Vazquez fired three rounds in rapid succession when he was about 15-18 feet from Bowen, one of which hit Bowen in the buttocks. SUF 88-89. It is also undisputed that Vazquez fired at Bowen through the windshield of his patrol car while the car was still moving, and that Vazquez had less-lethal weapons at his disposal. SUF 125, 128.

[12] Further, the testimony Bowen cites (that he was "trying to get out of the way from getting run over") does not directly contradict the evidence indicating he continued to run *towards the buildings*. See also Def. Ex. I (Osuna Decl., ¶¶ 3, 6, Ex. 1-2) (lending further support for video evidence showing Bowen's route after exiting the SUV was in front of the oncoming police vehicles, rather than a few steps out of the way to avoid being hit by a car). And there is no suggestion that "[running] away from the police vehicle" was inconsistent with him running towards the buildings. See Bowles v. City of Porterville, 571 F. App'x 538, 540 (9th Cir. 2014), as amended (May 1, 2014).

[13] Defendants have not convinced the Court that Bowen's deposition testimony contradicting his unsworn interview is akin to a "sham affidavit" that the Court can wholly disregard for the purposes of this motion. See Leslie v. Grupo ICA, 198 F.3d 1152, 1157-58 (9th Cir. 1999).

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IV. § 1983 CLAIM AGAINST VAZQUEZ & QUALIFIED IMMUNITY

Vazquez asserts he is entitled to qualified immunity with respect to the Section 1983 claim. Qualified immunity is more than a mere defense at trial; it is "an entitlement not to stand trial or face the other burdens of litigation." Mitchell v. Forsyth, 472 U.S. 511, 526 (1985). Because the benefit of immunity is effectively lost if the case erroneously goes to trial, the Supreme Court repeatedly has stressed the importance of resolving immunity questions at the earliest possible stage of the litigation. Saucier v. Katz, 533 U.S. 194, 200-01 (2001). To do so, courts engage in a two-prong inquiry.

First, viewing the facts in the light most favorable to the plaintiff, the court determines whether the officers' conduct violated a federal right. Tolan v. Cotton, 134 S. Ct. 1861, 1865 (2014) (per curiam); Saucier, 533 U.S. at 201. In excessive force cases, the federal right at issue is the Fourth Amendment right against unreasonable seizures. Tolan, 134 S. Ct. at 1865. The court must balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." Id. (citing Tennessee v. Garner, 471 U.S. 1, 8 (1985)). "[P]roper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Graham v. Connor, 490 U.S. 386, 396 (1989).

Second, the court determines whether the right was "clearly established" at the time the violation occurred. Tolan, 134 S. Ct. at 1166. The state of the law must have been such that the deputies had fair warning that their conduct was unconstitutional. Id. A prior case need not be "on all fours," but the contours of the right must be sufficiently definite so that a reasonable officer would have understood he was violating the plaintiff's constitutional rights. City & Cnty. of San Francisco v. Sheehan, 135 S. Ct. 1765, 1774 (2015); Anderson v. Creighton, 483 U.S. 635, 640 (1987). A "clearly established" right cannot be defined generally. See Brouseau v. Haugen, 543 U.S. 194, 198 (2004) (per curiam). The inquiry must be made "in light of the specific context of the case, not as a broad general proposition." Id. In requiring that the right be "clearly established," courts recognize that officers may have a reasonable but mistaken understanding regarding the amount of force that is legal under some circumstances. Saucier, 533 U.S. at 205.

The Court may engage the two prongs of the qualified immunity test in either order. Pearson v. Callahan, 555 U.S. 223, 236 (2009). However, it must limit its examination to undisputed facts. Tolan, 134 S. Ct. at 1866. "[U]nlike in other cases, the qualified immunity inquiry is the same as the inquiry made on the merits. But, even

though reasonableness traditionally is a question of fact for the jury, defendants can still win on summary judgment if the district court concludes, after resolving all factual disputes in favor of the plaintiff, that the officer's use of force was objectively reasonable under the circumstances." Scott v. Henrich, 39 F.3d 912, 914-915 (9th Cir. 1994) (internal punctuation and citations omitted). On the other hand, where the reasonableness of the officer's conduct turns on disputed issues of material fact, the question is one that should be left for the jury. Torres v. City of Madera, 648 F.3d 1119, 1123 (9th Cir. 2011).

A. Violation of Federal Right

Reasonableness "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" and includes "allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving." Graham, 490 U.S. at 396-397. Reasonableness is assessed by examining the severity of the crime committed, whether the individual poses an immediate safety threat to the officers or others, and whether the individual is actively resisting or attempting to flee. Id. at 396. Deadly force is not unreasonable, and therefore, not a violation of an individual's Fourth Amendment rights, when the "officer has probable cause to believe that the suspect poses a threat of serious harm, either to the officer or to others." Garner, 471 U.S. at. 11. "If the person is armed – or reasonably suspected of being armed – a furtive movement, harrowing gesture, or serious verbal threat might create an immediate threat." George v. Morris, 736 F.3d 829, 838 (9th Cir. 2013) cert. denied, 134 S. Ct. 2695 (2014).

"It is reasonable for police to move quickly if delay 'would gravely endanger their lives or the lives of others.' This is true even when, judged with the benefit of hindsight, the officers may have made 'some mistakes.'" City & Cnty. of San Francisco, 135 S. Ct. at 1775. Even officers who act contrary to their training do not lose the protections of qualified immunity. Id. at 1777 (explaining a plaintiff cannot avoid summary judgment by merely producing an expert's report saying the officer's conduct leading up to the deadly confrontation was "'imprudent, inappropriate, or even reckless.'").

Certain aspects of the events leading to Bowen's injury are disputed; much of what transpired is not. Bowen, a suspected bank robber, was pursued by officers – among them Vazquez, who had in mind recent armed bank robberies. In attempting to flee from police, Bowen drove at high speeds in the middle of the day with other drivers around, running stop signs and red lights. He swerved through and drove into oncoming traffic, forcing other drivers to avoid being rear-ended or hit head-on.

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When Vazquez joined the pursuit, he saw Bowen drive into oncoming traffic to evade a spike trap. He saw that, despite losing a tire, Bowen cut through an occupied gas station at 50-60 miles per hour – getting airborne close to gas pumps, pedestrians, and other vehicles. With three working wheels, he saw Bowen run red lights at 80 miles per hour, spin out of control at least twice, and continue to flee. Viewing the facts in the light most favorable to Bowen, it is undisputed that after coming out of one spin, Bowen accelerated while making contact with Whiddon's passenger-side door, pushing Whiddon's truck out of his way to continue his escape. Bowen also does not dispute that he sideswiped Whiddon.[14] In addition to use of the spike trap, both Whiddon and Vazquez attempted to intervene and stop Bowen by bumping his vehicle – to no avail. Bowen testified that at the time of the chase, he "wasn't even thinking" about the people's lives he was putting in danger, confirmed that he "just wanted to get away" "at any cost," and that he thought that if he "didn't get shot [he] was going to . . . kill [himself]." Def. Ex. B (Bowen Depo. at 139:12-14, 139:22-24, 140:16-25).[15] Vazquez testified that he perceived Bowen's actions as attempted murder because it appeared Bowen was intentionally going after Whiddon with his SUV. Def. Ex. C (Vazquez Depo. at 51:5-52:4, 86:9-24).[16]

The only video evidence shows the end of the pursuit as Bowen – still speeding without one wheel – crashed into a busy commercial parking lot. Accepting Bowen's version that he exited the vehicle with his hands raised, it is nonetheless undisputed that Bowen was running in the direction of businesses known to be occupied, that Vazquez

[14] See supra note 5; SUF 55.

[15] Bowen's testimony ("I do care because I don't want to see nobody hurt.") does not create a triable issue as to his responses regarding whether, in the moment, he thought about other's lives and was willing to get away at any cost. Pl. Ex. A (Bowen Depo. at 140:16-25).

[16] As discussed above, Bowen's attempt to raise a triable issue here falls flat. He agrees he regained control, continued to accelerate while making contact with Whiddon, and went straight to push Whiddon out of his path and continue fleeing. And he does not dispute Whiddon's testimony about the second encounter. See supra note 5; SUF 55. Even putting aside these issues, Bowen's testimony about what was happening inside his vehicle does not controvert the fact that, while Bowen was driving the SUV, it made contact with Whiddon, forcibly removed Whiddon's vehicle as an obstacle, and continued fleeing. See Marchisheck v. San Mateo Cty., 199 F.3d 1068, 1078 (9th Cir. 1999) (no disputed issue of fact where plaintiff's evidence that she did not see a notice posted failed to contradict testimony offered by defendant that someone posted the notice); see also Bowles, 571 F. App'x at 540 ("Plaintiffs do not question [the officer defendant's] subjective fear.").

did not know whether Bowen was armed but had concerns he may have been armed, and that Vazquez feared what Bowen would do inside the building – including taking a hostage. Bowen does not dispute witness testimony that there was some time between Bowen's exiting with arms raised and Vazquez firing shots when Bowen's arms were not in the air.[17] Even if the Court disregards this uncontroverted testimony, Bowen fails to point to any case law indicating that a fleeing suspect who has shown reckless disregard for the public and twice accelerated into a law enforcement vehicle while attempting to flee is still considered "surrendered" despite undisputed testimony he was running from his crashed vehicle towards an occupied building – even if running with his arms in the air (or as Bowen describes it, "ditched his vehicle and got on foot," Opp. at 9). Cf. Plumhoff v. Rickard, 134 S. Ct. 2012, 2021-22 (2014) ("[T]he record conclusively disproves respondent's claim that the chase in the present case was already over when petitioners began shooting. Under the circumstances at the moment when the shots were fired, all that a reasonable police officer could have concluded was that [the suspect] was intent on resuming his flight and that, if he was allowed to do so, he would once again pose a deadly threat for others on the road.").

Bowen attempts to create a disputed fact regarding Vazquez's stated concern for building occupants given the shots fired towards the building. But the evidence Bowen cites does not directly contradict Vazquez's testimony that he was concerned for the building occupants. See PSSUF 83; see also Marchisheck, 199 F.3d at 1078. Instead, Vazquez testified that he deliberately shot at Bowen when there was a concrete or stucco wall as a backdrop – not an open doorway, window, or individuals. Def. Ex. C (Vazquez Depo. at 62:4-11); Pl. Ex. B (Vazquez Depo. at 65:12-18 & Ex. 24).[18]

Bowen also argues that Vazquez shooting from his vehicle violated Murrieta Police policy. But officers who act contrary to their training do not lose the protections of qualified immunity. City & Cnty. of San Francisco, 135 S. Ct. at 1777. Further, while the policy provided by Defendants indicates such action is "rarely effective," Def. Ex. G at § 300.4.1, Vazquez's supervisor testified that, while there may be concerns with visibility and backdrop, the policy does not *prohibit* an officer from shooting from a moving vehicle. Pl. Ex. C (Flavin Depo. at 26:21-27:3). It is also undisputed that Vazquez "received department training in shooting through windshields shortly before

[17] See supra note 11.

[18] Nor does Bowen pointing to the backdrop of Vazquez's shots justify drawing an inference in Bowen's favor regarding whether Vazquez was concerned about the safety of the building occupants. For example, Bowen provides no evidence that Vazquez's bullets did – or could – travel through that backdrop and harm the building occupants.

this incident, and completed all qualification shoots, which also contained briefings on the law of constitutional use of force." SUF 117. Finally, Bowen cites no authority that shooting from a moving vehicle alone is sufficient to defeat a motion for summary judgment on the basis of qualified immunity.

Bowen correctly notes it is undisputed Vazquez never verbally warned Bowen before shooting him and that Vazquez had less-lethal weapons at his disposal. See Def. Resp. to Pl. Sep. Stmt. Undisputed Facts 127-28. Still, "[o]fficers [] need not avail themselves of the least intrusive means of responding to an exigent situation; they need only act within that range of conduct we identify as reasonable." Scott, 39 F.3d at 915. And while a court may consider an officer's failure to order a suspect to halt before using force that could result in serious injury, see Deorle, 272 F.3d at 1283-84, Bowen fails to present any evidence that it was feasible for Vazquez to give a verbal warning or use a less-lethal option before Bowen was able to reach the buildings. Nor does Bowen dispute the evidence that he successfully evaded police attempts to halt his fleeing vehicle.

Bowen also correctly notes Vazquez had no historical, factual basis to believe that Bowen would take a hostage if he reached inside a building. Still, Bowen does not dispute the historical evidence showing Bowen did not – at that moment – consider the lives around him while his evasive behavior continued to escalate, including by driving into oncoming traffic, ramming a police vehicle out of his way after (or even while) losing control, "launching" through a populated gas station, and crashing into a crowded parking lot before "ditch[ing]" his vehicle and heading in the direction of a building.

In light of the totality of circumstances present here, Vazquez's split-second decision to use deadly force was not a violation of Bowen's Fourth Amendment rights because he had probable cause – based on objectively reasonable facts – to believe Bowen posed a threat of serious physical harm to others. Cf. Mullenix v. Luna, 136 S. Ct. 305, 308 (2015) (not taking up lower court's determination, under first prong, that officer's actions "were objectively unreasonable because several of the factors that had justified deadly force in previous cases were absent here: There were no innocent bystanders, [the suspect's] driving was relatively controlled, [the officer] had not first given the spike strips a chance to work [and instead shot at the suspect from a highway overpass], and [the officer's] decision was not a split-second judgment.").[19]

[19] This case is also distinguishable from recent Ninth Circuit decisions finding deadly force unreasonable. See, e.g., A.K.H. by & through Landeros v. City of Tustin, 837 F.3d 1005, 1011-13 (9th Cir. 2016) (crime involving domestic abuse was over; although suspect walking alongside road was not obeying officer's command given from patrol car to halt, he was also not fleeing; officer had received information that suspect was not known to be carrying weapon; encounter lasted less than a minute and officer shot suspect almost simultaneous to him

B. Clearly Established

Even if Vazquez was unreasonable in his use of force, he would be entitled to qualified immunity because it was not clearly established at the time of the shooting that his conduct was unconstitutional. Bowen bears the burden of proving the right allegedly violated was clearly established. Romero v. Kitsap Cnty., 931 F.2d 624, 627 (9th Cir.1991). Bowen argues that because he had unequivocally surrendered, he had a clearly established right not to be shot. See Opp. at 5. The Court agrees that the right not to be shot after one has unequivocally surrendered is clearly established. However, Bowen points to no case law indicating when an officer is on notice that a dangerous chase with a fleeing suspect has ended and surrender is unequivocal. Instead, Bowen points only to testimony that he exited the vehicle with his hands raised. See Opp. at 5 (citing Def. Ex. I, Osuna Decl. at ¶ 5). Bowen fails to mention that the same witness he relies on for this testimony also testified that Bowen *reached down*. Def. Ex. I (Osuna Decl. at ¶ 5). Nor does Bowen mention that he agreed it was undisputed that Vazquez *perceived Bowen to be running towards a building he knew to be occupied*. SUF 83, 86. This undercuts Bowen's argument that surrender was unequivocal. Even accepting Bowen's testimony that he exited with arms raised and only ran to avoid being hit, he does not dispute that he was running in the direction of the building – and the video evidence contradicts his argument of an unambiguous surrender (i.e., he merely exited the vehicle and stepped out of the way).[20]

Defendants correctly observe that the Supreme Court has "never found the use of deadly force in connection with a dangerous car chase to violate the Fourth Amendment, let alone to be a basis for denying qualified immunity." Mullenix, 136 S. Ct. at 310. Here, the car chase was over at the moment deadly force was used because Bowen had exited his vehicle. Still, Mullenix reiterated that a *general* test for when deadly force may be appropriate in the context of a fleeing felon is *not* the proper inquiry under this prong; instead, it must be clearly established that the Fourth Amendment prohibited the officer's conduct in the *specific situation he confronted*. See id. at 308-09, 311. Here,

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complying with officer's command to take his hand out of his pocket). So too is it distinguishable from the case A.K.H. relied on to show that officer had violated a clearly established right. See id. at 1013 (discussing Garner, 471 U.S. at 21 (not reasonable to use deadly force to stop "young, slight, and unarmed" house burglar from climbing over fence when officer correctly believed suspect to be unarmed and "never attempted to justify his actions on any basis other than the need to prevent an escape")).

[20] See supra note 12.

the specific situation involved a dangerous car chase on occupied streets involving numerous collisions that ended with a crash in a commercial parking lot and a suspected felon, feared to be armed, still running on foot in the direction of occupied buildings. Bowen fails to point this Court to authority that clearly establishes that an officer confronted with these facts is on notice that the suspect has unequivocally surrendered and no longer poses a threat so that lethal force is clearly unjustified, or authority otherwise placing an officer on notice that this specific factual scenario does not justify the use of lethal force.[21]

For all these reasons, Vazquez is entitled to qualified immunity. Defendants' motion for summary judgment on Bowen's Section 1983 claim against Vazquez is GRANTED.

V. § 1983 CLAIMS AGAINST CITY OF MURRIETA

Bowen also brought § 1983 claims against the City of Murrieta for an unconstitutional custom or policy and negligent hiring, training, and retention. Municipal governments may be liable under § 1983 for deprivations of constitutional rights. Monell v. Dept. of Social Servs. of the City of New York, 436 U.S. 658, 690-91 (1978). In cases where Monell liability is alleged for failure to train, the failure must be the result of "deliberate indifference" to the rights of individuals. Long v. City & Cnty. of Honolulu, 511 F.3d 901, 907 (9th Cir. 2007). Without a violation of a constitutional right, however, there is no municipal liability. Long, 54 F.3d at 907; see also City of Los Angeles v. Heller, 475 U.S. 796, 799 (1986) ("If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point."). Bowen's inability to show that his constitutional rights were violated defeats his Monell claim.

In the alternative, an agency is liable only where its policies or customs actually inflict a civil rights injury, not merely as an employer responsible for employee actions. Monell, 436 U.S. at 691. The custom must be "persistent and widespread," as opposed to

[21] Compare Forrett v. Richardson, 112 F.3d 416, 419-21 (9th Cir. 1997); cf. Jay v. Hendershott, 579 F. App'x 948, 951-53 (11th Cir. 2014) (unpublished) (noting right not clearly established, particularly given court and parties' inability to find a case similar to scenario involving a car chase – albeit one at low-speeds with a suspect who committed little more than impaired driving and demonstrated no aggressive or hostile behavior – ending with the suspect exiting vehicle and appearing determined to make it towards an open garage, where officers feared a possible hostage scenario and so used attack dog).

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being "predicated on isolated or sporadic incidents." Trevino v. Gates, 99 F.3d 911, 918 (9th Cir. 1996) (affirming summary judgment). "A plaintiff cannot prove the existence of a municipal policy or custom based solely on the occurrence of a single incident or unconstitutional action by a non-policymaking employee." Davis v. City of Ellensburg, 869 F .2d 1230, 1233 (9th Cir. 1989) (emphasis in original) (affirming summary judgment).

Here, Bowen identifies only the incident involving himself and Vazquez, and does not dispute that this was Vazquez's first and only officer-involved shooting. SUF 69. Nor does he dispute that Vazquez has no "lawsuits about use of force, no incidents of excessive force at all, and no citizen complaints involving excessive force or use of force" or that Vazquez "has never been reprimanded by any of the law enforcement agencies for which he worked for any use of force issues." SUF 114-15. And it is undisputed that prior to this incident Vazquez had completed training on shooting through a windshield, which also contained briefings on the law of constitutional use of force. SUF 117.

Bowen fails to provide evidence about any other officer-involved shootings or excessive force claims in Murrieta. Defendants provide evidence of the official policy about the proper use of deadly force, Def. Ex. G; however, Bowen's arguments against Vazquez rest, in part, on his allegation that Vazquez *violated* that policy. See Opp. at 10; Pl. Ex. C (Flavin Depo. at 28:13-29:10). In the face of Defendants' extensive argument and evidence regarding Bowen's failure to meet his burden on these claims, Bowen is silent. At the least, Bowen has abandoned these claims; alternatively, he has failed to point the Court to any evidence supporting them, and so Defendants' motion as to claims against the City of Murrieta is GRANTED.[22]

IT IS SO ORDERED.

[22] Because the Court GRANTS Defendants' motion as to Bowen's underlying claims, the motion as to punitive damages is moot.