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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

PAULA J. BROWN,

Plaintiff and Appellant,

v.

CHRISTOPHER BALDWIN,

Defendant and Respondent.

D059750

(Super. Ct. No. GIC868862)

APPEAL from a judgment of the Superior Court of San Diego County, David B. Oberholtzer, Judge. Affirmed.

Gomez Law Group and Alvin M. Gomez for Plaintiff and Appellant.

Daley & Heft, Lee H. Roistacher, Robert W. Brockman, Jr., and Matthew E. Bennett for Defendant and Respondent.

I.

INTRODUCTION

Paula J. Brown, an innocent bystander, was injured by fragments from at least one stray bullet fired by a police officer. At the time shots were fired, law enforcement officers were attempting to apprehend a murder suspect who had just driven up onto the sidewalk at a strip mall and was heading in the direction of two police officers at a high rate of speed. Several officers fired at the suspect, believing that the life of at least one of the officers was in imminent danger. Paula and her son, Jonathan D. Brown, who was with Paula at the time she was shot, sued a number of the officers who were on the scene, including respondent El Cajon Police Officer Christopher Baldwin.¹

The trial court denied Baldwin's motion for summary judgment, while granting the summary judgment motion of fellow officer Robert Ransweiler. Brown appealed from the court's judgment in favor of Ransweiler. In an opinion issued in *Brown v. Ransweiler* (2009) 171 Cal.App.4th 516 (*Brown I*), we affirmed the judgment as to Ransweiler. After we issued our opinion in *Brown I*, Baldwin again moved for summary judgment (second motion for summary judgment). Although the trial court initially denied Baldwin's second motion for summary judgment, the court subsequently granted the motion.

On appeal, Brown contends that Baldwin's second motion for summary judgment was procedurally barred and that the trial court therefore should not have considered it.

¹ Jonathan was dismissed from the case in December 2009.

In the alternative, Brown argues that even if the court properly considered Baldwin's second motion for summary judgment, there remain triable issues of material fact as to her claims against Baldwin, rendering summary judgment inappropriate.

After Brown filed a notice of appeal, Baldwin moved to dismiss the appeal, contending that Brown's appeal is untimely. We deferred consideration of the motion to dismiss, and the parties filed briefs addressing the merits of the appeal.

We conclude that the record does not conclusively establish that Brown's appeal is untimely, and we therefore consider the appeal on the merits. We further conclude that the trial court did not abuse its discretion in considering Baldwin's second motion for summary judgment, and that the court did not err in granting summary judgment in favor of Baldwin. We therefore affirm the judgment.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual background*

On August 5, 2004, members of the Violent Crimes Task Force (VCTF)² were conducting surveillance on Thomas Miller, a suspected drug dealer, because they believed that Miller was going to meet with Jorge Ojeda, Jr., who was a suspect in a murder investigation.

After learning that Miller was a "person of interest" to the El Cajon Police Department, Tim Faubel, a San Diego Police Department detective and VCTF leader,

² The VCTF is a multi-agency task force.

informed El Cajon Police Officer Robert Ransweiler that the VCTF was going to be watching Miller, and asked Ransweiler to assist in the surveillance.³ Faubel informed Ransweiler that Miller was at a Spring Valley strip mall.

Ransweiler and Baldwin proceeded to the strip mall to assist in the surveillance effort. After Ransweiler and Baldwin arrived at the strip mall, they conducted surveillance of Miller from their vehicle. Faubel and other VCTF members were also at the strip mall, watching Miller. Faubel was in charge of surveillance and arresting Ojeda if he appeared.

A man driving a Jeep pulled into the strip mall parking lot and parked next to Miller. Over the police radio, a member of the VCTF identified the man driving the Jeep as Ojeda. Ojeda got out of his Jeep and began talking with Miller. They spoke for approximately 10 to 15 minutes.

While Ojeda was talking with Miller, Faubel contacted the San Diego Police Department and requested additional assistance in arresting Ojeda. In the meantime, Faubel devised a tactical plan to apprehend Ojeda. He ordered "all units" to move in to arrest Ojeda once Ojeda got back into his parked vehicle. Faubel ordered marked police cars to "come in behind the Jeep to block Ojeda's potential escape."

Once Ojeda got back into the Jeep, Faubel ordered all personnel, including Ransweiler and Baldwin, to converge on Ojeda and arrest him. VCTF members in marked police cars used their vehicles to block Ojeda's Jeep from behind. Other VCTF

³ Ransweiler and his partner, Baldwin, were not members of the VCTF.

members, as well as Ransweiler and Baldwin, ran toward Ojeda and ordered him to get out of his vehicle. Ransweiler and Baldwin approached Ojeda from the east along a covered sidewalk that abutted the strip mall. All of the officers were wearing raid gear as they approached Ojeda.

Ojeda refused to turn off the ignition of his vehicle or to get out of the vehicle. Instead, he drove his Jeep up over the curb and onto the sidewalk. Ojeda then "gunned" the engine, turned right, and drove on the sidewalk, toward Ransweiler and Baldwin. Ojeda began to drive at a high rate of speed directly toward Ransweiler and Baldwin. As Ojeda accelerated toward the two officers, Ransweiler dove to his left, between two parked cars.

Baldwin, who was a few steps behind Ransweiler, was not able to make a similar move to get out of the path of the oncoming vehicle, due to his position in relation to the parked cars. As the Jeep was coming directly at him, Baldwin shot his gun in the direction of the Jeep, aiming for the windshield of the vehicle. All of Baldwin's gunshots were parallel to the storefronts.

As Baldwin was backing up in an effort to get away from the Jeep, he tripped and fell to the ground. A number of other officers saw Baldwin fall and feared that Ojeda was about to run him over. Those officers, including Ransweiler, all fired rounds at Ojeda. Both Ransweiler and Baldwin were using .40 caliber handguns.

Ojeda was struck by several rounds fired by Ransweiler, and was pronounced dead at the scene.

Officers fired a total of 33 or 34 rounds that day. Officer Ransweiler fired five shots; Officer Baldwin fired 14 shots; Officer Stephen Kinkaide fired five shots; Officer Fred James fired five, and possibly six, shots; and Officer Sean Torphy fired four shots.

At the time of the incident, Paula and Jonathan were in the lobby of their dentist's office, which was located in the strip mall. In addition to the dental office, the strip mall housed a Subway restaurant, a plumbing store, and a charter school, all of which were open for business at the time of the incident. Jonathan heard shots being fired, and then heard his mother yell that she had been hit. Glass from a broken window was flying through the lobby of the dental office. Jonathan turned his back to the window and grabbed his mother.

Criminalist Lance Martini determined, to a reasonable degree of scientific probability, that Paula had been hit by a "projectile core" discharged from Officer Baldwin's firearm. Paula's injuries were consistent with being struck by a fragment or ricochet, not by a stabilized projectile (a bullet). The bullet fragment went through Paula's breast area. Martini could not rule out the possibility that Paula had been struck by multiple bullet fragments.

B. *Procedural background*

Brown filed a complaint against Baldwin, Ransweiler and other law enforcement officers, asserting claims for negligence and battery.

After answering the complaint, Baldwin and Ransweiler filed a joint motion for summary judgment, or, in the alternative, summary adjudication. Baldwin and Ransweiler argued that they could not be found liable for their conduct in the

performance of their police duties, and that their conduct was not, as a matter of law, negligent. The officers further argued that they could not be liable for a battery because their shooting of Ojeda was justifiable homicide, and they were therefore immune from any civil liability arising from the shooting.

The trial court granted Ransweiler's motion for summary judgment in full and entered judgment in favor of Ransweiler. With respect to Baldwin, the trial court granted summary adjudication in his favor on the battery claim, but denied summary adjudication on the negligence claim.

The Browns appealed from the judgment entered in favor of Ransweiler, and we issued our opinion in *Brown I* affirming that judgment in February 2009.

In late 2010, Baldwin moved again for summary judgment of the remaining negligence claim against him. Brown opposed Baldwin's second motion for summary judgment, arguing both that the motion was procedurally barred in that Baldwin was essentially seeking reconsideration of the trial court's denial of his 2007 motion for summary judgment, and that there remained triable issues of fact with respect to the reasonableness of Baldwin's conduct.

On October 8, 2010, the trial court denied Baldwin's second summary judgment motion. Baldwin filed a petition for mandamus in this court seeking immediate review of the court's order. While the petition was pending, on its own motion, the trial court reconsidered its October 8 order, and on November 8, 2010, the court vacated its

October 8 order and entered a new order granting summary judgment in favor of Baldwin.⁴

The trial court entered judgment in favor of Baldwin on November 17, 2010. Brown appealed from the judgment on May 6, 2011. The parties dispute whether Brown's appeal is timely. We address the timeliness of Brown's appeal in part III.A., *post*.

III.

DISCUSSION

A. *Baldwin's motion to dismiss the appeal is denied*

Prior to any briefing in this appeal, Baldwin filed a motion in this court seeking to dismiss Brown's appeal as untimely. Brown opposed the motion. We issued an order stating that the motion to dismiss the appeal would be considered with the merits of the appeal. Because dismissal of the appeal would obviate the need to address the merits of the appeal, we first address the motion.

A notice of appeal from a judgment must be filed on or before the earliest of (1) 60 days after the trial court's mailing of the notice of entry of judgment; (2) 60 days after a party serves a notice of entry of judgment or a file-stamped copy of the judgment,

⁴ The trial court's new order rendered Baldwin's petition for a writ of mandamus moot, and this court dismissed the petition.

accompanied by proof of service; *or* (3) 180 days after entry of judgment. (Cal. Rules of Court, rule 8.104(a)(1)(A)-(C).)⁵

The filing of a timely notice of appeal is a jurisdictional prerequisite. "Unless the notice [of appeal] is actually or constructively filed within the appropriate filing period, an appellate court is without jurisdiction to determine the merits of the appeal and must dismiss the appeal." (*In re Jordan* (1992) 4 Cal.4th 116, 121.) The purpose of this requirement is to promote the finality of judgments by forcing the losing party to take an appeal expeditiously or not at all. (*In re Chavez* (2003) 30 Cal.4th 643, 650.)

The trial court entered judgment in favor of Baldwin on November 17, 2010. Brown filed her notice of appeal on May 6, 2011, which was 170 days after entry of judgment.

In a declaration filed in support of Baldwin's motion to dismiss the appeal, his counsel asserts that on November 19, 2010, he served a file-stamped copy of the November 17 judgment on Brown's attorney. Baldwin attaches to his motion to dismiss, as exhibit A, a copy of a document that he contends is the November 17 judgment, together with a proof of service pertaining to this document, dated November 19, 2010, and signed by "Cecilia Gebhardt."

In response to Baldwin's motion to dismiss the appeal, Brown contends that Baldwin's attorney never served either the judgment or a notice of entry of judgment on her attorney, and that her notice of appeal, filed May 6, 2011, was timely filed within 180

⁵ All rule references are to the California Rules of Court.

days after the entry of judgment on November 17, 2010. In support of her opposition to Baldwin's motion to dismiss, Brown submits as exhibit 4 a copy of a document that she contends constitutes the judgment entered in this case. Exhibit A and exhibit 4 are similar—but not identical—documents. Although the substance of the text of the two documents is the same, exhibit A states in its title that it is a "[PROPOSED] JUDGMENT," while exhibit 4 has the word "[PROPOSED]" interlineated by hand. Other differences exist as well. For example, exhibit A includes a stamp of the judge's name on the signature line, while exhibit 4 bears a handwritten signature of the judge on the signature line, with a stamp of the judge's name placed below the signature line. In addition, other date and time stamps are located in different places on the two documents. Finally, on the bottom of exhibit 4 there is a handwritten note awarding Baldwin costs in the amount of \$16,320.90. Exhibit A has no similar notation.⁶

The question that Baldwin's motion raises is whether the record demonstrates that Baldwin did, in fact, serve notice of the entry of judgment on Brown, thereby triggering the 60-day period under rule 8.104(a)(2), or whether the applicable time period is the 180-day period provided for in rule 8.104(a)(3), which applies in the absence of service of the judgment by one party on the other.

⁶ Copies of these documents are attached as exhibits to this opinion. Court exhibit 1 is the document that Baldwin attached as exhibit A in support of his motion to dismiss. Court exhibit 2 is the document that Brown attached as exhibit 4 in support of her opposition to Baldwin's motion to dismiss the appeal.

Since Baldwin is the party seeking dismissal of the appeal, he bears the burden of establishing that dismissal is appropriate. (See *Potrero Neuvo Land Co. v. All Persons Claiming etc.* (1909) 155 Cal. 371, 372 [the burden is on the party moving to dismiss the appeal to show from the record that the grounds for dismissal of the appeal exist]; see also Evid. Code, § 500 ["a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief . . . that he is asserting"]; rule 8.54(a)(1) & (a)(2) [a party moving in a reviewing court "must serve and file a written motion stating the grounds and the relief requested and identifying any documents on which the motion is based," and if the motion is "based on matters outside the record," the motion must be accompanied by declarations or other supporting evidence].)

Baldwin must demonstrate that he in fact served either a notice of entry of judgment or a file-stamped copy of the judgment, as he contends in his motion to dismiss, on Brown on November 19, 2010, in order to establish that Brown's notice of appeal was not timely. The evidence to which Baldwin points to meet this burden is exhibit A to his motion to dismiss. However, the record in this case reveals at least two problems with relying on the evidence that Baldwin submitted as exhibit A.

First, the judgment that is in the superior court file in this case is identical to the document that Brown submitted as exhibit 4, *not* the document that Baldwin submitted as exhibit A. There is no proof of service in the superior court file indicating that a copy of the judgment that is in the superior court file was ever served on Brown. Given the fact that the judgment contained in the superior court file differs from the document that

Baldwin contends is the "judgment" that he served on Brown, we cannot be certain that Baldwin in fact served the final judgment on Brown as of November 19, 2010.⁷

Second, although Baldwin submitted to this court a proof of service that he contends demonstrates that he did, in fact, serve a file-stamped copy of the judgment on Brown on November 19, 2010, which would trigger the 60-day period under rule 8.104(a)(2) (exhibit A to Baldwin's motion to dismiss the appeal), this proof of service document is insufficient to establish that Baldwin served Brown with a file-stamped copy of *the judgment* entered in this case on November 19, 2010. In the November 19, 2010 proof of service document, Gebhardt avers that she served the following document on

⁷ Code of Civil Procedure section 664.5, subdivision (a) requires that the party who submits a judgment for entry do two things: (1) mail a copy of a notice of entry to all other parties, and (2) file with the superior court the notice of entry of judgment together with a proof of service of that document. It provides in relevant part:

"In any contested action or special proceeding other than a small claims action or an action or proceeding in which a prevailing party is not represented by counsel, the party submitting an order or judgment for entry *shall prepare and mail a copy of the notice of entry of judgment to all parties who have appeared in the action or proceeding and shall file with the court the original notice of entry of judgment together with the proof of service by mail.*" (Italics added.)

The apparent purpose of the second of these requirements is to enable the party mailing a copy of the notice of entry of judgment to later establish that this mailing occurred, for purposes of determining the timeliness of post-judgment proceedings. We acknowledge that pursuant to rule 8.104(a)(2), the 60-day period for *appealing* a judgment may be triggered in two ways, either by the service of a "Notice of Entry" of judgment and proof of service, or by the service of a file-stamped copy of the judgment, together with proof of service, and that Code of Civil Procedure section 664.5, subdivision (a) refers only to serving a "notice of entry of judgment." In this way, rule 8.104(a)(2) allows a party to trigger the shorter 60-day appeal period in a manner that requires no proof of service under section 664.5. However, a party who wishes to ensure that the record reflects his or her service of the documents triggering the 60-day appeal period under rule 8.104(a)(2) would be well-advised to follow the requirements of section 664.5, subdivision (a).

Brown's attorney: "CONFORMED [PROPOSED] JUDGMENT." Gebhardt does not state that she served the final, as opposed to a "proposed," judgment on Brown's attorney. As a result, the proof of service does not, by its terms, establish that the document that Gebhardt served on November 19, 2010 is the final judgment as to Baldwin.

The right of appeal is to be accorded in doubtful cases ""when such can be accomplished without doing violence to applicable rules."" (*Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 113.) Given the inconsistencies in the record before us with respect to service of the judgment on Brown's attorney, we cannot conclude that Brown was properly served with a notice of entry of judgment that triggered the 60-day period for filing a notice of appeal, and therefore cannot conclude that Brown's notice of appeal, which was filed within 180 days of the entry of judgment, was untimely. We therefore deny Baldwin's motion to dismiss the appeal.

B. *The trial court did not abuse its discretion in considering Baldwin's second motion for summary judgment*

Brown contends that Baldwin's second motion for summary judgment was "procedurally barred" under the relevant statutes. Specifically, she relies on section 437c, subdivision (f)(2), which limits a party's ability to renew a motion for summary judgment, and section 1008, which generally governs motions for reconsideration. In contrast to the independent review that we apply in considering the granting of a motion for summary judgment, we review for an abuse of discretion a trial court's decision to allow a party to file a renewed or subsequent motion for summary judgment. (See *Pender v. Radin* (1994) 23 Cal.App.4th 1807, 1812.)

Section 437c, subdivision (f)(2) provides: "[A] party may not move for summary judgment based on issues asserted in a prior motion for summary adjudication and denied by the court, *unless* that party establishes to the satisfaction of the court, newly discovered facts or circumstances or a change of law supporting the issues reasserted in the summary judgment motion." (Italics added.) In this situation, the trial court applied section 437c, subdivision (f)(2) and determined that Baldwin had established, to the court's satisfaction, that this court's opinion in *Brown I* presented new circumstances sufficient to support a consideration of the issues raised in Baldwin's second motion for summary judgment. The trial court specifically determined that because this court had examined the conduct of the officers in the same underlying incident and had concluded that Ransweiler's conduct was reasonable as a matter of law, that determination constituted a new circumstance for purposes of the trial court's consideration of the reasonableness of Baldwin's conduct.

As the trial court determined, we examined the same facts that are at issue in Baldwin's motion for summary judgment in *Brown I*, and considered the evidence that Brown set forth in responding to Ransweiler and Baldwin's original joint motion for summary judgment. In particular, in *Brown I*, we concluded that some portions of Brown's expert's "opinions" were mere conjecture, and were insufficient to create triable issues of fact with respect to the reasonableness of the officers' conduct on the day in question. (See *Brown I, supra*, 171 Cal.App.4th at pp. 529-533.)

The significance of this court's opinion in *Brown I* to the court's prior summary judgment ruling with respect to Baldwin was not lost on the trial court. Given this

intervening authority, which concerned the precise case at issue before the trial court, the court did not abuse its discretion in concluding that *Brown I* constituted a sufficient change in circumstance to permit Baldwin to file a second summary judgment motion pursuant to section 473c, subdivision (f)(2). We therefore consider the court's summary judgment ruling on its merits.

C. *The trial court did not err in granting summary judgment in Baldwin's favor*

1. *Standards on summary judgment*

Summary judgment is granted when a moving party establishes the right to the entry of judgment as a matter of law. (§ 437c, subd. (c).) A "party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) Once the moving party meets this initial burden, the burden then shifts to the party opposing summary judgment to establish, by means of competent and admissible evidence, that a triable issue of material fact still remains. (*Id.* at pp. 850-851.)

"An issue of fact can only be created by a conflict of evidence. It is not created by 'speculation, conjecture, imagination or guess work.' [Citation.] Further, an issue of fact is not raised by 'cryptic, broadly phrased, and conclusory assertions' [citation], or mere possibilities [citation]. 'Thus, while the court in determining a motion for summary judgment does not "try" the case, the court is bound to consider the competency of the evidence presented.'" (*Sinai Memorial Chapel v. Dudler* (1991) 231 Cal.App.3d 190, 196-197.)

On appeal, the reviewing court makes "'an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law.'" (*Trop v. Sony Pictures Entertainment, Inc.* (2005) 129 Cal.App.4th 1133, 1143, quoting *Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222-223.) A trial court's ruling granting summary judgment may be affirmed on appeal if it is proper upon any theory of law applicable to the case. (*Farron v. City and County of San Francisco* (1989) 216 Cal.App.3d 1071, 1074.)

2. Analysis

Brown contends that there remain triable issues of fact with respect to whether Baldwin acted negligently during the incident with Ojeda. According to Brown, the trial court applied "the incorrect standard of care and then improperly weigh[ed] the evidence." Specifically, Brown contends that there remain triable issues of fact as to whether Baldwin was negligent both "before the discharge of his weapon and during the discharge of his weapon." We disagree.

The elements of a negligence cause of action are: (1) a legal duty to use due care; (2) a breach of that duty; (3) the breach was the proximate or legal cause of the resulting injury; and (4) actual loss or damage resulting from the breach of the duty of care. (*Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917-918.) "The existence of a duty of care is a question of law to be determined by the court alone. [Citations.] This is because "legal duties are . . . merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done." [Citation.] Duty is simply a shorthand

expression for the sum total of policy considerations favoring a conclusion that the plaintiff is entitled to legal protection.'" (*Munoz v. City of Union City* (2004) 120 Cal.App.4th 1077, 1093-1094 (*Munoz*)). Under established law, police officers have a duty "to use reasonable care in deciding to use and in fact using deadly force." (*Id.* at p. 1101.) An "officer's lack of due care can give rise to negligence liability for the intentional shooting death of a suspect." (*Munoz v. Olin* (1979) 24 Cal.3d 629, 634.)

- a. *Baldwin's decision to use deadly force and his use of deadly force were not, as a matter of law, negligent*

With respect to Brown's contention that triable issues remain with respect to Baldwin's conduct "during the discharge of his weapon" (i.e., Baldwin's use of force in shooting at Ojeda), we conclude that Baldwin's decision to use deadly force and his use of deadly force in firing at Ojeda's moving vehicle were objectively reasonable under the circumstances.

An officer "'may use reasonable force to make an arrest, prevent escape or overcome resistance, and need not desist in the face of resistance.'" (*Munoz, supra*, 120 Cal.App.4th at p. 1102, citing Pen. Code, § 835a.) "'Unlike private citizens, police officers act under color of law to protect the public interest. They are charged with acting affirmatively and using force as part of their duties, because "the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.'"' (*Munoz, supra*, 120 Cal.App.4th at p. 1109.)

"'The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of

hindsight. [Citation.] . . . [T]he question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. [Citations.]'" (Brown I, supra, 171 Cal.App.4th at pp. 527-528.) "In calculating whether the amount of force was excessive, a trier of fact must recognize that peace officers are often forced to make split-second judgments, in tense circumstances, concerning the amount of force required." (Id. at p. 528.) ""We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes 'reasonable' action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure."" (Ibid.) "Placing the burden of proof on the plaintiff to establish that an officer's use of force was unreasonable 'gives the police appropriate maneuvering room in which to make such judgments free from the need to justify every action in a court of law.'" (Ibid.)

Furthermore, "[w]here potential danger, emergency conditions, or other exigent circumstances exist, "[t]he Supreme Court's definition of reasonableness is . . . 'comparatively generous to the police'" (Brown I, supra, 171 Cal.App.4th at p. 528.) ""In effect, 'the Supreme Court intends to surround the police who make these on-the-spot choices in dangerous situations with a fairly wide zone of protection in close cases. . . .'" (Ibid.) "A police officer's use of deadly force is reasonable if "'the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.'" (Ibid.) ""Thus, 'an officer may reasonably

use deadly force when he or she confronts an armed suspect in close proximity whose actions indicate an intent to attack.'"" (Ibid.)

Applying these standards of reasonableness to Baldwin's conduct during the incident in question, the uncontradicted evidence establishes that Ojeda demonstrated an intent to harm the officers. In response to a strong show of force by officers in raid gear who ordered Ojeda to get out of his vehicle, Ojeda instead drove his vehicle up onto the sidewalk adjacent to the strip mall, "gunned" the engine, and drove directly toward Ransweiler and Baldwin. Although Ransweiler was able to dive out of the way, Baldwin was unable to do the same and remained directly in the path of Ojeda's vehicle. Any reasonable person would conclude that Baldwin's fear for his life was reasonable under these circumstances.

After Ojeda took this extreme action in response to police orders to surrender, Baldwin shot at Ojeda in an attempt to stop him from harming Baldwin or anyone else, or to stop him from escaping. Baldwin, who was in the direct line of Ojeda's oncoming vehicle, shot directly at Ojeda 14 times, from a relatively close distance. All of Baldwin's shots hit Ojeda's vehicle.⁸ The only reasonable conclusion from this evidence is that Baldwin acted reasonably in deciding to shoot at Ojeda, and in shooting at Ojeda.

⁸ To the extent that Brown is suggesting that Baldwin's conduct was "unreasonable" because he shot 14 times, rather than some lesser number of times, "[t]he number of shots by itself cannot be determinative as to whether the force used was reasonable. . . . That multiple shots were fired does not suggest the officers shot mindlessly as much as it indicates that they sought to ensure the elimination of a deadly threat.'" (*Lopez v. City of Los Angeles* (2011) 196 Cal.App.4th 675, 690, quoting *Elliott v. Leavitt* (4th Cir. 1996) 99 F.3d 640, 643.)

Baldwin's use of force in shooting his weapon at Ojeda's vehicle and shooting in a direction parallel to the strip mall's building face was not excessive or unreasonably dangerous *relative to the danger that Ojeda's actions posed*.

Brown further contends that issues of material fact exist as a result of certain provisions in the El Cajon Police Department's policies and procedures manual. Brown maintains that Baldwin failed to comply with various provisions of this manual during the incident involving Ojeda, and that these failures suggest that Baldwin was negligent.

As Brown mentions, Evidence Code section 669, subdivision (a) establishes a presumption that the violation of a statute, ordinance, or regulation of a public entity constitutes a failure to exercise due care. In *Peterson v. City of Long Beach* (1979) 24 Cal.3d 238, 247, the Supreme Court held that a city police department manual was a quasi-legislative measure that came within the provisions of Evidence Code section 669. However, after *Peterson*, the Legislature enacted Evidence Code section 669.1, which provides that a rule, policy, manual, or guideline of state or local government setting forth standards for employees in the conduct of their employment *shall not* be considered a statute, ordinance, or regulation unless formally adopted in the manner necessary for the adoption of statutes, ordinances, and regulations. (*Minch v. Department of California Highway Patrol* (2006) 140 Cal.App.4th 895, 907.) Although Brown ultimately acknowledges in her briefing that Evidence Code section 669.1 eliminated the effect of *Peterson* with respect to police manuals such as the one at issue here, she nevertheless argues that "the use of policy and procedure as a factor is important."

Even if we were to consider this manual to constitute evidence bearing on the reasonableness of Baldwin's conduct, it would not create a triable issue of material fact because none of the evidence demonstrates that Baldwin's conduct violated any of the policies that Brown identifies as being relevant.⁹ For example, Brown mentions the following policy regarding "Firing at or From Moving Vehicles": "Firing at or [from] moving vehicles to disable them is generally prohibited. Only in situations in which the threat to life from the moving vehicle or its occupants outweighs the threat to innocent persons is such action justified." The facts of this case demonstrate that Baldwin's conduct met this policy guideline. He was facing a fast-approaching vehicle, being driven by a murder suspect who showed no sign of surrendering, in a tight space. The threat to Baldwin's life in those moments was both significant and imminent. His decision to shoot at Ojeda's vehicle was objectively reasonable as a matter of law under these circumstances. The El Cajon Police Department's policy does not suggest otherwise.

The declaration of Brown's expert, Roger Clark, a retired police officer, is not sufficient to raise a triable issue of material fact. In *Brown I*, we described in detail the deficiencies in Clark's declaration and concluded that his declaration failed to demonstrate the existence of material disputes of fact. (*Brown I, supra*, 171 Cal.App.4th at pp. 529-533.) The Clark declaration that Brown submitted with respect to Baldwin's

⁹ Baldwin objected in the trial court, and continues to object, to the admission of the policies and procedures manual, contending that it constitutes inadmissible hearsay and lacks a sufficient foundational showing.

second motion for summary judgment is *the same declaration* that we considered in *Brown I* and found insufficient to create material disputes of fact. Obviously, the Clark declaration continues to suffer from the same deficiencies that we identified in *Brown I*, and fails to demonstrate the existence of disputes of material fact with respect to Brown's negligence claim against Baldwin. For example, Clark's declaration pertaining to Baldwin's conduct includes Clark's "conclusion as to the ultimate issues in dispute, i.e., whether [the officer at issue] acted reasonably or was justified in shooting Ojeda, without providing any reasoned explanation as to why the underlying facts lead to his ultimate conclusion." (*Brown I, supra*, 171 Cal.App.4th at p. 530.) Specifically, as was the case with respect to Clark's conclusion that Officer Ransweiler's conduct in shooting at Ojeda was unreasonable, Clark provides no reasoned explanation or factual support for his conclusion that Baldwin's conduct in shooting Ojeda was unreasonable. Further, as we pointed out in *Brown I*, many of Clark's opinions are based on conjecture, rather than on actual evidence. (See *id.* at pp. 530-533.) Therefore, for the same reasons that we rejected the contention that Clark's opinions demonstrated the existence of material disputes of fact in our opinion in *Brown I*, we reject that contention here.¹⁰

Based on facts that are undisputed, and in view of the extreme exigency of the circumstances that Baldwin was facing, we conclude as a matter of law that Baldwin met

¹⁰ We are mystified as to why Brown would submit the identical declaration that we found lacking in *Brown I* and make the same arguments that we already rejected.

his duty to use reasonable care in deciding to use, and in using, deadly force against Ojeda.

- b. *Baldwin's conduct prior to his use of deadly force was not, as a matter of law, negligent*

Brown argues that Baldwin could be found to have been negligent in his conduct before he decided to discharge his weapon. In other words, Brown contends that Baldwin may be liable for his tactical decisions prior to his use of deadly force, and that the trial court failed to consider these tactical decisions.

On a request from the United States Court of Appeals for the Ninth Circuit, the Supreme Court recently addressed the question "'[w]hether under California negligence law, liability can arise from tactical conduct and decisions employed by law enforcement preceding the use of deadly force.'" (*Hayes v. County of San Diego* (Aug. 19, 2013, S193997) ___ Cal.4th ___ [2013 Cal. Lexis 6652] (*Hayes*)). The *Hayes* court concluded that "liability can arise if the tactical conduct and decisions leading up to the use of deadly force show, as part of the totality of circumstances, that the use of deadly force was unreasonable." (*Id.* at p. *2.)

In *Brown I* we concluded that we did not have to resolve the question that the Supreme Court just answered in *Hayes* because, even presuming that Officer Ransweiler "could be held liable for tactical negligence, under the facts presented in the summary judgment proceedings, Ransweiler's conduct was objectively reasonable under the circumstances." (*Brown I, supra*, 171 Cal.App.4th at p. 536.) Although it is now clear under *Hayes* that an officer has a duty to act reasonably when using deadly force and that

this duty extends to the totality of the circumstances surrounding the shooting, including the officer's preshooting conduct, we reach the same conclusion with respect to Brown's contentions as to Baldwin as we did with respect to Brown's contentions against Ransweiler regarding his tactical preshooting decisions. Specifically, we conclude that Baldwin, who acted in a manner virtually identical to Ransweiler prior to their use of force against Ojeda, acted objectively reasonably under the circumstances, even with respect to his tactical conduct and the decisions he made prior to his use of deadly force, as a matter of law.

Brown suggests in her briefing that Baldwin was negligent in not attempting to arrest Ojeda before Ojeda returned to his vehicle, which Ojeda was then able to use as a deadly weapon. However, the undisputed facts establish that Baldwin was not in charge of the decision as to when police would arrest Ojeda. Rather, all of the evidence demonstrated that it was Faubel who made the decision that officers would move in to arrest Ojeda only after Ojeda returned to his vehicle.¹¹

¹¹ Brown attempts to demonstrate that this fact is in dispute by citing to the following "fact" in her response to Baldwin's separate statement of undisputed facts: "Agent Marilyn Fletcher did not recall anybody being in charge of the VCTF surveillance on August 5, 2004, and said it's never specified that a certain person is in charge." However, the evidence that Brown cites as supporting this "fact" demonstrates that Fletcher was responding to the question whether she remembered who had been "in charge" of the surveillance efforts as to Miller *prior* to August 5, 2004, *not* on the date of the shooting incident. Fletcher could not recall a specific individual being in charge of the surveillance efforts prior to the date of the Ojeda shooting incident, but did not say anything that would conflict with the abundant other evidence demonstrating that Faubel was the one who made the tactical decision as to when and how Ojeda's arrest would be effected.

Further, even viewing all of the alleged facts and the inferences to be drawn from them in favor of Brown, it is still clear that Baldwin's conduct prior to his use of deadly force in these circumstances met the standard of a reasonably prudent police officer, just as we determined Ransweiler's did in *Brown I*. (See *Brown I, supra*, 171 Cal.App.4th at pp. 536-537.) The undisputed facts establish that Baldwin was aware that Ojeda was a murder suspect who was the subject of a warrant for a parole violation. Faubel ordered Baldwin, Ransweiler and the other officers at the scene to move in to apprehend Ojeda once Ojeda got into his vehicle. Under the circumstances, it was objectively reasonable for Baldwin to follow Faubel's orders and to approach Ojeda with his firearm drawn while other officers in marked units moved in to block Ojeda's escape. It was similarly objectively reasonable for all of the officers to attempt to surround Ojeda from all sides, including from the sidewalk. As we stated in *Brown I*, the officers might have been negligent if they had *not* sought to prevent Ojeda from escaping into one of the businesses at the mall.

We find it useful to repeat here a pertinent passage from *Brown I*, which applies with equal force to Baldwin's actions during this incident as it did to the actions taken by Baldwin's partner, Officer Ransweiler, during the same incident:

"The law has never been applied to suggest that there is only one reasonable action that an officer may take under a given set of circumstances. There will virtually always be a *range* of conduct that is reasonable. As long as an officer's conduct falls within the range of conduct that is reasonable under the circumstances, there is no requirement that he or she choose the 'most reasonable' action or the conduct that is the least likely to cause harm and at the same time the most likely to result in the successful apprehension of a violent suspect, in order to avoid liability for negligence. It would be unreasonable to require police officers in the

field to engage in the sort of complex calculus that would be necessary to determine the 'best' or most effective and least dangerous method of handling an immediate and dangerous situation, particularly when officers are forced to make split-second decisions under tense and often perilous conditions." (*Brown I, supra*, 171 Cal.App.4th at pp. 537-538.)

In sum, Brown has raised no triable issues of material fact with respect to her negligence claim against Baldwin for his tactical conduct preceding the use of deadly force. We conclude that Baldwin's conduct was objectively reasonable as a matter of law.

The trial court's grant of summary judgment on the remaining negligence claim against Baldwin was thus proper.

IV.

DISPOSITION

The judgment is affirmed. Baldwin is entitled to his costs on appeal.

AARON, J.

WE CONCUR:

HUFFMAN, Acting P. J.

IRION, J.