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No. 67628-8

**COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON**

ORIGINAL

**David R. Gallegos,
Appellant**

v.

**Jeremy Freeman & Whatcom County, WA,
Respondents**

REPLY BRIEF OF APPELLANT

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A. The Respondent has Misstated the Legal Standard to be Followed in Analyzing Qualified Immunity

Appellant David Gallegos takes exception to the respondent's contention, based on *Skoog v. Clackamas County*, 469 F.3d 1221, 1229 (2006),¹ that the analysis for deciding whether a claim brought under 42 U.S.C. § 1983 should be dismissed on the basis of qualified immunity requires that the court engage in a so-called "three-part test". Accordingly, the appellant is compelled to discuss further the inquiries to be undertaken in addressing Freeman's affirmative defense that he is entitled to qualified immunity.

Citing *Saucier v. Katz*, 533 U.S. 194, 201-202, 121 S.Ct. 2151 (2001), the respondent has erroneously asserted that "*the traditional determination of whether an officer is entitled to summary judgment based on the affirmative defense of qualified immunity required applying a three-part test.*" [emphasis added] (Respondent's Brief at 24)

A review of the *Saucier*² *Id.*, opinion and post-*Saucier* opinions reflects that the three-part test is neither traditional nor appropriate. Its utilization in this case will merely confound the process of identifying the factual issues which need to be determined to achieve the objective of

¹ *Skoog* was a case involving the seizure of a camera, not excessive force.

² The dissent in *Saucier, Id.*, at 210, refers to the analysis set forth by the majority as a "two-part test".

deciding whether any genuine issues of material fact exist as they relate to qualified immunity. As noted in *Inouye v. Kemna*, 504 F.3d 705, (9th Cir.2007), questions two and three of the *Skoog* three-part test are merely alternative phrasing of the same question. *Id.*, 712, FN 6.

The task before a court when qualified immunity is invoked was succinctly stated in *Pearson v. Callahan*, 555 U.S. 223, 129 S.Ct. 808, 815-16, (2009) as follows:

“First, a court must decide whether the facts that a plaintiff has alleged or shown make out a violation of a constitutional right. Second, if the plaintiff has satisfied this first step, the court must decide whether the right at issue was “clearly established” at the time of defendant’s alleged misconduct. [citations omitted] (citing *Saucier, Id.*, at 201)

Hence, for purposes of presenting his reply, the appellant will address both of the *Saucier* “prongs” or “inquiries” comprising what is routinely referred to in post-*Saucier* opinions as the “two-part test.”

The post-*Saucier* decision of *Brosseau v. Haugen*, 543 U.S. 194, 125 S. Ct. 596, (2004) is instructive in describing the application of the *Saucier* two-part test in the context of a deadly force case:

“. . . claims of excessive force are to be judged under the *Fourth Amendment’s* “objective reasonableness” standard. *Id.*, at 388, 104 L. Ed. 2d 443, 109 S. Ct. 1865. Specifically with regard to deadly force, we explained in *Garner* that it is unreasonable for an officer to “seize an unarmed, non-dangerous suspect by shooting him dead.” 471 U.S., at 11, 85 L. Ed. 2d 1, 105 S. Ct. 1694. *But*

"[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Ibid. Brosseau, Id.*, at 197-98. [emphasis added]

Thus, Freeman is not entitled to qualified immunity unless he establishes through undisputed facts that shooting Gallegos was objectively reasonable. If he fails to do so, then the only remaining basis for furnishing him qualified immunity would be a determination that the right of Gallegos not to be shot under such circumstances - assuming the circumstances can be sufficiently determined - was not clearly established³ in that a reasonable officer would not, or could not, be expected to know it would be unlawful to employ deadly force.

More specifically, as noted in the citation above from *Brosseau, Id.*, to conclude that Freeman's use of deadly force was objectively reasonable, thereby entitling him to qualified immunity under the first *Saucier* prong, requires that the court find that he has established through undisputed facts

³ See *Inouye, Id.*, at 712: "In making this determination, we consider the state of the law at the time of the alleged violation. *Blankenhorn v. City of Orange*, 485 F.3d 463, 476 (9th Cir.2007); *Sorrels v. McKey*, 290 F.3d 965, 970 (9th Cir.2002). We also examine the "information possessed" by the officer to determine whether a reasonable official in a particular factual situation should have been on notice that his or her conduct was illegal. *Anderson*, 483 U.S. at 641, 107 S.Ct. 3034; *Sorrels*, 290 F.3d at 970. The "subjective beliefs" of the actual officer are, of course, "irrelevant." *Anderson*, 483 U.S. at 641, 107 S.Ct. 3034. *Inouye v. Kemna*, 504 F.3d 705, 712 (9th Cir.2007)

that he, or another person, was in imminent danger of being killed or seriously injured just prior to or at the moment that the shooting occurred.

B. Respondent has Misstated and Omitted Material Facts and Presented Unsupported Conclusions.

In addressing the question as to whether shooting Gallegos was objectively reasonable, i.e. whether Freeman, or some other person, was in imminent danger of being killed or seriously injured, the crucial evidence is that which logically assists the court in determining facts relating to or establishing the following: (a) The speed of the vehicle; (b) The relative positions of the vehicle and Freeman, as well as other persons; (c) The path the vehicle traveled; (d) Whether the vehicle made any sudden or unexpected movements in the direction of Freeman; and (e) Whether Gallegos had made prior threats to kill, harm or run over Freeman with his vehicle.

Comparing the record herein to Freeman's "Summary of Facts" reveals that he has incorrectly characterized certain "facts" as undisputed, when in actuality, such "facts" are, at a minimum, disputed and unclear.

In addition, he has recited voluminous purported facts which are immaterial. For example, based to a large degree on accusations by Gallegos' former spouse (Emma Alanis-Vera), Freeman has made an undisguised attempt to vilify Gallegos by indulging in an extraneous and,

in many respects, inaccurate discussion of the appellant's personal history, characterizing him as being an unfaithful husband who was physically and mentally abusive. (Respondent's Brief at 5) In fact, Gallegos had never been convicted of a crime of violence. (CP 279)

He further inaccurately claims that Gallegos attempted suicide between 2003 and 2005 on "at least three or as many as four or five times," (Respondent's Brief at 5) which, even if true, is irrelevant in that no such information had been conveyed to Freeman before he shot Gallegos.

As for the alleged "scream" to which Freeman has repeatedly referred in his declarations and in his brief, and which he claims led him to believe that Gallegos had killed Skyla McKee (CP 692, 18-25), it is significant that Sgt. Cooley, while standing next to Freeman at the time, did not hear it. (CP 168, 20-23; 172, 10-13) This is not to suggest that Freeman did not hear anything at all but to question what he did hear. In fact, during the course of his trial testimony, Freeman acknowledged that he was not sure whether what he heard actually was a "scream". (CP 171, 6-10; 174, 1-2) It is now known from a review of the 911 audio tape (Ex. 9 to respondent's second motion for summary judgment, Track 12, time 4:56 – 4:57) that Skyla McKee at one point can be heard yelling, "It's not worth it" in a loud high-pitched voice. This exclamation lasted approximately one full second and although it is not entirely clear whether this was the

“scream” to which Freeman has alluded, it seems to be the point on the audio recording at which Ms. McKee’s voice is at its loudest.

The appellant has taken space for the above discussion because Freeman has dwelled on the “scream” and because a court, in conducting the *Saucier* two-part test, allows the officer to take into consideration the nature of the crime, if any, that has been committed. However, it is submitted that Freeman’s assumption or belief, upon hearing what he was not even sure was a scream, that the woman (McKee) with Gallegos had just been killed, is patently unreasonable. (CP 692; 18-21)

More importantly, in discussing the events in the field, Freeman makes the following inaccurate and highly misleading statement:

“There is also no dispute that there were only two people in the field with or near David Gallegos just before he was shot. These two people were Skyla McKee and Deputy Freeman. Significantly, these two witnesses recount the same circumstances.” (Respondent’s Brief at 31)

It seems that Freeman is attempting to persuade the court that the descriptions of the events by Sgt. Cooley and Santos Gallegos should not be considered because neither of them were “in the field”. Although, arguably, neither Sgt. Cooley nor Santos Gallegos were “in the field”, depending on what is defined to be the field’s perimeter, it is worth recalling that Santos Gallegos had an excellent vantage point from the

south edge of the field and continuously observed the events as they unfolded up until the shooting itself. (CP 23, ¶ 23; 324, ¶ 30; 326, ¶ 38)

The respondent makes only scant reference to the description of the events from David Gallegos and only to argue that some of his statements are inadmissible. (Respondent's Brief at 23) The respondent has cited no judicial authority or procedural rules to support the proposition implied in his brief that the appellant's account of the events should be disregarded. Gallegos' testimony, like that of Freeman, may be assessed by the court by holding it up to the light of whatever facts appear to be undisputed.

It is a gross misrepresentation and distortion of the record to assert that Skyla McKee and Freeman "recount the same circumstances". (Respondent's Brief at 31, 41) To which "circumstances" is Freeman referring? Is he including his claim, contained in his police report (CP 703, Appendix 1) that Gallegos "swerved" in his direction just before he [Freeman] yelled and turned on his flashlight? If so, he has misconstrued the facts because Skyla McKee, like Santos Gallegos, stated she did not see the vehicle swerve. (CP 770, ¶ 17) It is noteworthy that Freeman has not directly addressed Sgt. Cooley's trial testimony that the vehicle remained on the road up until the moment of the shooting. (CP 252, 8-16) (See Appendix 2).

In addition, respondent Freeman also made the following inaccurate statement: “The only two witnesses in the field at the time confirm the same facts, *contemporaneously* with the events happening around them”. Based upon this essentially isolated and highly misleading assertion, the respondent then immediately leaps to the following sweeping conclusion: “Those undisputed facts alone make Deputy Freeman’s use of force objectively reasonable under the circumstances.” (Respondent’s Brief at 33)

It is not at all clear as to what constitutes the predicate for “those undisputed facts”. The respondent seems to rely heavily on his claim that only two witnesses were in the field as a foundation for his argument. If so, then his argument is untenable because, based on the record before the court, there were two other witnesses to the events in the field besides McKee and Freeman and their observations, in combination with the testimony of the appellant, thoroughly discredit most of Freeman’s version of the events, particularly with respect to critical factual issues, i.e. whether he was continually “tracked” by the vehicle and whether it ever swerved directly at him. Further, by using the word “contemporaneously”, Freeman seems to be implying that this court should ignore, or place less weight upon, the conclusions reached by the Bellingham Police Department investigators following the events.

Freeman's claim that he obtained permission from Cooley to "follow the sound of the scream" (Respondent's Brief at 15), is not corroborated by Cooley, who indicated Freeman basically just "took off" upon hearing the sound. (CP 183, 14-16) Although it is arguably immaterial whether or not he had such permission, this statement casts further doubt on the accuracy of Freeman's account of the events.

Freeman states that he was "illuminated by the vehicle's headlights so he began stepping to the side of the path to get out of the way. (CP 388-89) However, the vehicle continued to approach Deputy Freeman, and as he stepped off the path, it appeared to Deputy Freeman that the vehicle's lights continued to track him." (Respondent's Brief at 16)

With respect to this issue, his statements in his declarations and his trial testimony were considerably more specific in stating that he was in the headlights and being tracked by the vehicle from the outset of the vehicle's initial movement from the north end of the field.. (CP 187, 6-11) This claim is belied by the fact that none of the five other people in the vicinity observed Freeman at all after Gallegos turned on the headlights until an instant before the shooting occurred when Freeman shined his flashlight.

Conspicuously omitted in Freeman's Summary of Facts, and in his entire argument, is any reference to the claim inserted in his police report that he saw the vehicle "swerve directly at me to the east side of the

pathway”. (CP 703, Appendix 1) It is especially significant that there is no mention whatsoever in the Respondent’s Brief of the physical evidence, reported by Bellingham Police Department investigators, consisting of visible, continuous tire impressions on the roadway over its entire distance from the north end of the field to the point at which Gallegos was shot. (CP 705-708; see the Total Station Diagram at CP 709)

To summarize, Freeman has utterly failed to refute the copious evidence from which it can reasonably be inferred that at no time before he was shot did Gallegos ever swerve or even steer his vehicle at Freeman. Freeman’s claim that the vehicle continuously tracked him the entire time is rendered, at a minimum, highly doubtful by the tire impressions and the observations of the witnesses, including Sgt. Cooley.

By his own account, Freeman was not on the road as the car drew closer. In fact, in his report, written much closer in time to the events and at a time when his recollection would presumably have been more accurate than when he signed declarations years later, he estimates he was *twenty feet away from the side of road* just before he yelled, turned on his flashlight and fired. (CP 703) (Appendix 1)

By themselves, Santos Gallegos’ observations, which included, “It was clear to me that neither of the officers was in danger of being hit my brother’s vehicle when Deputy Freeman shot him”, are sufficient to

validate the conclusion that the issue as to whether Freeman, or anyone else, was in imminent danger of grave harm when the shooting occurred is, at a minimum, genuinely in dispute. (See Declaration of Santos Gallegos at CP 327 ¶ 41)

Respondent has stated as a fact that Gallegos exclaimed after the shooting that he “knew Sergeant Cooley did not shoot him because he saw the person that shot him and that person had a dog.” (Respondent’s Brief at 18) Gallegos denies he made any such statement (CP 616, ¶ 13) and denies any allegation that he saw any officer in the field, let alone knew his location. (CP 615 ¶ 5)

Finally, the respondent states that, “[I]t is of no importance that Plaintiff’s experts, in hindsight, have opined that Deputy Freeman was not in harm’s way, that he could have moved off the path, or that the car was not going as fast as he believed.” (Respondent’s Brief at 32) This statement is false, misleading and, in regard to the path, is nonsensical. None of the respondent’s experts “opined” that Freeman “could have moved off the path.” The statement implies that Freeman, or some other person, has claimed he was located “on the path” just before the shooting occurred. To the contrary, it is undisputed that Freeman was well “off the path” when he shot Gallegos and the experts took this undisputed fact into consideration in reaching their respective opinions as to whether imminent

danger existed. As noted, Freeman himself estimated he was twenty feet off the path.

Appellant is also compelled to address the statement that Gallegos “actively resisted arrest by failing to stop his vehicle when ordered to do so.” (Respondent’s Brief at 37) Obviously, Gallegos had no meaningful opportunity to stop because he was shot almost immediately after Freeman yelled.

Respondent further claims that the appellant has produced no expert to argue that “Freeman acted as any other reasonable officer would have in the situation, and fired his weapon.” (Respondent’s Brief at 37) Indeed, all three of the appellant’s experts, whose opinions are in the record, opined that Freeman’s conduct in shooting Gallegos was unreasonable and/or unnecessary. (CP 623 ¶ 30; 715 ¶ 24; 335 ¶ 33)

C. Mental State of David Gallegos

The respondent has argued that the court may consider the reasonableness of officers’ use of force in light of whether officers knew that an individual was mentally unstable. (Respondent’s Brief at 30, citing, *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir.2001).⁴ However, he fails to

⁴ *Deorle, Id.*, offers an excellent analysis of qualified immunity doctrine in a case involving a suicidal individual who was seriously injured after being struck with a lead-filled beanbag fired at close range from a shotgun after he had made threats directed at an officer and brandished a hatchet at one of the offers.

explain the manner in which this particular knowledge affects the analysis of whether an officer's use of force was objectively reasonable. There is no suggestion in *Deorle, Id.*, that if a suspect is mentally unstable or suicidal, the officer has greater license to shoot him.

Freeman's emphasis on the mental state of Gallegos and his suggestion that because he [Gallegos] had earlier "attempted suicide", he [Freeman] had additional justification for utilizing deadly force is not supported by decisional law and he has failed to cite any authority supportive of such a proposition. *Deorle, Id.* and *Glenn v. Washington County*, ___ F.3d ___ W 6760348 (9th Cir.2011)

D. Credibility of Deputy Freeman

Essentially the only "evidence" to support the conclusion that Freeman was in imminent danger of being killed or seriously injured is his own version of the events as described in his brief and through declarations submitted respectively in support of each of his summary judgment motions. Accordingly, he has placed his own credibility in issue, thereby inviting a response from the appellant.

Because he has failed to refute, through undisputed evidence, that appellant's vehicle was driven continuously within the edges of the road up to the point of the shooting and because it must be assumed, taking the facts in the light most favorable to Gallegos, that the vehicle never did

swerve directly at or in the direction of Freeman, the claim by Freeman that he “believed” his life was in danger when he shot Gallegos, assuming he actually believed it, is an unreasonable belief.

Although he stated in his police report at page 4 (CP 703; Appendix 1) that the vehicle was going as fast as 35 to 40 miles per hour, he has eschewed any meaningful discussion in his brief of the actual speed of the vehicle. Moreover, he has omitted any reference to the estimates offered by Santos Gallegos, (CP 251, 10-12; 344, ¶ 29) Gaylan Warren, (CP 713 ¶ g) and the BPD testing results, with respect to which Paul Tillman testified at trial that Gallegos was likely traveling at a speed of around 17 mph when he was shot. (CP 247) Instead, Freeman merely states, “the only two witnesses, other than the plaintiff himself, both note that the Plaintiff was driving at a high rate of speed.” (Respondent’s Brief at 31)

Since his police report was written, Freeman has avoided repeating the claim that Gallegos swerved in his direction when the vehicle was within fifty feet of him. It is significant that he says the swerving occurred before he yelled at Gallegos to halt and before he then turned on his flashlight. It is obvious from his report that he did not consider himself to be in imminent danger and did not take any protective action until he allegedly saw the vehicle “swerve directly at me”. But we now know that the vehicle did not swerve at Freeman; *ergo*, he was never in imminent

danger of being killed or seriously injured by Gallegos. Moreover, his report indicates that he yelled at Gallegos to stop *after* Gallegos allegedly swerved at him and then, according to his account, he apparently still had sufficient time to yell “halt”, light up the interior of the car and take aim before shooting. (Appendix 1)

Furthermore, all three shots were well placed in that they all struck Gallegos. This placement of the shots leads to the inference that Freeman had time to take aim and was not jumping or scrambling to get out of the way of the vehicle. It is a reasonable inference from these facts that Freeman ambushed Gallegos in the sense that he had decided to shoot Gallegos well before the vehicle was within fifty feet, perhaps because he [Freeman] had unreasonably assumed that Gallegos had just killed Skyla McKee. (CP 692; 18-21)

In his declaration filed in support of his 2007 motion for summary judgment (CP 78-81) Freeman stated as follows:

“I fired my weapon because I believed he was trying to run me over with his car. *He had continuously tracked me* while I was trying to get out of his headlights. He did not stop, or turn away from me. In fact, as I moved to the right he turned into me. I knew he was unstable, he was threatening to take his own life, and I was fearful that he wanted to take mine as well. *It crossed my mind* that he was trying to take as many others with him as he could. Not only me, but *Sergeant Cooley and the two citizens down at the end of the road. I gave him every chance to stop and waited as long as I could. I did not want to shoot,*

but his actions left me no choice. I felt that if I did not shoot I would either be killed or seriously injured. (CP 81) [emphasis added]

When dissected, the above statement alone reflects that Freeman's version of the events is doubtful when considered with his acknowledging that he turned on his flashlight immediately after he yelled something to the effect of "Sheriff, K9, Stop" and that, by his own admission, only as little as one to three seconds elapsed after turning on the light before he began shooting. (Respondent's Brief at 36) This undisputed rapid sequence of events just prior to the actual shooting hardly comports with the claim that he gave Gallegos "every chance to stop" and waited "as long as I could." (CP 81)

E. Applicable Decisional Law

Respondent has cited no less than six automobile pursuit cases, most of which involved shockingly egregious driving at extremely high speeds over considerable distances and time.⁵ For this reason alone, these cases are distinguishable and not the least bit helpful in addressing the issues herein.

⁵ *Scott v. Harris*, 550 U.S. 372, 127 S.Ct. 1769 (2007); *Billington v. Smith*, 292 F.3d 1177 (9th Cir.2002) *Pace v. Bianco*, 283 F.3d 1275 (11th Cir.2002); *Scott v. Clay County*, 205 F.3d 867 (6th Cir.2000) *Cole v. Bone*, 993 F.2d 1328 (8th Cir. 1993); *Smith v. Fredlund*, 954 F.2d 343 (6th Cir.1992).

Additionally, a review of the judicial opinions in all of the car-chase cases, including *Brosseau, Id.*, demonstrates that, unlike the situation presented here, the salient, material facts were essentially undisputed and the respective suspects had repeatedly disobeyed commands by the police before force was utilized. Consequently, it is submitted that the six cases involving Hollywood-style car chase cases have no value in determining whether Freeman's conduct was objectively reasonable.

Likewise, *Forrett v. Richardson*, 112 F.3d 416 (9th Cir.1997), a case which went to trial on Forrett's § 1983 excessive force claims and involved an hour of "hot pursuit", has no precedential value in analyzing the instant case because *Forrett* presents an entirely dissimilar set of facts and for the further reasons that the suspect conceded that the officers had probable cause to believe he had committed a crime involving the infliction of serious harm and that he was consciously attempting to evade arrest. *Forrett, Id.*, at 420.

On the other hand, *Cowan v. Breen*, 352 F.3d 756 (2nd Cir.2003), in which the driver of an automobile was shot and killed, is a case involving facts very similar to the instant case, certainly more similar than any of the car chase cases cited by the respondent, and yet the respondent, devoid of any serious analysis, summarily dismisses *Cowan* as having "facts so

different” that the “reasoning is not applicable to this case.” (Respondent’s Brief at 39) (See Appellant’s Opening Brief at 36-37).

Brosseau, Id. was discussed at length in the appellant’s memorandum filed in response to Freeman’s 2011 summary judgment motion and the factual dissimilarities were meticulously described. (CP 662-663) Clearly, *Brosseau* is not a factually analogous case for the reason, *inter alia*, that the material facts were not in dispute. One of the undisputed facts was that, at the time of the shooting, a woman and her three-year old daughter were occupying a small car situated directly in front of the suspect (Haugen) and were at risk of grave harm when Haugen, despite multiple attempts by Officer Brosseau to prevent him from doing so, managed to get his car started and began moving forward.

Another case which has some factual similarities to the instant case is *Starks v. Enyart*, 5 F.3d.230 (7th Cir.1993). (Please see the discussion, at CP 125, of the *Starks, Id.* case in the Plaintiff’s Memorandum filed in response to Freeman’s 2007 motion for summary judgment. CP 125)

Although Freeman has presented a quotation from *Scott v. Harris*, Id.,550 U.S. 372, he has not furnished any reasons whatsoever why *Scott* has any factual precedential value to the instant case. The fact that in *Scott* the entire sequence of events culminating in Harris crashing his vehicle and sustaining injuries, which rendered him a quadriplegic, was captured on

video led the court to observe that the facts were not in dispute, thereby refuting the claimant's version.

Finally, Respondent has cited *Harris v. Roderick*, 126 F.3d 1189, 1203 for the proposition that this "case law clearly establishes that law enforcement officers may shoot to kill when a suspect is fleeing and his escape will result in a serious threat of injury to person." (Brief of Respondent at 41-42). It is submitted that a review of this opinion reflects that this proposition, as described by Freeman, was not validated by the court and that although the officer who shot Harris made this argument, the court, without specifically accepting or rejecting it, found that shooting Harris was objectively unreasonable.

F. Exclusion of Evidence

In his brief respondent offers a discussion in support of his position that the declarations of appellant's expert, D.P. Van Blaricom should be excluded. In support thereof, he has alluded to a single statement made by Van Blaricom during the course of his deposition. (Respondent's Brief at 21) It is submitted that one would have to know the context of this statement to ascertain if it is truly "contradictory" to the statements made in his declaration and report. (Respondent's Brief at 21) It should be obvious that a party is not entitled to exclude the entire report of an obviously qualified expert merely by citing an isolated deposition

statement which he characterizes as inconsistent with opinions offered in the expert's declaration but then fails to provide the full context within which the deposition statement was made. The extent, if any, to which any statement made by Van Blaricom in his declaration is "contradictory" to a prior deposition statement may certainly be taken into account by the court in determining what weight to place upon his opinions but the statement itself should not, *ipso facto*, provide a basis for excluding altogether the expert's opinions.

Most importantly, even assuming, *arguendo*, that Van Blaricom was speaking of negligence at one point during his deposition, his conclusion that Freeman's conduct was not objectively reasonable would nevertheless be relevant to qualified immunity. The quality of his analysis and the validity of his opinions is a matter for this court.

The opinions of forensics scientist, Gaylan Warren, are based upon his examination of virtually all of the physical evidence, a review of the police reports, including the BPD report and the Total Station Diagram. An expert opinion on the ultimate issue in a case is permissible both at trial and with respect to summary judgment. ER 702, 704; *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 350, 588 P.2d 1346 (1979)

The respondent has failed to offer a valid basis for excluding Warren's opinion and, accordingly, respondent's argument that a portion of

Warren's declaration should be excluded also has no merit. It is fundamental that any expert witness must first recite and address certain facts before rendering opinions or deriving inferences based upon those facts.

The respondent has not asked this court to exclude the opinion testimony of appellant's initial expert witness, Ed Mott, who concluded, after reviewing considerable evidence, including police reports, that Freeman's use of deadly force was not objectively reasonable. (CP 328-325)

As for the supplemental declaration of David Gallegos, the respondent seeks to persuade this court to disregard various statements (CP 615, ¶'s 7-10) on the grounds that such statements are "self-serving, and nothing but speculation and, therefore do not constitute facts." (Respondent's Brief at 23) A review of the statements, e.g. "The road was somewhat slick. . .", discloses that the Respondent's claim is contrary to the record. He also has asserted the Gallegos Supplemental Declaration contradicts prior deposition testimony but he has failed to designate which statements are contradictory.

G. State Law Negligence and Battery Claims

It is the appellant's position that the state law claims should not be dismissed if the court concludes that Freeman is not entitled to qualified

immunity. In his 2011 motion for summary judgment, Freeman sought dismissal of the causes of action based on negligence and assault on the grounds that he is “. . . Entitled to State Law Qualified Immunity . . . “ (CP 417) As the respondent himself notes, *Guffey v. State*, 102 Wn.2d 144, 152, 690 P.2d 1163 (1984) and *McKinney v. City of Tukwila*, 103 Wn.App. 391, 409, 13 P.3d 631 (2000) hold that an officer is not entitled to qualified immunity upon using excessive force unless he demonstrates that he “acted reasonably” under the circumstances. (Respondent’s Brief at 43) Gallegos does not disagree.

The respondent has neither identified any substantive distinction between “qualified immunity under state law” and under federal law nor has he suggested a different analysis should be followed under state law. Therefore, appellant’s arguments challenging Freeman’s claim to qualified immunity apply with equal force to the constitutional claims and the state law claims.

Recognizing that, pursuant to *Saucier, Id.* at 200. qualified immunity is not a mere defense but is an immunity from suit, it was considered that the trial court’s ruling that Freeman is entitled to qualified immunity logically subsumed all of the plaintiffs’ claims against him. It would undermine the entire concept of qualified immunity to hold that Freeman is immune from suit for his conduct because he enjoys qualified

immunity but that Gallegos may nevertheless proceed with his negligence action.

As for the argument by respondent that the appellant has failed to show that Freeman owed him a duty of care, appellant submits that no authority is required to defeat the proposition that notwithstanding a determination that his conduct in shooting Gallegos was objectively unreasonable, he nevertheless can escape liability for negligently shooting Gallegos because he owed Gallegos no duty of due care.

The same analysis applies to the appellant's common law battery claim. If Freeman's conduct in using deadly force is determined to be objectively unreasonable, then, *ipso facto*, he has committed a battery.

H. The Right Freeman Violated was Clearly Established.

Even without the benefit of pre-existing court decisions involving cases factually "on all fours" to the instant case, any reasonable officer would recognize that shooting a driver when he is proceeding at a modest speed and is not presenting a risk of killing or seriously injuring the officer or anyone else would be unlawful, especially when there is no evidence indicating that the driver has earlier committed a violent felony or that he has been threatening the officer or any other person.

I. Summary

It is readily apparent that Freeman has abandoned the claim on page 4 of his police report (CP 383) that when Gallegos reached a distance within 50 feet, he [Freeman] “saw it [the vehicle] swerve directly at me to the east side of the pathway...”⁶ Consequently, in light of the overwhelming evidence that Gallegos did not deviate from the road, it should be considered an undisputed fact that Freeman was never in any danger of being run over. As for the risk of imminent harm to others, about the most that Freeman has said is that it “crossed my mind that [Gallegos] was trying to *take out as many others with him as he could.*” (CP 81, 13-14) The only others to whom he refers are Sgt. Cooley and two citizens he describes as being located “*down at the end of the road.*” (CP 81)

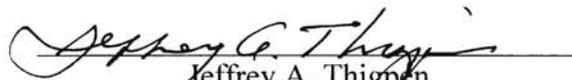
Therefore Freeman’s claim that he “became afraid” when he “realized” that the vehicle “was not stopping” [within a second after he yelled his command] (See Declaration of Jeremy Freeman, CP 389 ¶ 18), even if true, does not make shooting Gallegos objectively reasonable if his fear was unreasonable in light of his location off to the side of the road and the speed and direction of the vehicle.

⁶ In neither of his summary judgment declarations did Freeman repeat the allegation that Gallegos swerved at him.

For Freeman to avail himself to qualified immunity, it is incumbent upon him to show much more evidence favoring the reasonableness of his conduct than his mere claim he was in fear that either he or some other person was at serious risk of death or serious bodily harm. He must demonstrate, through undisputed facts, that such a fear was reasonable, i.e. that a reasonable officer would have had the same fear under the circumstances. *State v. Bilieu*, 112 Wn.2d 587 773 P.2d 46 (1989)

Because Freeman's version of the critical facts is thoroughly discredited by reliable evidence, there are genuine issues of material fact relating to the determination of as to whether shooting Gallegos was objectively reasonable. Assuming, as indicated by the facts, that neither Freeman nor anyone else was in imminent danger at the time of the shooting, a reasonable officer would certainly have known that utilizing deadly force under such circumstances would be unlawful. Accordingly, Freeman should not be legally permitted to avoid a jury trial on the grounds that he is entitled to qualified immunity.

Respectfully Submitted this 13th day of April, 2012.


Jeffrey A. Thigpen
Attorney for Appellant

APPENDIX

OFFENSE DESCRIPTION:		DATE:	EVENT NUMBER:
() VICTIM INVOLVED SHOOTING		02-10-05	05A02800
<input checked="" type="checkbox"/> CONT. NARRATIVE <input type="checkbox"/> FOLLOW-UP			05A-2788
1. Reconstruct incident and describe investigation. 2. Victim's injuries - details and where medical exam occurred. 3. Property damaged - describe and indicate amount of loss. 4. If significant, describe vehicle.		5. Identify undeveloped leads. 6. List statements taken. 7. List persons from whom statements need to be taken later. 8. Physical evidence - detail what and where found, by whom, and disposition.	
ADDITIONAL COPIES TO:			

NARRATIVE:

hear her scream again. When I did not hear the woman again, it increased my fear that she had been killed.

At that point I told Sergeant Cooley that I was going to make my way back to where I thought I heard the scream come from. My K-9 Deuce and I started to jog along the wheel rut pathway north into the field. As we started to jog, the two people Sergeant Cooley was speaking with started to come with us. I stopped, and almost in unison, Sergeant Cooley and I ordered them to stay back where they were. They stopped, and K-9 Deuce and I continued to jog into the field with Sergeant Cooley following us.

After running approximately one hundred yards into the field I saw vehicle headlights come on pointing south toward us. What-Comm gave another update that Mr. Gallegos was out in the field inside of his car. I radioed What-Comm that we were about to contact him, and I asked for emergency traffic. Another unit walked over my radio traffic, but 2 Sam 10 relayed my request to What-Comm. What-Comm confirmed my request for emergency traffic.

I requested emergency traffic because we were about to contact an individual who was now in my mind a suicidal criminal suspect who may have just murdered or seriously hurt the woman who screamed. The situation appeared to be a serious officer and public safety situation, and I wanted the radio open so we could communicate and relay information without being interrupted.

I continued to move north toward the vehicle and where the scream came from, but I moved to my right (east) out of the direct light from the headlights. As I moved, I drew my primary handgun because I believed Suspect Gallegos to have firearms with him, and I feared he was just using his vehicle lights to illuminate us so he could shoot at us.

The vehicle engine started revving while I was still about two hundred yards away, and then it appeared the driver put the vehicle into gear as it rapidly accelerated south toward us on the wheel rut path. The vehicle accelerated to approximately thirty-five to forty miles per hour, and I had moved about twenty feet to the east side of the pathway. I was side stepping to my right (east) so I could watch the vehicle as I moved.

The vehicle was now about fifty feet from me, and I could see it was a red car. There was nothing for me to hide behind that would shelter me from the impact of the car, and there was no way for me to outrun the car in the open field either. As the car came closer I saw it swerve directly at me to the east side of the pathway, and the car's headlights illuminated me as I continued to move to my right. I had my flashlight in my left hand with the dog lead loop around my left middle finger. I illuminated the interior of the car with my flashlight, and I yelled "Sheriff K-9 stop." I could see the interior of the vehicle through the windshield, and it appeared to be

REPORTING OFFICER:

J. Freeman

REVIEWING OFFICER:

7A146

CP 252, 8-16

Question: As the vehicle was traveling down the path, did you watch the vehicle the whole time?

Answer: Yes

Question: And did it appear to be traveling straight down the path?

Answer: It did.

Question: Any divergencies that you saw?

Answer: I didn't see any divergencies after the initial fishtailing at the beginning.

APPENDIX 2

CERTIFICATE OF SERVICE

I, Sandra Harper, hereby certify that I am the paralegal for attorney Jeffrey A. Thigpen and that on the date below, I caused the foregoing Reply Brief of Appellant to be served upon the attorneys of record identified below in the manner indicated.

PATTERSON BUCHANAN FOBES, LEITCH & KALZER Attn: Sarah Spierling Mack 2112 Third Avenue, Suite 500 Seattle, WA 98121	<input checked="" type="checkbox"/> VIA REGULAR MAIL <input type="checkbox"/> VIA ELECTRONIC DELIVERY <input type="checkbox"/> HAND DELIVERED <input type="checkbox"/> BY FACSIMILE <input type="checkbox"/> VIA FEDERAL EXPRESS
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Whatcom County Prosecutor's Office Attn: Randall J. Watts 311 Grand Avenue, Suite 201 Bellingham WA 98225	<input type="checkbox"/> VIA REGULAR MAIL <input type="checkbox"/> VIA CERTIFIED MAIL <input checked="" type="checkbox"/> HAND DELIVERED <input type="checkbox"/> BY FACSIMILE <input type="checkbox"/> VIA FEDERAL EXPRESS
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I declare under penalty of perjury under the law of the State of Washington that the above statement is true and correct.

Signed in Bellingham, Washington this 13th day of April, 2012


Sandra Harper