AO44
(Rev. 11/07)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

INVOICE NO: 00004886

MAKE CHECKS PAYABLE TO:

Amy Hughes
Amy Hughes
P.O. Box 656
Cortaro, AZ 85652

Phone:

Dianne Davenport, RDR, CRR
United States Court Reporter
405 W. Congress
Suite 1500
Tucson, AZ 85701

Phone: (520) 205-4266

Dianne_Davenport@azd.uscourts.gov

[X] CRIMINAL [ ] CIVIL

DATE ORDERED: 02-11-2014

DATE DELIVERED: 02-18-2014

Case Style: CV 11-366, HUGHES v KISELA
Motion Hearing 12-9-13

CATEGORY	ORIGINAL			1ST COPY			2ND COPY			TOTAL CHARGES
	PAGES	PRICE	SUBTOTAL	PAGES	PRICE	SUBTOTAL	PAGES	PRICE	SUBTOTAL	
Ordinary	32	3.65	116.80							116.80
14-Day										
Expedited										
Daily										
Hourly										
Realtime										
Misc. Desc.									MISC. CHARGES:	
									TOTAL:	116.80
									LESS DISCOUNT FOR LATE DELIVERY:	
									TAX (If Applicable):	
									LESS AMOUNT OF DEPOSIT:	113.00
									TOTAL REFUND:	
									TOTAL DUE:	~~3.80~~

Deposit Date: 02-13-2014

paid in full

ADDITIONAL INFORMATION

Full price may be charged only if the transcript is delivered within the required time frame. For example, if an orc for expedited transcript is not completed and delivered within seven (7) calendar days, payment would be at the ordinary delivery rate.

CERTIFICATION

I certify that the transcript fees charged and page format used comply with the requirements of this court and the Judicial Conference of the United States.

SIGNATURE: Dianne Davenport

DATE 2-18-14

(All previous editions of this form are cancelled and should be destroyed)

1 IN THE UNITED STATES DISTRICT COURT

2 DISTRICT OF ARIZONA

3

4 AMY HUGHES, a single woman,) CV 11-366-TUC-FRZ
)
5 Plaintiff,)
)
6 v.)
)
7 CORPORAL ANDREW KISELA, 0203) December 9, 2013
both individually and in his) Tucson, Arizona
8 official capacity,)
)
9 Defendant.)

10

11 MOTION HEARING

12

BEFORE: HONORABLE FRANK R. ZAPATA
13 UNITED STATES SENIOR COURT JUDGE
405 W. CONGRESS
14 TUCSON, ARIZONA 85701

15

16 A P P E A R A N C E S

17 FOR THE PLAINTIFF: MR. VERNON PELTZ, ATTORNEY AT LAW.

18 FOR THE DEFENDANT: MR. PAUL CORREA, ASSISTANT
ATTORNEY GENERAL.

19

20

21

DIANNE DAVENPORT, RDR, CRR
22 405 W. CONGRESS, SUITE 1500
TUCSON, ARIZONA 85701
23 (520)205-4266

24

25 Proceedings Prepared by Computerized Realtime Translation

1 PROCEEDINGS

2 (Call to order of court, 10:05 a.m.)

3 THE CLERK: Civil matter 11-366, Amy Hughes versus

4 Andrew Kisela, on for motion hearing.

5 Counsel, please state your appearance.

6 MR. PELTZ: Vernon Peltz appearing for the plaintiff, who

7 is present seated to my right.

8 THE COURT: Good morning.

9 MR. CORREA: Paul Correa for the Arizona Board of

10 Regents and the state defendants.

11 THE COURT: Good morning.

12 We had a slight glitch before we started. So we are set

13 for hearing this morning on the defendants' motion for summary

14 judgment.

15 Mr. Correa, are you ready to proceed?

16 MR. CORREA: Yes, Your Honor.

17 I've laid out a couple of legal arguments in our motion

18 for summary judgment. It's really a qualified immunity motion.

19 Although the facts that are undisputed seem clear enough that this

20 was not a use of excessive force under controlling precedent in the

21 Ninth Circuit.

22 So either way that you take it, I think that the officer in

23 this case is entitled to summary judgment. He's sued in his official --

24 or in his individual capacity under section 1983.

25 I've set out in the reply what the facts have settled upon

1 as undisputed looking at the plaintiff's counterstatement of facts and
2 our undisputed -- and our statement of facts and tried to collect for
3 the court what facts are now agreed on or weren't controverted and so
4 should be accepted as admitted or uncontroverted for purposes of this
5 motion. I won't go through all of that again.
6 The court is, I'm sure, very familiar with the standards
7 for excessive force under Graham v. Connor and very familiar with the
8 qualified immunity analysis in this circuit, but I did want to just
9 emphasize a couple of points and I think pictures speak louder than
10 words.
11 We attached as Exhibit 1 to the statement of fact a color
12 photograph of the weapon. And I'll put that up here. I've got it
13 upside down I guess. I guess it doesn't matter.
14 So there isn't any dispute that this was a deadly weapon
15 that was in the hands of Ms. Chadwick (sic). And it's unfortunate that
16 she was injured and she is probably fortunate that she wasn't killed.
17 The officer shot four times.
18 But objectively what was presented to the officer was
19 somebody holding a deadly weapon in his hand. There isn't any
20 dispute about it. So that's what we are looking at.
21 Another fact that was mentioned in the motion was that
22 there was a fence between the officers and Ms. Chadwick and Ms.
23 Hughes that prevented the officers from other options that might have
24 been available.
25 Of course under the analysis, there isn't any requirement

1 for the officers to use the least intrussive force. The only question
2 under the qualified immunity analysis is whether the use of force was
3 reasonable under the circumstances.
4 But here one of the circumstances was this -- maybe I'll
5 turn it. There was a fence between the officers and the subjects that
6 they were making contact with that would have prevented the officers
7 from jumping over the fence under the exigencies, you know, in an
8 effective way and would have prevented them from firing the taser
9 through the chain-link fence to incapacitate what they perceived to be
10 was an assailant.
11 And this is -- it's really an academic point because, as I
12 mentioned, there isn't any requirement they use the least intrusive
13 amount of force, but the plaintiff had raised the argument that they
14 ought to have perhaps used a taser which is certainly something that
15 the UAP officers carry.
16 And I attached as Exhibit A in our reply a picture of the
17 taser. You can see they have got a square shape. The top end of this
18 actually pops off when the barbs are fired and barbs come out here
19 and here and then go aways connected to wires back to the taser
20 device.
21 So it would be difficult at best, if it's even possible, to fit
22 something like that through a chain-link fence. And our expert spoke
23 to that a little bit. So here is the close-up of the chain-link fence.
24 So those are some of the facts, Your Honor.
25 Again, it's unfortunate that Ms. Chadwick (sic) was

1 injured. Nobody considers that a desirable outcome. But the question
2 for the court under the qualified immunity analysis is whether the
3 officer who encounters somebody holding a deadly weapon who
4 refuses more than one command to drop it and is close enough to
5 strike somebody who she is engaging with that weapon whether a
6 reasonable officer would know that it is clearly established to be
7 unconstitutional for him to use deadly force to prevent an attack or
8 deadly injury.
9 And the law in the Ninth Circuit is certainly that it's not.
10 There's a case that's even more tragic than this out of the Ninth Circuit
11 out of California involving a kid with a sword who was trying to get
12 into the house where he lived with his parents. And there was deadly
13 force used to stop him from entering the house.
14 This case I think is controlled by the analysis in that
15 Ninth Circuit case.
16 Does the court have any questions about the motion?
17 THE COURT: Factually let me ask you this. In this
18 situation, Officer Kunz, I believe is her name, K-u-n-z --
19 MR. CORREA: Yes.
20 THE COURT: -- stated that she heard Ms. Hughes
21 speaking to or stating -- at least I think her assumption was she was
22 speaking to Ms. Chadwick stating "Give it to me" or "Just give it to
23 me" or something like that.
24 MR. CORREA: Yes.
25 THE COURT: My recollection is that the other officers,

1 they didn't report hearing that.

2 MR. CORREA: Right.

3 THE COURT: That exchange. Or maybe I missed that

4 somewhere along the line. Is that -- is my recollection of the facts

5 that have been presented, is that -- the only one that reports hearing

6 that is Officer Kunz while Officer Kisela does not report hearing any

7 conversation between or demands from Ms. Hughes to Ms. Chadwick

8 "Give it to me."

9 MR. CORREA: Right. That's not in his statement. You

10 know, as the court understands, the background to this was that Ms.

11 Hughes believed that Ms. Chadwick owed her money. And the

12 statement of Ms. Chadwick is that she actually did give her the $20.

13 So from our perspective, from the defendants'

14 perspective, this is an interesting fact. Not that the officers don't all

15 remember hearing it because it's not unusual for different people to

16 remember different parts of an event more clearly or to forget bits that

17 somebody else recalls. That happens all the time when you have more

18 than one witness telling the story again.

19 But what's important I think for our facts is that Ms.

20 Chadwick says that she did give the money to Ms. Hughes and that

21 puts Ms. Hughes extremely close to Ms. Chadwick holding the knife

22 close enough to take $20 from Ms. Chadwick's hand. That puts her

23 certainly close enough to strike her with the weapon.

24 THE COURT: And in this situation Officer Kisela says

25 that he observes movement of the knife on the part of Ms. Hughes

1 that he took to be a threatening movement of the knife. I don't recall
2 the other officers, either Officer Garcia or Officer Kunz, saying that
3 they saw that movement other than she was carrying the knife.
4 What about that situation?
5 MR. CORREA: Right. Again, the critical perspective is
6 Mr. -- is Corporal Kisela's perspective, and he reports having seen
7 some movement that he identifies as one of the things that's a factor
8 in his mind as he's making that split-second decision whether to use
9 deadly force or not, and he does.
10 The other officers don't have that in their statements.
11 Of course at this point, nobody has been deposed.
12 There is movement reported by Ms. Chadwick. She
13 reports a lot of movement of the knife perhaps from hand to hand and
14 Ms. Hughes -- in Ms. Hughes' hand. So her statement is consistent
15 with Corporal Kisela's and in fact it even goes beyond that.
16 If Ms. Chadwick (sic) was moving the knife from hand to
17 hand or moving it in any way, that certainly could be considered
18 menacing from the perspective of an officer who is encountering them
19 and doesn't know anything else about the people.
20 THE COURT: And her statement differed also from the
21 other police officers who said basically she was holding the knife down
22 when she was approaching Ms. Chadwick.
23 MR. CORREA: Right.
24 THE COURT: In Ms. Chadwick's statement, there was a
25 statement -- I believe it was in her affidavit, was it not? -- that she

1 was moving the knife from hand to hand or saw her move the knife
2 from hand to hand which -- well, that's different than what the other
3 people perceived.
4 MR. CORREA: It may not have been in her affidavit. It
5 may have been in her declaration. I don't recall. It was not
6 controverted.
7 THE COURT: It was in one of her statements. I don't
8 recall which statement. I think it is fairly -- there's some divergence
9 between her initial statements, I'm speaking of Ms. Chadwick, to the
10 police as to the affidavit that she later filed --
11 MR. CORREA: Yes.
12 THE COURT: -- as to her state of mind at that point,
13 whether she had some fear, things that she saw.
14 But the thing is that, of course, was not something
15 known to the officer at the time that he acted. And the question
16 whether he acted properly or improperly at that point can only go to
17 what he knew, what he had in his knowledge at that point when he
18 acted.
19 So later we have information first of all -- and I say this
20 only because it was mentioned by plaintiff, I think, and I don't
21 remember by both sides -- about the conversations that Ms. Chadwick
22 says to have taken place between her and Ms. Hughes when she's
23 inside the house holding the knife in a threatening manner over one of
24 her dogs that -- but that, of course, is something that came to light
25 after the fact and that really has no applicability at this point.

1 I mention it only because it seemed that was an issue
2 that was raised or at least information put forth in the pleadings.
3 MR. CORREA: Right. The court mentioned the position
4 of the knife, you know, and I think it's not controverted at this point
5 that she had the knife.
6 It shouldn't matter whether the knife was being held
7 over her head or down at her side. Either way a person can close to a
8 point where the knife is used to deadly effect bringing the knife up or
9 bringing it down. That's something I think our expert, Bennie Click,
10 discussed briefly in his report. And, again, it's not controverted.
11 THE COURT: As to what starts this whole unfortunate
12 situation going forward is a report to the Tucson Police Department
13 from an individual who claims to have seen a woman unidentified at
14 that point by name but identified I think by what she was wearing as
15 having a large knife and that -- acting erratically I believe was the
16 situation and seen hacking at a tree in somebody's yard I believe it
17 was.
18 MR. CORREA: Yes.
19 THE COURT: That was information that was relayed to
20 Officer Kisela.
21 Is that information that he could rely upon in making his
22 decision as to whether or not there was a threat present that he had to
23 take some action against when he saw?
24 MR. CORREA: Sure.
25 THE COURT: At that point my understanding is that it's

1 clear that the person that made the original call spoke to the officers
2 while they were right in front of the house and identified Ms. Hughes
3 as the person that they had seen -- or she had seen with a knife
4 hacking at the tree and acting erratically at that point.
5 MR. CORREA: Right. All of that information goes into
6 the calculus of whether the officer would have reasonably perceived
7 there was a threat, how he would have perceived the exigencies of the
8 circumstance and whether he would have understood that Ms.
9 Chadwick (sic) was potentially a menace. Whether she was or was
10 not, that plays into his reasonable perception. That would go, you
11 know, to the question of whether it's excessive force.
12 The question of whether there should be qualified
13 immunity is, of course, a purely legal question and we look to the
14 Ninth Circuit for guidance.
15 In this case the officer encountering someone holding a
16 deadly weapon and refusing his lawful commands more than once to
17 drop it, close enough to injure or kill somebody, that is something in
18 which the use of deadly force is not clearly unconstitutional.
19 THE COURT: And in this case as to the commands, each
20 officer in their statement is that they -- several times each officer said,
21 "Drop the knife, drop the knife." They didn't identify themselves as
22 police officers. But as I understand it from the pleadings, they were
23 dressed in full police uniforms at that point.
24 MR. CORREA: Right.
25 THE COURT: And that is somewhat different from what

1 Ms. Chadwick heard. Her statement, as I recall, is that she heard
2 them yell "drop the knife" twice.
3 MR. CORREA: Two points on that, Your Honor.
4 One, we take the facts in the light most favorable to the
5 nonmovant in this case, the plaintiff.
6 So in the reply where I've tried to sum up the
7 uncontroverted statements of fact, discounting the statements from
8 the other officers that everybody shouted several times to drop the
9 knife, we have through admissions of the plaintiff or through their
10 failure to controvert facts, at least two times Ms. Chadwick (sic) being
11 instructed to drop the knife. So more than one time.
12 And so for purposes of this motion, we can accept that
13 she was told more than one time to drop the knife without getting into
14 the dispute about how many times or how many officers.
15 And then as to Ms. Chadwick, in her statements, which
16 are also uncontroverted, she reports that Ms. Hughes had accused her
17 of calling the police. And that tells us that Ms. Hughes was aware that
18 those were police officers that were in her front yard -- or outside her
19 front yard.
20 THE COURT: And that conversation, according to Ms.
21 Chadwick, occurred after she had exited the house and Ms. Hughes
22 had exited the house as I understand those facts. Is that correct?
23 MR. CORREA: I believe so.
24 THE COURT: Well, obviously Ms. Hughes could not have
25 known that to make that allegation if she hadn't seen the police

1 officers out there.

2 So I think it is reasonable to believe that she -- if she

3 made that statement at all, if we are to credit the statement by Ms.

4 Chadwick, that that statement was made after Ms. Hughes exited the

5 house and saw the police officers there.

6 MR. CORREA: That seems to be the facts. Again, I

7 think our focus is on not necessarily what Ms. Hughes understood and

8 whether those were officers or not but what Corporal Kisela was

9 perceiving in that situation which is somebody who is refusing his

10 commands.

11 You know, I mean, hypothetically, a situation could

12 present where somebody is deaf and that is unknown to the officer and

13 they wouldn't hear their commands.

14 But if they are holding a knife and refusing to drop it and

15 engaged with somebody else, that presents an instance of apparent

16 use of deadly force against another person in which case the use of

17 force is justified at common law and not unconstitutional as an issue of

18 civil rights.

19 THE COURT: Do you have anything further?

20 MR. CORREA: No, Your Honor. Thank you.

21 THE COURT: Thank you.

22 Mr. Peltz.

23 MR. PELTZ: Good morning, Your Honor.

24 THE COURT: Good morning.

25 MR. PELTZ: You know, this wasn't just an issue of

1 whether or not some force was, you know, a little over the line. Make
2 no mistake about it, this is the ultimate use of force. There is no force
3 higher than deadly force. And Amy almost lost her life that day. She's
4 lucky to be alive, lucky to be alive.
5 Now, my understanding of the law in qualified immunity
6 is basically we can sum it up into one simple proposition. I believe I
7 cited the case that says when it comes to deadly force, the only issue
8 really in a case involving the use of deadly force is the objective
9 reasonableness of the officer. That's the only thing that's left when it
10 comes to the use of deadly force. There's no force higher than deadly
11 force.
12 And I think that's been a little bit minimized here today.
13 Because before Corporal Kisela should have shot Amy, he should have
14 been really sure that there was a threat, that he was actually saving
15 somebody's life and that there was a real danger. Because absent that
16 there's no question that his force was unreasonable.
17 Now, the defendant has consistently stated facts that,
18 you know, he says are not in dispute, but there really is a lot of
19 dispute as you have pointed out right here at this hearing.
20 It's disputed whether or not Sharon (sic) was carrying
21 the knife at her side facing away from her as she walked out there or
22 pointed at Sharon. That's a disputed fact. It's disputed by the other
23 officers who were present at the scene and said, no, I didn't -- I saw
24 the knife in her hand like this away from Sharon.
25 It is a disputed fact as to whether or not Kisela -- Kisela

1 said Sharon Chadwick was crying and visibly upset. It's disputed by
2 the other officers who were present, did not observe Sharon Chadwick
3 crying. In her affidavit she said she was not crying.
4 There was probably no time for even tears. This
5 happened by all best estimates in a five- to ten-second period. This
6 isn't something that kind of got along and the officers thought, well,
7 she is getting a little closer now.
8 This is -- those two women walked out of their house,
9 and within a few seconds after that command "Drop the knife, drop
10 the knife," boom, boom, boom, five shots rang out and Amy was shot
11 in her own front yard.
12 I notice that the defense puts a picture up of this
13 weapon. It doesn't change anything to call an ordinary kitchen knife a
14 deadly weapon. I have two of those knives at least in my own kitchen
15 because I cook. They are the handiest knives for cooking that ever
16 were. Mine are extremely sharp. If you did stab somebody, it would
17 go all the way through them.
18 The fact of the matter is it's just a kitchen knife unless
19 the person wielding it is threatening or causing some reason to make
20 someone believe they are going to stab them. It's not a weapon until
21 you use it as a weapon.
22 And the problem for the defense is the undisputed facts.
23 The only undisputed facts don't show any intent. No reasonable
24 person would believe, just by observing those things, that Amy is
25 about to stab Sharon.

1 THE COURT: Well, let me ask you, in that last
2 statement you say, it's not a deadly weapon until somebody uses it as
3 such, that it's a kitchen knife. It's a very large kitchen knife. Looks to
4 me like it's about 10, 12 inches in length, the blade.
5 But the fact is that in a situation like this, once
6 somebody uses it, then somebody is dead at that point or very
7 severely injured. And, I mean, you can't wait, I don't believe, the
8 officer certainly can't wait to see if the person is actually going to stab
9 somebody before some action is taken to mitigate the threat if the
10 officer perceives a threat.
11 That's my -- as I understand the law here. And I may be
12 incorrect, but you may correct me if I am incorrect on that.
13 MR. PELTZ: Your Honor, that is true. That is true. But
14 that's the facts that are precisely in dispute in this issue. What was it
15 that Corporal Kisela saw that a reasonable officer would believe it
16 required the use of deadly force.
17 The only things that are not disputed -- which way the
18 knife was facing, how close the person was, whether or not Sharon
19 was crying, whether there was any threatening -- none of that -- all of
20 that is disputed to the extent that it exists.
21 The only thing that the officer can rely on in this case as
22 undisputed facts are that Amy had a knife and that she was in close
23 proximity to Sharon.
24 THE COURT: Well --
25 MR. PELTZ: That's it. And on that --

1 THE COURT: What about the fact that three police
2 officers are making statements -- are yelling commands to "Drop the
3 knife, drop the knife"? And viewing the evidence in the light most
4 favorable to the plaintiff, Ms. Chadwick says she heard it at least
5 twice, that there was a command to her "Drop the knife, drop the
6 knife."
7 MR. PELTZ: So that -- add that fact and those are the
8 only undisputed facts. She had a knife in her hand. She was standing
9 close to her good friend in her own front yard and she didn't drop it on
10 command. That would justify the use of deadly force of killing a
11 person?
12 Not to mention -- the defendant makes much of the fact,
13 well, they are not required to use the least amount of force, but, you
14 know, they are not required to use deadly force unless it's really
15 totally reasonable. It's deadly force. There's no other force higher.
16 I can think of lots of things that could have been done.
17 When the woman refused to drop the knife, yeah, maybe she could
18 have been deaf. The officers could have done more to ascertain if she
19 heard them or if she was mentally competent to understand.
20 The officers could have done something as simple as
21 telling Sharon, "Ma'am, would you come over here?" The officers
22 never even asked if Sharon was being threatened, if there was
23 anything wrong, if she was even disturbed.
24 They never even asked if Sharon felt threatened. How
25 about that? Why couldn't the officers have done that before they shot

1 Amy? "Ma'am, could you come over here?"
2 Officer Garcia said point blank the reason that he did not
3 shoot Amy is because he thought the commands might have worked if
4 they would have tried a little more.
5 Before you use deadly force --
6 THE COURT: Well, the thing is I can agree with you that
7 something else may have been effective and avoided this, but the
8 problem is that under the law and the circuit that that is not
9 necessarily required of an officer.
10 If that officer is perceiving what that officer objectively
11 believes to be a threat to somebody else, a threat by way of a deadly
12 weapon which was this knife, that the officer can respond with deadly
13 force to prevent somebody from injuring somebody if that's what that
14 officer is perceiving.
15 The question is: Are there facts that would have caused
16 this officer to perceive that? I mean, I understand that, yes, a taser
17 may have worked. They had reasons why they claim they didn't use
18 it, because of the fence, the distance, the closeness of people to each
19 other at that point. Certainly if they could have moved Ms. Chadwick
20 out of harm's way, if in fact harm existed, that could have worked.
21 But the issue is, and you had mentioned it, this matter
22 took place in a matter of seconds. I mean, there was not a lot of time
23 for anybody to react.
24 So that's -- that's problematic here, the fact that there
25 could have been alternative means that would have resulted. The

1 question is: Does the law require those alternative means to be used
2 if they -- a police officer has reasonably and objectively made a very
3 quick decision that deadly force was necessary to prevent serious
4 harm or injury to another person?
5 MR. PELTZ: Well, Your Honor, the key issue there is
6 "objectively." In other words, would a reasonable officer observing
7 what Corporal Kisela observed have felt the use of deadly force was
8 necessary. Two of the three officers present at that scene that day
9 with their guns drawn did not perceive that what was happening was
10 enough to cause them to use deadly force.
11 Two out of three officers -- if they are all three
12 reasonable people, two out of three reasonable officers did not think
13 the use of deadly force was reasonable. Right there alone is an issue
14 about the objectively reasonable standard.
15 Secondly, I don't think that you can grant summary
16 judgment in this case because what Kisela relies on, what he says the
17 things that he relied on to make him decide to shoot that day, many of
18 those factors are in dispute.
19 For example, Corporal Kisela says, "I saw Sharon
20 Chadwick crying and visibly upset." That fact, while it might tend to
21 lend to the reasonableness of an officer's actions, is in dispute. He's
22 the only one that saw that. None of the other officers saw it. Sharon
23 Chadwick denies it. Only Corporal Kisela says, "I saw she was crying."
24 The position of the knife, how the person was holding
25 the knife. Critically relevant to whether there is going to be an assault

1 or you just walked out of your kitchen with a knife in your hand, you
2 know, because you were chopping carrots or something. Critically
3 important. Was the knife in a threatening mode or was it down at
4 your side in a nonthreatening mode?
5 Well, the other two officers said the knife was down at
6 her side and she was not threatening. Two out of the three officers
7 didn't see any threatening behavior. They didn't see the knife in a
8 threatening behavior. They didn't see -- those are all disputed facts.
9 So what we really get down to: Is the use of deadly
10 force reasonable when you have a woman with a knife in close
11 proximity to her good friend, five to six feet, and she doesn't drop it
12 when commanded?
13 Those are the only undisputed facts. And I don't think
14 the constitution ever envisioned that I could be in fear of my life
15 because I walked out of my house with a knife and I was talking to my
16 friend and didn't hear the police or didn't respond quickly enough.
17 Deadly force. We are talking about the use of deadly
18 force, Your Honor, the absolute most force there is.
19 My understanding, even by the experts, is that the force
20 should be used on a continuum. You should always start out using the
21 least amount of force possible. Maybe that's a command voice.
22 Maybe that's yelling "Drop the knife." When that doesn't work, you
23 escalate it a little bit. You don't jump all the way to deadly force when
24 a person simply has not obeyed your command to drop your knife.
25 That's not what -- the question is whether Officer --

1 Corporal Kisela was objectively reasonable. I don't think you can
2 grant summary judgment because some of the key facts that would
3 allow a jury to decide whether he was reasonable are in dispute, which
4 way was the knife being held, whether Sharon was crying, what was
5 the officer observing to make him believe there was a threat to stab
6 Sharon.
7 You would think it would take something, a movement,
8 something, maybe yelling. It would be a totally different situation if
9 Amy was yelling at Hughes (sic) or threatening her. We see none of
10 that.
11 Amy was shot in her front yard walking out to get 20
12 bucks from her best friend and housemate.
13 THE COURT: What about the incident that triggered this
14 whole tragic and unfortunate situation here that a caller calls in to 911
15 saying there's a woman out there who is -- I believe the language
16 was behaving erratically, stabbing a tree or hacking at a tree with a
17 very large knife, and then the police in response go looking for this
18 person and the next thing they see is Ms. Hughes walking out of the
19 house carrying a very large knife following Ms. Chadwick and not
20 responding to their demands, their commands to drop the knife or not
21 responding to them at all in any way?
22 What does that add to or not add to the whole scene
23 that we have here that the police officers have information about that?
24 MR. PELTZ: Well, Your Honor, the information -- I do
25 believe the facts are not in dispute on that. I believe the recall was

1 that it was a woman acting erratically stabbing a tree with a knife.
2 That was a tree, not a person. That is erratic behavior.
3 But that again signifies somebody that maybe is not
4 quite in their right mind. We don't know what is happening at that
5 point.
6 Now, there was a few things that I wanted to correct.
7 One, the officers got the report and they responded to
8 the area. The reportee was there and said, "I don't see the person
9 now," but she described a woman basically wearing a teal dress or -- I
10 don't remember what -- white top and teal dress. She described the
11 woman just generally.
12 The reportee was not there and did not pick out Amy
13 Hughes as the woman. She had already departed the scene.
14 Officer Kunz arrived at the scene and they were
15 conversing about what had happened. She was on a bike. Corporal
16 Kisela was in his car with Garcia in this passenger seat and I got the
17 idea she was talking through the passenger window when she saw the
18 woman come out that sort of matched the description.
19 At that point we don't even know that is -- now, she did
20 have a knife. That leads a little more. But all of that as -- you know,
21 my problem with the whole situation is that just on that right there the
22 officers came to the fence with their guns drawn already charged for
23 deadly force, guns drawn, fingers on the trigger.
24 At that point, knowing nothing more than that, that in
25 itself could be considered excessive. At that point, with all the other

1 weapons that you had in your arsenal, it even seems premature to
2 draw your weapons. But we are still left with what they see.
3 Did what Officer -- Corporal Kisela see, would that give a
4 reasonable officer the right to use deadly force? And if it's only that
5 she's close, she's the one with the knife and was seen acting erratic
6 prior, I don't believe that justifies the use of deadly force especially
7 when there were so many other things that should have been done.
8 Amy almost lost her life because she had walked out of
9 the house carelessless holding the knife still. Yes, it's not relevant to
10 what the officer knew. There had been a previous incident and Amy
11 and Sharon have quite a long history of helping each other through
12 tough times. Amy is a little bit mentally challenged. There had been
13 an incident. That incident had passed.
14 Amy was just walking out of the house still with the
15 knife in her hand not intending to hurt anybody and didn't hear the
16 commands.
17 Why couldn't there have been more commands? Why
18 couldn't they have done something other? There are so many things
19 that should have been done and could have been done.
20 I recognize the law doesn't require that, but I think that
21 the law has certainly serious concerns about when you're going to use
22 deadly force. And if you apply the Graham v. Connor factors, none of
23 them suggest that a reasonable officer should have used force.
24 The severity of the crime, there is no crime here, Your
25 Honor. Amy Hughes did absolutely nothing wrong. There is no crime

1 and there is no suspect. The severity of the crime.
2 Let's see what the other one is. Whether or not the
3 suspect posed an immediate threat to the safety of officers and others.
4 The only factor that even remotely applies is whether or
5 not Amy posed a threat to others. The officers, clearly no threat.
6 They are on the outside of the fence. No threat to the officers. They
7 were also armed.
8 So whether or not Amy posed a threat to Sharon, that
9 turns in to be the central issue. What did Corporal Kisela see that
10 would lead an officer -- a reasonable officer to believe that she posed
11 a threat? The other two officers didn't see that. They didn't see a
12 threat or I'm assuming they would have acted. It comes down to that.
13 And what Corporal Kisela saw was not enough to
14 convince a reasonable officer that Amy posed an actual threat to her
15 good friend in that front yard that day. And it almost is that simple.
16 I'm not asking you to find for me. I didn't file a
17 response because I believe there are disputed issues of fact. I didn't
18 file my own motion because I think there are disputed issues of fact as
19 to what Kisela actually saw. He says he saw something none of the
20 other officers saw.
21 It might be a little different if the knife was actually
22 pointing toward Sharon or if Sharon was visibly upset. That might be
23 a different scenario. But those are disputed facts. And if you view
24 those facts in the light most favorable to my client, the nonmoving
25 party, you have to resolve those in favor of her and say, well, I'm

1 going to go with, okay, only two times they said drop the knife,
2 because the number of times they shouted is disputed other than a
3 couple; I have to find the knife was pointed away because it's a
4 disputed issue and only Kisela says the knife was pointed forward in a
5 threatening manner; I'm going to have to find that it's disputed as to
6 whether or not Sharon Chadwick was crying or visibly upset.
7 With all of those disputed facts, you cannot say that the
8 officer's actions were reasonable as a matter of law.
9 You know, if Sharon was visibly crying, if the knife was
10 pointed to her, those kind of things that are critically in dispute,
11 maybe the officer would be entitled to qualified immunity, but those
12 key facts are certainly in dispute here.
13 And it's important that Amy gets her day to talk to the
14 jury and let them know what she thinks happened and let the jury
15 decide what facts happened. That's the primary reason that I don't
16 believe you should grant summary judgment on the issue of qualified
17 immunity.
18 I admit the facts of this case are somewhat different.
19 She did have a knife. She was seen stabbing at a tree. That is erratic
20 behavior. Does that alone justify the use of deadly force? Do the
21 officers get to show up and respond to a call that says there's an
22 erratic women here and shoot her? Not in the America I live in. That
23 to my mind -- I have not filed a motion, but as I stand here, you can
24 certainly tell I believe that use of force was excessive from the start
25 showing up to the fence.

1 But those -- today the only issue is whether or not the
2 undisputed facts clearly demonstrate that Corporal Kisela's use of force
3 was reasonable. And I don't believe that they do, Your Honor.
4 THE COURT: Let me ask you this. You mentioned it and
5 I saw that that came up in Ms. Chadwick's statement about that Ms.
6 Hughes had simply walked out of the house carrying a knife that she
7 forgot to put down perhaps while she was in the kitchen carving or
8 cutting up carrots.
9 But yet in her statement she says that Ms. Hughes was
10 moving different from what other people said. Officer Kisela says he
11 saw her raise the knife in what he considered to be a threatening
12 gesture. The other officer said it appeared to him the knife was down,
13 not raised as he had said. But Ms. Chadwick says that she saw her
14 moving the knife from from one hand to the other.
15 That is certainly not in keeping with somebody that
16 forgot the knife and was not even aware they were carrying the knife
17 at that point. I mean, that statement is from Ms. Chadwick.
18 What do we do with that? That clearly shows some
19 movement, if we are to believe anybody, that Ms. Hughes was actually
20 moving the knife, either up or moving it from hand to hand as Ms.
21 Chadwick said.
22 So that's an issue there clearly I think points to the fact
23 that -- the belief that she knew she was carrying a knife at least,
24 didn't just forget it.
25 MR. PELTZ: Well, Your Honor, I believe that is also a

1 disputed fact. Because the statement that Mr. Correa is using is a
2 statement that the officers indicate she gave to them.
3 Ms. Chadwick's affidavit -- we disputed that fact.
4 Ms. Chadwick in her affidavit said, "I never told the officers that. It
5 was my understanding that the knife was down at her side. I never
6 told" -- she disputes that she told the officers she was crying or that
7 the knife was being moved about. That's a disputed issue.
8 THE COURT: At this point then, we would take the
9 evidence in the light most favorable to the plaintiff obviously. So if in
10 fact that is a disputed issue, then it would be of no moment at this
11 point.
12 Let me ask you another thing.
13 The issue regarding -- I ask it because it was raised that
14 perhaps because of her mental illness or for whatever reason that she
15 was not -- didn't hear the officers making the command to drop the
16 knife, but yet Ms. Chadwick states that she made a statement to her --
17 that Ms. Hughes made a statement to her, "You called the police on
18 me, didn't you?" or "You called the cops on me," which she denies, and
19 she makes that statement a second time to her, "You called the police
20 on me."
21 Well, the only way that she would have known that
22 somebody called the police on her is if she walks out and sees police
23 officers standing at her fence there.
24 MR. PELTZ: Your Honor, while that is true, the fact of
25 the matter, it's not at issue about whether she saw them or they were

1 dressed in their uniforms. The question is whether or not -- you know,
2 how she responded.
3 There's a couple of different ways. You know, there's
4 the deer in the headlights action. You don't know what to do. You
5 stand right in front of the car until it hits you. And other people would
6 be quick enough to jump out of the way and avoid that.
7 It's not that Ms. Hughes did not know that there was --
8 cognitively know there were police there. I do believe she did. But
9 Ms. Hughes was struck with just terror and not knowing what to do.
10 It's not that she didn't know they were police. She literally was
11 incapable of, you know, jumping out of the way of what was a danger.
12 I mean, it's not that she didn't see the officers. That's not the issue.
13 The question is whether or not it's objectively reasonable
14 for Corporal Kisela to shoot her because she didn't drop the knife. If
15 that's the only thing that she has done, that's the issue, Your Honor.
16 But I'm convinced that Ms. Hughes probably heard it,
17 even saw them, but just like a deer in the headlights, didn't know
18 what to do, you know, didn't realize maybe she had the knife in her
19 hand in that few seconds of time she had before she was shot.
20 THE COURT: Anything further?
21 MR. PELTZ: No, Your Honor.
22 THE COURT: Thank you.
23 MR. PELTZ: Thank you.
24 THE COURT: Mr. Correa.
25 MR. CORREA: Briefly, Your Honor.

1 That is an unfortunate scenario if that's true as the
2 plaintiff's attorney just explained that Ms. Chadwick (sic) knew the
3 officers were there, heard them commanding her to drop the knife and
4 just didn't know what to do or how to react because of whatever
5 mental, you know, frailties she may have. That would be sad if that's
6 the case. Again, it's unfortunate that Ms. Chadwick (sic) was injured.
7 From the perspective of the officer, of course it's
8 unknown what an assailant's state of mind is. And so that wouldn't
9 change the analysis from the perspective of Corporal Kisela in this
10 case.
11 If you encounter somebody for whatever reason that is
12 refusing to obey commands to drop a deadly weapon, then deadly
13 force is justified to prevent an attack, deadly or serious injury to
14 somebody else. And that is the state of the law.
15 What we heard from the plaintiff's attorney was a lot of
16 argument about what could have, should have been done, 20/20
17 hindsight. That is not the way that we analyze these kinds of cases.
18 I cited Forrester from the Ninth Circuit on page 4 of the
19 reply. The appropriate inquiry is whether the officers acted
20 reasonably, not whether they had less intrusive alternatives available
21 to them.
22 And, of course, Graham talks about the fact that we
23 don't engage in 20/20 hindsight analysis when we are considering
24 excessive force cases, but we consider the fact that the officers have
25 to make hard choices in split-second decisions.

1 I also pointed out in the reply that in summary
2 judgment there could be a lot of disputed facts that are not material
3 disputed facts. And I have tried to focus in the reply on the material
4 facts that matter.
5 The demeanor of Ms. Chadwick in response to Ms.
6 Hughes, if that's disputed I don't think it's material because you can
7 take that fact out of the equation and still Corporal Kisela's response
8 would be justified and appropriate under the circumstances if he
9 perceives there's a threat.
10 There has been some discussion here about the report
11 that Officer Kisela heard on the radio and then from the witness that
12 flagged them down. That is important. Because that is a fact that was
13 in his mind that is undisputed which would have figured into his
14 analysis.
15 So those are facts 1 and 2 on my enumerated summary
16 in the reply.
17 They had a report that there was a woman walking down
18 the street and hacking a tree with a large knife over the dispatch
19 radio.
20 And when they got to 7th Street, they were flagged
21 down by the reporting party. She told them she had just seen the
22 woman with the knife walking down the street acting erratically. So
23 that's the background.
24 They show up at the house and see Ms. Hughes come
25 out with a knife. She is identified as the person who had been hacking

1 trees walking around the street with a knife.

2 And that's, from a reasonable police officer's perspective,

3 a dangerous person. Somebody that is acting erratically is somebody

4 who may harm somebody else if they are holding a deadly weapon.

5 You know, I laid out the argument that this is not

6 excessive force under the Graham v. Connor analysis because I think

7 if you take the facts in the light most favorable to the plaintiff and just

8 settle on what is undisputed or uncontroverted, you still have a

9 situation where the use of deadly force would have been justified and

10 not excessive.

11 But this is really a motion for summary judgment under

12 qualified immunity. And the question there is whether the law was

13 clearly established that the use of force violated the Fourth

14 Amendment.

15 We have the Blanford case which was the case with the

16 young man. I think he was around San Francisco. I don't know why I

17 think that. The young man with the long knife that was trying to get

18 into his parents' house. I think that really provides the governing

19 precedent in this case that in these situations where someone is using

20 a deadly weapon like a knife, that the use of force is justified.

21 I think in the Blanford case there also was an instruction

22 for the subject to drop the knife and that wasn't complied with.

23 So you don't have a lot of time to react from the officer's

24 perspective. Mr. Click, our expert, talked about the fact you can close

25 the distance, you know, from -- in half a second from 20 feet. That is

1 what they are taught in the officer academy.

2 Here you have a case where the woman was close

3 enough to exchange -- the women were close enough money could be

4 exchanged. Clearly Ms. Chadwick and Ms. Hughes were close enough

5 that Ms. Hughes could have struck her with a knife.

6 It doesn't matter how she was holding the knife. The

7 knife has a point -- you can see the photograph of it -- that could have

8 been brought up to deadly effect.

9 So, again, the position that she may have been holding

10 the knife is disputed from the plaintiff's perspective but that's not a

11 material issue of fact for purposes of the analysis here.

12 That is all I have, Your Honor, unless you have

13 questions.

14 THE COURT: No further questions. Thank you.

15 MR. CORREA: Thank you.

16 THE COURT: Counsel, thank you. I'm going to take the

17 matter under advisement and we will issue an order as quickly as we

18 can.

19 I appreciate your arguments. I think that they were

20 very helpful to the court.

21 This is a very tragic case and legally a very difficult case

22 quite frankly, but that is a matter that the court will review again and

23 will deal with and you should be getting an order from us fairly

24 shortly.

25 I appreciate your arguments. We will stand at recess at

1 this time.

2 Thank you.

3 (The proceedings concluded at 11:10 a.m.)

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4 CERTIFICATE
5
6
7
8
9 I, Dianne Davenport, certify that the foregoing is a correct
10 transcript from the record of proceedings in the above-entitled matter.
11
12
13
14
15 /s/ Dianne Davenport February 18, 2014
16
17
18
19
20
21
22
23
24
25