

AUG 25 2026

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TRISTAN ASSANCE,

Plaintiff - Appellee,

v.

BRANDON HOLZER,

Defendant - Appellant,

and

COUNTY OF LINCOLN, JAMES KIRK
KRAFT,

Defendants.

No. 24-7356

D.C. No. 9:24-cv-00009-DWM

MEMORANDUM*

Appeal from the United States District Court
for the District of Montana
Donald W. Molloy, District Judge, Presiding

Argued and Submitted March 13, 2026
Portland, Oregon

Before: COLLINS and LEE, Circuit Judges, and FITZWATER,** District Judge.

Plaintiff-Appellee Tristan Assance (“Assance”) brought this action under 42

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Sidney A. Fitzwater, United States District Judge for the Northern District of Texas, sitting by designation.

U.S.C. § 1983, alleging, *inter alia*, that Defendant-Appellant Brandon Holzer (“Deputy Holzer”) used excessive force, in violation of the Fourth Amendment, when he shot Assance. Deputy Holzer moved for judgment on the pleadings under Fed. R. Civ. P. 12(c), based on the affirmative defense of qualified immunity. The district court denied the motion, and Deputy Holzer appealed. We have jurisdiction under 28 U.S.C. § 1291 and the collateral order doctrine, *see Polanco v. Diaz*, 76 F.4th 918, 925 (9th Cir. 2023), and we affirm.

1. “We review de novo a denial of a motion to dismiss based on qualified immunity, accepting as true all well-pleaded allegations of material fact and construing them in the light most favorable to the non-moving party.” *Hyde v. City of Willcox*, 23 F.4th 863, 869 (9th Cir. 2022).¹ The district court’s decision whether “to take judicial notice . . . is reviewed for an abuse of discretion.” *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998 (9th Cir. 2018).

2. To defeat qualified immunity, Assance was obligated to plausibly plead that Deputy Holzer’s conduct violated the Fourth Amendment and that the unlawfulness of his conduct was clearly established at the time. *See District of Columbia v. Wesby*, 583 U.S. 48, 62-63 (2018).

¹ Although Deputy Holzer filed his motion under Rule 12(c), “[a]nalysis under Rule 12(c) is ‘substantially identical’ to analysis under Rule 12(b)(6).” *Chavez v. United States*, 683 F.3d 1102, 1108 (9th Cir. 2012) (citation omitted).

Assance has plausibly pleaded that Deputy Holzer's conduct violated the Fourth Amendment. "The use of deadly force is only reasonable if a suspect 'poses a *significant* threat of death or serious physical injury to the officer or others.'" *S.R. Nehad v. Browder*, 929 F.3d 1125, 1132-33 (9th Cir. 2019) (quoting *Gonzalez v. City of Anaheim*, 747 F.3d 789, 793 (9th Cir. 2014) (en banc)). Assance alleges that Deputy Holzer's use of force was based on his mistaken belief that Assance had fired on Deputy James Kraft ("Deputy Kraft"). "When an officer's use of force is based on a mistake of fact, we ask whether a reasonable officer would have or *should* have accurately perceived that fact." *Est. of Strickland v. Nevada County*, 69 F.4th 614, 621 (9th Cir. 2023) (internal quotation marks omitted) (citation omitted). Here, Assance alleges that Deputy Holzer shot Assance because he mistook the sound of Deputy Kraft's taser for the sound of Assance firing his weapon at Deputy Kraft. While Deputy Kraft did not provide the requisite warning to the other officers on the scene before discharging his taser, Assance has plausibly pleaded that Deputy Holzer could hear the order given to Deputy Kraft to use his taser on Assance. And when Holzer opened fire, Assance had his back turned to all of the officers. Although Assance had been acting erratically and had disobeyed orders to drop his weapon before Deputy Holzer shot him, Holzer did not observe Assance to have the gun in his hand at the time Holzer fired, and, in fact, the gun was not in Assance's hand.

Moreover, Assance had not moved toward, verbally threatened, or pointed his firearm at anyone during the encounter. Under these circumstances, Assance has plausibly pleaded that Deputy Holzer's mistake of fact was objectively unreasonable and that he violated Assance's Fourth Amendment rights. *See Torres v. City of Madera*, 648 F.3d 1119, 1127 (9th Cir. 2011) (concluding that, because fact-finder could determine that officer's mistaken belief was objectively unreasonable, plaintiff had properly alleged Fourth Amendment violation).

3. Assance has also plausibly pleaded that Holzer's conduct violated clearly established law. When an officer's use of force is based on an unreasonable mistake of fact, we assume that he "correctly perceived all of the relevant facts and ask whether an officer could have reasonably believed at the time that the force actually used was lawful under the circumstances." *See id.* (internal quotation marks omitted) (assuming that officer correctly perceived all relevant facts after first determining that fact-finder could conclude that her mistake was unreasonable). Here, had Deputy Holzer realized that the noise was the sound of Deputy Kraft's taser, any reasonable officer under these circumstances would have understood that the use of force was unlawful. *See George v. Morris*, 736 F.3d 829, 832-33, 838-39 (9th Cir. 2013) (concluding that force was excessive where officers responding to a domestic disturbance shot an armed and erratic suspect who had not pointed his firearm at

anyone).

Therefore, at this stage, Holzer is not entitled to qualified immunity. *See Demuth v. County of Los Angeles*, 798 F.3d 837, 839 (9th Cir. 2015) (“An unreasonable mistake of fact does not provide the basis for qualified immunity.”).

4. Deputy Holzer also contends that the district court abused its discretion when it declined to take judicial notice of the parties’ statement of stipulated facts. The statement of stipulated facts clarifies that Assance had his firearm in his waistband when Deputy Holzer shot him. Even assuming that Assance had his firearm in his waistband at the time he was shot, the outcome is the same: Assance had plausibly pleaded that Deputy Holzer’s mistake of fact was objectively unreasonable. Accordingly, even if the district court erred in declining to take judicial notice of the stipulated facts, the error was harmless.

The district court’s decision denying Deputy Holzer qualified immunity is affirmed.

AFFIRMED.