

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALEXANDER PEREZ)
ALVARADO; ELMER PEREZ)
ALVARADO,)

Plaintiffs,)

v.)

THE CITY OF SANTA ANA;)
SANTA ANA POLICE)
DEPARTMENT; CORPORAL M.)
MORENO; OFFICER T. LE;)
OFFICER B. SONTAG;)
OFFICER D. PREWETT,)

Defendants.

Case No.
SACV 12-0328 JGB (ANx)

**ORDER DENYING DEFENDANTS'
MOTION FOR PARTIAL SUMMARY
JUDGMENT**

Before the Court is a Motion for Partial Summary Judgment filed by Defendants. ("Motion," Doc. No. 44.) After considering all papers submitted in support of and in opposition to the Motion and the arguments presented at the May 20, 2013 hearing, the Court DENIES Defendants' Motion for Partial Summary Judgment.

1 I. BACKGROUND

2
3 A. Procedural Background

4
5 Plaintiffs Alexander Perez Alvarado ("APA") and Elmer
6 Perez Alvarado ("EPA") are the surviving minor sons of
7 Decedent Elmer Alexander Perez ("Perez") represented by
8 their guardian ad litem Diana Alvarado¹. Plaintiffs
9 filed their Complaint against Defendants The City of
10 Santa Ana ("Santa Ana"), Santa Ana Police Department
11 ("SAPD"), Corporal M. Moreno ("Moreno"), Officer T. Lee
12 ("Lee")², Officer B. Sontag ("Sontag"), and Officer D.
13 Prewett ("Prewett") (collectively, "Defendants") on March
14 6, 2012. ("Compl.," Doc. No. 3.) Defendants answered on
15 May 21, 2012. (Doc. No. 16.)

16 Defendants filed a Motion for Partial Summary
17 Judgment on April 1, 2013. ("Motion," Doc. No. 44.) In
18 support of their Motion, they included: Statement of
19 Uncontroverted Facts and Conclusions of Law ("SUF"); a
20 Declaration of Steven Wysocky ("Wysocky Decl.") attaching
21 exhibits A through E and G through N, and a Declaration
22 of Corporal Anthony Bertagna ("Bertagna Decl.") attaching
23 exhibit F-1, a SAPD 9-1-1 dispatch log from December 16,
24 2010 from 5:07am to 6:26am ("Dispatch Log"), and exhibit

25
26 ¹ The parties refer to Ms. Alvarado as "Diana" or
27 "Diane." For consistency, the Court will identify Ms.
Alvarado as "Diana."

28 ² Incorrectly spelled as "Le" in certain documents.

1 F-2, a digital recording of all radio broadcasts for that
2 time period ("SAPD Radio Broadcast").³

3 Plaintiffs opposed the Motion on April 15, 2013.
4 ("Opp'n," Doc. No. 50.)⁴ Plaintiffs attached a Statement
5 of Genuine Disputes of Material Fact ("SGI") and 24
6 exhibits.

7 On April 22, 2013, Defendants replied ("Reply," Doc.
8 No. 53) and also filed objections to the evidence offered
9 in Plaintiffs' opposition ("Obj.," Doc. No. 52.).

10
11 **B. The Complaint**

12
13 Plaintiffs APA and EPA bring their claims through
14 their mother, Diana Alvarado ("Alvarado"), as surviving
15 sons of Decedent Perez, their father. (Compl. ¶¶ 1-2.)
16 The Complaint alleges that on December 16, 2010 APA was
17 residing with his parents, Alvarado and Perez, at their
18 home in Santa Ana. (Compl. ¶ 11.) At the time, Alvarado
19 was pregnant with her second son with Perez who was born
20 three months after the incident. (Id.) The Complaint
21 contends that Santa Ana Police Officers shot an unarmed
22

23
24 _____
25 ³ Defendants also lodged a copy of a disc with the
26 SAPD Radio Broadcast. (Doc. No. 48.)

27 ⁴ Plaintiffs' Opposition was filed seven days late
28 without explanation or excuse. On April 23, 2013, the
Court issued an Order to Show Cause why Plaintiffs' late
filing should not be rejected. (Doc. No. 54.)
Plaintiffs filed a response on April 25, 2013 (Doc. No.
55), and the Court discharged its Order (Doc. No. 56).

1 Perez multiple times resulting in his death. (Compl. ¶
2 12.)

3 Based on these facts, the Complaint stated four
4 claims for relief, each of which included several
5 subparts. (Compl. at 8-24.) Since that time, Plaintiffs
6 have stipulated to dismiss several causes of action,
7 namely their claims for conspiracy in violation of 42
8 U.S.C. §§ 1985 and 1986, the entirety of the second claim
9 for a Monell violation under 42 U.S.C § 1983, and their
10 state law claims for negligent hiring, training, and
11 retention. (Doc. No. 43.) In response to Defendants'
12 Motion, Plaintiffs also conceded that they have no
13 evidence to support the entirety of their fourth claim
14 under California Civil Code §§ 51, 51.7, 52 and 52.1.
15 (Opp'n at 12.) Plaintiffs agreed to withdraw their
16 fourth claim for relief. (Id.) The Court therefore
17 DISMISSES Plaintiffs' fourth claim for relief pursuant to
18 Cal. Civ. Code §§ 51, 51.7, 52, and 52.1.

19 Two claims for relief remain. Plaintiffs' first
20 claim is for violation of 42 U.S.C. § 1983 for Fourth and
21 Fourteenth Amendment violations against the individual
22 officer Defendants. (Compl. ¶¶ 25-43.) The third claim
23 for relief includes state law wrongful death and survival
24 claims under Cal. Code Civ. P. §§ 377.60 and 377.30 based
25 on assault and battery and negligence. (Compl. ¶¶ 50-
26 61.)

27
28

1 **C. Motion for Partial Summary Judgment**

2
3 Defendants seek summary judgment on two portions of
4 Plaintiffs' remaining claims. Defendants move for
5 judgment as a matter of law on (1) Plaintiffs' 42 U.S.C.
6 § 1983 claim under the Fourteenth Amendment and (2) the
7 preshooting negligence aspect of Plaintiffs' negligence
8 claim under California law. (Motion at 5.)⁵

9
10 **II. LEGAL STANDARD⁶**

11
12 A court shall grant a motion for summary judgment
13 when there is no genuine issue as to any material fact
14 and the moving party is entitled to judgment as a matter
15 of law. Fed. R. Civ. P. 56(a); Anderson v. Liberty
16 Lobby, Inc., 477 U.S. 242, 247-48 (1986). The moving
17 party must show that "under the governing law, there can
18 be but one reasonable conclusion as to the verdict."
19 Anderson, 477 U.S. at 250.

20 Generally, the burden is on the moving party to
21 demonstrate that it is entitled to summary judgment. See
22 Margolis v. Ryan, 140 F.3d 850, 852 (9th Cir. 1998)

23
24 ⁵ Defendants also sought summary judgment on
25 Plaintiffs' fourth claim for relief under several
26 sections of the California Civil Code. As discussed
27 above, Plaintiffs voluntarily withdrew this claim. The
28 Court therefore does not address Defendants' arguments
related to Plaintiffs' fourth claim.

⁶ Unless otherwise noted, all references to "Rule"
refer to the Federal Rules of Civil Procedure.

1 (citing Anderson, 477 U.S. at 256-57); Retail Clerks
2 Union Local 648 v. Hub Pharmacy, Inc., 707 F.2d 1030,
3 1033 (9th Cir. 1983). The moving party bears the initial
4 burden of identifying the elements of the claim or
5 defense and evidence that it believes demonstrates the
6 absence of an issue of material fact. Celotex Corp. v.
7 Catrett, 477 U.S. 317, 323 (1986). Because summary
8 judgment is a "drastic device" that cuts off a party's
9 right to present its case to a jury, the moving party
10 bears a "heavy burden" of demonstrating the absence of
11 any genuine issue of material fact. See Avalos v. Baca,
12 No. 05-CV-07602-DDP, 2006 WL 2294878 (C.D. Cal. Aug. 7,
13 2006) (quoting Nationwide Life Ins. Co. v. Bankers
14 Leasing Ass'n, Inc., 182 F.3d 157, 160 (2d Cir. 1999)).

15 Where the non-moving party has the burden at trial,
16 however, the moving party need not produce evidence
17 negating or disproving every essential element of the
18 non-moving party's case. Celotex, 477 U.S. at 325.
19 Instead, the moving party's burden is met by pointing out
20 that there is an absence of evidence supporting the non-
21 moving party's case. Id.; Horphag Research Ltd. v.
22 Garcia, 475 F.3d 1029, 1035 (9th Cir. 2007). "[A]
23 summary judgment motion may properly be made in reliance
24 solely on the 'pleadings, depositions, answers to
25 interrogatories, and admissions on file.'" Celotex, 477
26 U.S. at 324 (quoting Fed. R. Civ. P. 56(c)).

27
28

1 The burden then shifts to the non-moving party to
2 show that there is a genuine issue of material fact that
3 must be resolved at trial. Fed. R. Civ. P. 56(c);
4 Celotex, 477 U.S. at 324; Anderson, 477 U.S. at 256. The
5 non-moving party must make an affirmative showing on all
6 matters placed in issue by the motion as to which it has
7 the burden of proof at trial. Celotex, 477 U.S. at 322;
8 Anderson, 477 U.S. at 252. See also William W.
9 Schwarzer, A. Wallace Tashima & James M. Wagstaffe,
10 Federal Civil Procedure Before Trial § 14:144. A genuine
11 issue of material fact will exist "if the evidence is
12 such that a reasonable jury could return a verdict for
13 the non-moving party." Anderson, 477 U.S. at 248.

14 In ruling on a motion for summary judgment, a court
15 construes the evidence in the light most favorable to the
16 non-moving party. Scott v. Harris, 550 U.S. 372, 378,
17 380 (2007); Barlow v. Ground, 943 F.2d 1132, 1135 (9th
18 Cir. 1991); T.W. Elec. Serv. Inc. v. Pac. Elec.
19 Contractors Ass'n, 809 F.2d 626, 630-31 (9th Cir. 1987).

20 If the Court is unable to render summary judgment
21 upon an entire case, it shall, if practicable, grant
22 summary adjudication for any issues as to which, standing
23 alone, summary judgment would be appropriate. See Fed.
24 R. Civ. P. 56(a); California v. Campbell, 138 F.3d 772,
25 780-81 (9th Cir. 1998). Thus, summary adjudication is a
26 mechanism through which the Court deems certain issues
27 established before trial. Lies v. Farrell Lines, Inc.,

28

1 641 F.2d 765, 769 n. 3 (9th Cir. 1981) (internal
2 quotation omitted). The standard that applies to a
3 motion for summary adjudication is the same as that which
4 applies to a motion for summary judgment. See Fed. R.
5 Civ. P. 56(a); Mora v. ChemTronics, 16 F. Supp. 2d. 1192,
6 1200 (S.D. Cal. 1998).

8 III. DISCUSSION

9 A. Evidentiary Objections

10
11 Defendants object to several pieces of evidence
12 offered by Plaintiffs. Many of Defendants' objections
13 are on grounds of relevance under Federal Rules of
14 Evidence 401 and 402. (See, e.g., Obj. ¶¶ 18, 19, 22.)
15 "Objections to evidence on the ground that it is
16 irrelevant, speculative, and/or argumentative, or that it
17 constitutes an improper legal conclusion are all
18 duplicative of the summary judgment standard itself" and
19 are thus "redundant" and unnecessary to consider here.
20 Burch v. Regents of Univ. of California, 433 F. Supp. 2d
21 1110, 1119 (E.D. Cal. 2006); see Anderson, 477 U.S. at
22 248 ("Factual disputes that are irrelevant or unnecessary
23 will not be counted."). Thus, the Court does not rule on
24 Defendants' relevance objections.

25
26 Defendants also object to the Deposition of Officer
27 Adam Aloyian ("Aloyian Depo.," Pl. Exh. 19) because it
28 lacks authentication pursuant to Federal Rules of

1 Evidence 901 and 902. (Obj. ¶ 20.) The Court finds that
2 Aloyian's deposition is not properly authenticated as the
3 copy provided to the Court was not signed by the
4 deponent, a notary public, or the court reporter. See
5 Orr v. Bank of Am., NT & SA, 285 F.3d 764, 774 (9th Cir.
6 2002); Pavone v. Citicorp Credit Servs., Inc., 60 F.
7 Supp. 2d 1040, 1045 (S.D. Cal.1997) (excluding a
8 deposition for failure to submit a signed certification
9 from the reporter). The Court therefore SUSTAINS
10 Defendants' objection to the Aloyian deposition, and the
11 Court does not consider it here.⁷

12 Finally, Defendants object to the expert report
13 authored by Plaintiffs' police practices expert, Roger
14 Clark. ("Clark Report," Pl. Exh. 22.) The Clark Report
15 is inadmissible for numerous reasons, chief among them
16 being that the Report is unsworn and fails to lay an
17 adequate foundation for an expert opinion under Federal
18 Rule of Evidence 702. It "is well established, that an
19

20
21 ⁷ Plaintiffs failed to properly authenticate all of
22 the deposition excerpts submitted in support of its
23 opposition. Plaintiffs failed to include reporter's
24 certifications or an affidavit from counsel laying the
25 proper foundation for the depositions. See Orr, 285 F.3d
26 at 774 ("A deposition or an extract therefrom is
27 authenticated in a motion for summary judgment when it
28 identifies the names of the deponent and the action and
includes the reporter's certification that the deposition
is a true record of the testimony of the deponent.").
However, "when a document has been authenticated by a
party, the requirement of authenticity is satisfied as to
that document with regards to all parties." Id. at 776.
All of the depositions, aside from Aloyian's, were
authenticated by Defendants, therefore their authenticity
is established for Plaintiffs as well.

1 unsworn expert report is inadmissible." Shuffle Master,
2 Inc. v. MP Games LLC, 553 F. Supp. 2d 1202, 1210 (D. Nev.
3 2008). The provided excerpts of the Clark Report do not
4 include Clark's signature let alone any attestation that
5 the conclusions in the Report are true and correct. In
6 addition, the Report provides no foundational information
7 about Clark's training or length of experience which gave
8 rise to his ability to come to a stated conclusion. See
9 Plush Lounge Las Vegas LLC v. Hotspur Resorts Nevada
10 Inc., 371 F. App'x 719, 720 (9th Cir. 2010). Without any
11 underlying support for his conclusions, Clark's Report is
12 "unsupported speculation" and must be excluded. See
13 Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 590
14 (1993). The Court SUSTAINS Defendants' objections to the
15 Clark Report.

16

17 **B. Undisputed Facts**

18

19 Given the limited scope of the instant Motion, the
20 Court primarily addresses undisputed and disputed facts
21 that are relevant to Defendants' Motion. However, facts
22 that are primarily relevant to Plaintiffs' wrongful death
23 and Fourth Amendment excessive force claims are provided
24 as necessary to give context and background to the claims
25 at issue.

26 Unless otherwise noted, the following material facts
27 are sufficiently supported by admissible evidence and are
28

1 uncontroverted. They are "admitted to exist without
2 controversy" for purposes of the Motion. L.R. 56-3
3 (facts not "controverted by declaration or other written
4 evidence" are assumed to exist without controversy); Fed.
5 R. Civ. P. 56(e)(2) (stating that where a party fails to
6 address another party's assertion of fact properly, the
7 court may "consider the fact undisputed for purposes of
8 the motion").

9
10 **1. 9-1-1 Call**

11
12 In the early morning hours of December 16, 2010,
13 Elmer Alexander Perez ("Perez") was in his condominium in
14 Santa Ana, California. (SUF ¶ 8; SGI ¶ 8.) Also present
15 were Perez's mother, Maria Calderon Herrera ("Mrs.
16 Herrera"), his step-father, Francisco Herrera ("Mr.
17 Herrera"), his sister, Kimberly Perez, his live-in
18 girlfriend, Diana Alvarado ("Alvarado"), and his 2-year-
19 old son, Plaintiff APA. (SUF ¶¶ 2-6; SGI ¶¶ 2-6.) At
20 the time, Alvarado was pregnant with Perez's second son,
21 Plaintiff EPA. (SUF ¶ 7; SGI ¶ 7.)

22 That morning, Mrs. Herrera awoke between 4:30am and
23 5:00am and began getting ready for work. (SUF ¶ 9; SGI ¶
24 9.) When she exited her bedroom, she saw Perez, her son,
25 holding a gun. (SUF ¶ 10; SGI ¶ 10.) Alvarado told Mrs.
26 Herrera that the gun was not real. (SUF ¶ 11; SGI ¶ 11.)
27 Mrs. Herrera noticed that Perez was acting strangely,
28

1 speaking fast, and acting paranoid, and she believed he
2 was under the influence of drugs. (SUF ¶ 12; SGI ¶ 12.)
3 Mrs. Herrera asked her husband to call the police to get
4 help for her son. (SUF ¶ 13; SGI ¶ 13.) Mr. Herrera
5 called 9-1-1 just after 5:00am and told the dispatcher
6 that Perez was on drugs and threatening everyone with a
7 toy gun. (SUF ¶ 15; SGI ¶ 15.)

8 At 5:11am, the dispatcher broadcast a request for
9 officers to respond to the condominium. (SUF ¶ 18; SGI ¶
10 18.) Dispatch notified officers that Perez was under the
11 influence of an unknown type of narcotics and was engaged
12 in a domestic dispute with his 7-month pregnant wife and
13 also possibly under the influence of alcohol. (SUF ¶ 19;
14 SGI ¶ 19.) The broadcast also notified officers that the
15 caller stated he is "certain" the subject has a toy gun,
16 not a real gun. (Dispatch Log at 1.) Multiple officers
17 responded to the call, including Moreno, Prewett, and Lee
18 who were first to arrive, followed by Sontag. (SUF ¶ 20;
19 SGI ¶ 20.)

20

21 **C. Disputed Facts**

22

23 Beginning with the officers' first contact with the
24 family, the parties recounting of the facts differs in
25 many respects. All disputed facts are specifically
26 noted.

27

28

1 **1. First Contact with Officers**

2

3 Mr. Herrera met Officers Moreno and Prewett outside

4 the home at approximately 5:20am. (SUF ¶ 21; SGI ¶ 21.)

5 The content of the conversation between the officers and

6 Mr. Herrera is disputed. Mr. Herrera states that he told

7 Moreno in Spanish that Perez had a toy gun and when asked

8 whether he was sure, Mr. Herrera repeated that "of course

9 it's a toy." (Deposition of Francisco Herrera ("Mr.

10 Herrera Depo.") 34:10-22, Wysocky Decl., Exh. D.) Moreno

11 recounts the same conversation, but also adds that he

12 asked Mr. Herrera how he knew it was a toy and whether he

13 had seen the gun himself. (Deposition of Corporal M.

14 Moreno ("Moreno Depo.") 39:3-11, Wysocky Decl., Exh. G.)

15 According to Moreno, Mr. Herrera replied that he had not

16 seen the gun, but his wife had seen it and relayed that

17 it was a toy. (Moreno Depo. 39:12-25.) He also admitted

18 that neither he nor his wife had ever owned or fired a

19 real gun. (Id.) Finally, when asked again how he knows

20 it is a real gun, Mr. Herrera replied "I don't know

21 then." (Id.) It is undisputed that Moreno relayed this

22 information onto Prewett who reported it to dispatch.

23 (SUF ¶ 24; SGI ¶ 24.)

24 The following facts are uncontroverted. Moreno,

25 Prewett, Lee and Mr. Herrera approached the residence,

26 and the officers told Kimberly Perez and Mrs. Herrera to

27 exit the home. (SUF ¶¶ 25-26; SGI ¶¶ 25-26.) On her way

28

1 out, Kimberly Perez told the officers that her brother
2 was on drugs and acting weird, that he was not harmful
3 and he had a toy gun in his hand, but to be careful
4 because her nephew and pregnant sister-in-law were
5 upstairs. (Deposition of Kimberly Perez ("K. Perez
6 Depo.") 36:8-15, Pl. Exh. 7.) Mrs. Herrera also states
7 that she told the officers not to harm her son because
8 the weapon is not real. (Deposition of Maria Antonia
9 Calderon Herrera ("Mrs. Herrera Depo.") 44:17-21, Pl.
10 Exh. 9.) Mr. Herrera then showed an unidentified officer
11 to the back of the condominium to show him the window of
12 the room where Perez was located. (SUF ¶ 27; SGI ¶ 27.)

13

14 **2. At The Doorway**

15

16 Meanwhile, the rest of the officers were at the front
17 door of the residence. There is disagreement over what
18 was said or heard by the officers and Perez during the
19 approximately 10 minutes the officers remained in the
20 doorway. (SUF ¶ 32; SGI ¶ 32.) However, all witnesses
21 agree that during this time the officers gave Perez the
22 command to come downstairs and asked him if he would
23 allow his wife and child to come down. (SUF ¶ 30; SGI ¶
24 30.)

25 In Plaintiffs' version of the facts, Mr. Herrera did
26 not hear any yelling or screaming from inside the house,
27 and he only heard the officers telling Perez to "come
28

1 down." (Mr. Herrera Depo. 39:9-23; 66:12-19.) Ms.
2 Alvarado also states that there was no screaming, crying,
3 commotion, or noise coming from inside during this time,
4 and she only heard the police tell Perez to "come down"
5 one time. (Deposition of Diana Alvarado ("Alvarado
6 Depo.") 50:4-14, 54:5-7, 81:22-25, 82:11-13, Pl. Exh. 2.)
7 Ms. Alvarado provides conflicting testimony regarding
8 whether Perez verbally responded to the officers'
9 commands to come down. (Compare Alvarado Depo. 54:5-13,
10 53:17-19 with 52:9-12.)

11 The officers provided testimony contrary to the
12 family members regarding the events during this time
13 period. Corporal Moreno testified that when they stood
14 at the threshold of the house he heard an argument going
15 on with raised voices and a female crying. (Moreno Depo.
16 71:17-72-15.) Officer Prewett similarly heard a woman
17 crying and a man shouting as well as objects being tossed
18 around. (Deposition of David Prewett ("Prewett Depo.")
19 40:3-8, Wysocky Decl., Exh H.) Prewett also recalls
20 Moreno giving Perez a command to come downstairs, and
21 Perez shouting unintelligible responses. (Prewett Depo.
22 40:14-42:4.) Prewett also states that he told Perez
23 multiple times that it was the police and they needed him
24 to come downstairs with his hands up. (Prewett Depo.
25 42:9-11.) Prewett testifies that he heard Perez make
26 comments such as "show me your face," "I am going to have
27 to handle this with my knife," and "I do not have any
28

1 kids up here." (Prewett Depo. 42:22-43:13.) At that
2 point, Prewett asked Perez to allow his wife and child to
3 come down. (Prewett Depo. 44:2-5.) A neighbor, Rian
4 Kennedy, also testified that he heard officers
5 repetitively asking Perez to come down and also telling
6 him that they wanted to make sure his wife and kid were
7 okay. (Deposition of Rian Kennedy ("Kennedy Depo.")
8 19:1-21, Wysocky Decl., Exh. I.) Both parties agree that
9 Perez did not come down the stairs, nor did he allow
10 Alvarado or APA to leave. (SUF ¶ 34; SGI ¶ 34.)

11 It is undisputed that during the negotiation with
12 Perez, other officers arrived on the scene, including
13 Aloyian, Hernandez, Romero, and Sontag. (SUF ¶ 33; SGI ¶
14 33.) When Prewett relayed to the others that he heard
15 Perez's comment about a knife, Moreno requested for
16 "less-lethal munitions to be brought to the scene."
17 (Moreno Depo. 77:3-12.) He also considered using a taser
18 and conceded it would be effective if Perez had a knife.
19 (Moreno Depo. 77:13-80:23.)

20

21 **3. Decision to Enter**

22

23 At 5:36am, Prewett reported to dispatch that it
24 "sounds like subj[ect] 242'ing [assaulting] relatives
25 ins[i]d[e] res[i]d[ence], also made threats on his own
26 life." (Dispatch Log at 5:36:24.) Prewett remembers
27 that at this time Perez became very loud, a child

28

1 screamed, and he heard several objects thrown around.
2 (Prewett Depo. 46:23-47:2.) At 5:37am, Moreno reported
3 to dispatch that the "susp[ect] [was] becoming more
4 violent" and the officers were "making entry." (Dispatch
5 Log at 5:37:08.) Moreno states that just before the
6 entry he started hearing a lot of banging, items being
7 broken upstairs, and flesh being struck. (Moreno Depo.
8 32:19-22.)

9 In contrast, Alvarado states that there was no
10 altercation occurring in the residence at this time, nor
11 were there any sounds of screaming or crying. (Alvarado
12 Depo. 49:16-50:14.) Mr. Herrera provided similar
13 testimony. (Mr. Herrera Depo. 66:12-19.)

14 Ultimately, the undisputed facts show that Moreno
15 made the decision that five officers, Moreno, Prewett,
16 Lee, Aloyian, and Sontag, would enter the house. (Moreno
17 Depo. 91:6-19.)

18

19 **4. The Shooting**

20

21 Officer Prewett led the entry team into the house
22 from the doorway to the bottom of a set of zigzagging
23 stairs along the wall opposite the front door. (SUF ¶
24 40; SGI ¶ 40.) The stairs ascended for approximately
25 nine steps toward the left side of the house where there
26 was a flat landing along the left wall, and then the
27 stairs pivoted and ascended for another approximately

28

1 five steps toward the right side of the house where they
2 reached the second floor. (Wysocky Decl., Exh. J.)

3 There are substantial disparities between Alvarado
4 and the officers' versions of the facts once the police
5 entered the home. According to Alvarado's deposition⁸,
6 it appears that Alvarado was out of view of the officers
7 when they entered because the officers told Perez that
8 they needed to see his wife and kid. (Alvarado Depo.
9 81:12-15.) At that point, she and her son approached the
10 landing where Perez was standing and saw that the
11 officers were standing at the bottom of the stairs. (Id.
12 81:12-21.) It appears that, according to Alvarado, Perez
13 was on the landing facing toward the police officers, and
14 she was on his left. (Id. 40:23-41:5.) Perez held the
15 gun in his right hand. (Id. 41:6-10.) While standing on
16 the landing, Alvarado told the police, "the pistol is a
17 toy." (Id. 31:17-25.) Alvarado testified that the
18 police said nothing after they asked to see her and her
19 son. (Id. 82:17-21, 34:22-23.) Perez then moved
20 Alvarado away from him with his left hand. (Id. 41:11-
21 13.) Then, Perez looked at the officers, and they
22 started to shoot him. (Id. 41:18-21.) At the time the
23 shots rang out, Alvarado states the gun was in Perez's

24

25

26 ⁸ Alvarado's testimony is unclear with respect to the
27 sequence of events leading up to the shooting and the
28 spatial locations of the parties and decedent. Despite
the lack of chronological clarity, it is clear to the
Court that Alvarado's description of the incident differs
substantially from that of the officers.

1 right hand, and his "hand [/] arm was glued to his body"
2 on the right side. (Id. 52:23-53:6.)

3 The officers present a contradictory version of the
4 events. The officers state that they entered the home
5 and then positioned themselves at the bottom of the
6 stairs. (Deposition of Tony Lee ("Lee Depo.") 94:4-17,
7 Wysocky Decl., Exh. K; Moreno Depo. 92:9-13.) When they
8 entered, the officers could see the left side of Perez's
9 body as he stood on the landing. (Deposition of Brandon
10 Sontag ("Sontag Depo.") 44:13-18, Wysocky Decl., Exh. L;
11 Prewett Depo. 59:15-28, Moreno Depo. 103:13-14.) They
12 also could see a weapon in Perez' right hand. (Lee Depo.
13 94:20-24, Sontag Depo. 43:20-25, Moreno Depo. 103:15-18.)
14 At least two of the officers had their guns aimed at
15 Perez when they entered. (Sontag Depo. 45:10-14; Lee
16 Depo. 95:9-14.) According to Lee, Prewett told Perez to
17 "drop the gun."⁹ (Lee Depo. 97:8-9.) At this point in
18 the officers' version of the facts, Perez rotated his
19 torso in the officers' direction, opening himself up
20 toward the officers. (Lee Depo. 97:10-18; Sontag Depo.
21 47:1-3, Prewett Depo. 58:18-59:10, Moreno Depo. 103:18-
22 23.) Simultaneously, Perez raised his right arm in an
23 arc toward the direction of the officers with the gun in
24 his hand arriving at the level of Perez's waist. (Lee
25 Depo. 98:9-11; Sontag Depo. 47:6-8; Prewett Depo. 60:5-

26
27 ⁹ It is undisputed that Rian Kennedy, the neighbor,
28 heard an officer say "Put it down" twice. (Kennedy Depo.
20:22-25.)

1 18; Moreno Depo. 104: 2-4.) While Moreno states that the
2 gun was pointed at him (Moreno Depo 103:5-12), Lee and
3 Sontag testified that the gun was pointed in the
4 direction of fellow officers, but not directly at them.
5 (Lee Depo. 100:6-19; Sontag Depo. 47:9-10.) At that
6 moment, the officers fired their weapons, with Sontag
7 firing two rounds (Sontag Depo. 50:1-2), Prewett shooting
8 ten (Prewett Depo. 60:19-24), and the other officers
9 firing an unknown number. (Lee Depo. 100:4-5.)

10 It is undisputed that according to dispatch records,
11 eleven seconds elapsed between the time the officers
12 entered the home to the time of Perez's shooting which
13 occurred at approximately 5:37am. (SUF ¶ 52; SGI ¶ 52.)
14 Perez died as a result of the gunshot wounds. (SUF ¶ 51;
15 SGI ¶ 51.)

17 **5. The Gun**

18
19 Both parties admit that the object in Perez's right
20 hand was a toy gun. (SUF ¶ 53; SGI ¶ 53.) However, the
21 parties dispute the identity of the toy held by Perez at
22 the time of the incident. Defendants provide photographs
23 of a fake gun retrieved during the investigation of the
24 incident. (Wysocky Decl., Exhs. M1-4, N.) The gun
25 pictured is black with a narrow tip. (Id.) Plaintiffs
26 state this is not the gun Perez was holding during the
27 shooting and describe the actual toy as light brown in
28

1 color without a narrow tip. (Alvarado Depo. 22:22-24:4.)
2 Nevertheless, the parties agree that the toy gun held by
3 Perez on the date of the incident did not have an orange
4 tip on the end of it. (SUF ¶ 43; SGI ¶ 43.)

5
6 **D. Judgment as a Matter of Law**

7
8 **1. Fourteenth Amendment Due Process**

9
10 Defendants seek summary judgment on a portion of
11 Plaintiffs' first cause of action under the Due Process
12 Clause of the Fourteenth Amendment pursuant to 42 U.S.C.
13 § 1983. This claim asserts Plaintiffs' deprivation of
14 familial association in the loss of their father against
15 the individual officers only.

16 The Ninth Circuit recognizes that children have a
17 constitutionally protected liberty interest under the
18 Fourteenth Amendment in the "companionship and society"
19 of their father. Curnow v. Ridgecrest Police, 952 F.2d
20 321, 325 (9th Cir. 1991). Defendants do not challenge
21 the standing of Perez's two sons to sue for
22 constitutional injury under the Fourteenth Amendment for
23 loss of familial relations.

24 "Official conduct that 'shocks the conscience' in
25 depriving [a child] of that interest is cognizable as a
26 violation of [substantive] due process." Wilkinson v.
27 Torres, 610 F.3d 546, 554 (9th Cir. 2010). In

1 determining whether excessive force shocks the
2 conscience, the Court must first ask "whether the
3 circumstances are such that actual deliberation [by the
4 officer] is practical." Porter v. Osborn, 546 F.3d 1131,
5 1137 (9th Cir. 2008) (quotation omitted). "Where actual
6 deliberation is practical, then an officer's 'deliberate
7 indifference' may suffice to shock the conscience. On
8 the other hand, where a law enforcement officer makes a
9 snap judgment because of an escalating situation, his
10 conduct may only be found to shock the conscience if he
11 acts with a purpose to harm unrelated to legitimate law
12 enforcement objectives." Wilkinson, 610 F.3d at 554.¹⁰

13
14 **a. Actual Deliberation**

15
16 In Porter v. Osborn, the Ninth Circuit found that
17 actual deliberation was not practical and applied the
18 purpose to harm standard where the police were faced with
19 an individual who, after being pepper-sprayed, refused to
20 get out of the car but instead started to drive his car
21 at the officers. 546 F.3d at 1139-40. The court held

22 _____
23 ¹⁰ The parties misstate the standard applicable to
24 Plaintiffs' Fourteenth Amendment due process claim. The
25 parties fail to distinguish between the proper
26 application of the purpose to harm and deliberate
27 indifference standards, and instead assume that the
28 purpose to harm test applies to the facts presented by
this case. (Motion at 7; Opp'n at 7-8.) Therefore, the
parties do not present any argument related to whether
actual deliberation was practicable under the
circumstances or whether Defendants meet the lesser
deliberate indifference standard.

1 that actual deliberation was not practical because the
2 situation evolved quickly and the suspect's evasive
3 actions forced the officers to make repeated split-second
4 decisions. Id. at 1139.

5 In Wilkinson, the Ninth Circuit also found that the
6 purpose to harm standard was appropriate where "[w]ithin
7 a matter of seconds, the situation evolved from a car
8 chase to a situation involving an accelerating vehicle in
9 dangerously close proximity to officers on foot," and the
10 suspect's "act of accelerating in reverse despite
11 repeated warnings to stop forced [the officer] to make a
12 split-second decision." 610 F.3d at 554. The court
13 noted that the entire sequence of events "occurred in
14 less than nine seconds." Id.

15 Viewing the facts in the light most favorable to
16 Plaintiffs, the Court cannot find as a matter of law that
17 actual deliberation was impossible. Even though the
18 officers were only inside the home for eleven seconds,
19 the officers were at the scene for over 25 minutes and
20 remained at the threshold of Plaintiffs' door for at
21 least 10 minutes formulating a plan. Thus, a jury could
22 reasonably find that the officers had time to deliberate
23 before shooting Perez. Moreover, under Plaintiff's
24 version of the facts, the situation was not evolving
25 rapidly, in fact it was not evolving at all, as they
26 claim there was no altercation, screaming, or crying
27 occurring inside the house at any time while the officers
28

1 were present. Similarly, according to Plaintiffs, Perez
2 was not involved in any evasive action because he was
3 standing still with his arms at his sides and was not
4 speaking at the time he was shot. The most that could be
5 said is that Perez was under the influence of drugs and
6 failed to obey officer commands to come downstairs. The
7 Court cannot find as a matter of law that these facts
8 qualify as a rapidly escalating situation requiring
9 split-second judgments.

10 Defendants argue that since they believed Perez was
11 holding a real gun, they subjectively thought they were
12 faced with a dangerous situation where they had to "act
13 decisively" and make decisions "in haste, under pressure,
14 and [] without the luxury of a second chance." County of
15 Sacramento v. Lewis, 523 U.S. 833, 853 (1998) (holding
16 that in the context of a high-speed chase, an officer
17 could not be liable for a due process violation without a
18 purpose to harm). However, Plaintiffs' version of the
19 facts calls into question Defendants' subjective
20 understanding of the danger they faced. Plaintiffs
21 present evidence to show that over the course of the 25
22 minutes they were on the scene, the officers were
23 repeatedly told by multiple family members and the
24 dispatcher that the gun was a toy and that Perez posed no
25 viable threat to the officers or others. See McMurray v.
26 Cnty. of Sacramento, CIV S-09-2245 GEB, 2011 WL 4709876,
27 at *23 (E.D. Cal. Oct. 4, 2011) (finding a genuine issue
28

1 of material fact as to whether the situation was "tense
2 and dangerous" where according to plaintiff "there was no
3 arguing or yelling, and no confrontation between Damion
4 and the deputies" and "there was nothing in Damion's hand
5 other than a telephone and there was no reason to believe
6 that he was armed"); cf. Moreland v. Las Vegas Metro.
7 Police Dep't, 159 F.3d 365, 372 (9th Cir. 1998) (finding
8 deliberation impracticable where "the gunfight in
9 progress threatened the lives of the 50 to 100 people who
10 were trapped in the parking lot"). Accepting Plaintiffs'
11 allegations as true, a reasonable jury could conclude
12 that the situation was not escalating at the time of the
13 shooting and that the officers had a sufficient
14 opportunity to deliberate on their course of conduct,
15 obviating the need to shoot Perez.

16 The Court finds that given the genuine disputes of
17 material fact, a reasonable jury could find that it was
18 practical for the officers to actually deliberate prior
19 to shooting Perez. Under the test outlined by the Ninth
20 Circuit, if actual deliberation is practical, the Court
21 must examine whether the officers exhibited deliberate
22 indifference toward the decedent. Wilkinson, 610 F.3d at
23 554.

24

25 **b. Deliberate Indifference**

26

27 Under the deliberate indifference standard,

28

1 Plaintiffs must demonstrate that the officers
2 “‘consciously disregard[ed]’ a substantial risk of
3 serious harm.” See Farmer v. Brennan, 511 U.S. 825, 839
4 (1994) (citation omitted). The officers cannot be liable
5 unless they were “aware of facts from which the inference
6 could be drawn that a substantial risk of serious harm
7 exists, and [they] must also draw the inference.” See
8 id. at 837.

9 As discussed above, Plaintiffs put forward sufficient
10 facts from which a reasonably jury could infer that the
11 officers were aware that Perez faced a substantial risk
12 of serious harm. They proffered evidence which
13 demonstrates that multiple family members and the 9-1-1
14 dispatcher told the officers that Perez's gun was fake.
15 Multiple officers admit to having heard these statements,
16 yet they ignored them when they formulated their plan of
17 entry and confronted Perez inside the home with guns
18 drawn. A factfinder could conclude that a substantial
19 risk of serious harm would have been obvious when five
20 officers entered a home with their guns drawn and aimed
21 at an unarmed and intoxicated Perez who was located only
22 feet from the door. Given that the officers nonetheless
23 proceeded with their course of conduct and fired a
24 minimum of fifteen rounds at Perez in close range, there
25 is sufficient evidence from which a jury could conclude
26 that the officers drew the inference that deadly harm was
27 highly probable under the circumstances and disregarded
28

1 that risk. See Kosakoff v. City of San Diego,
2 08-CV-1819UEGNLS, 2010 WL 1759455, at *12 (S.D. Cal. Apr.
3 29, 2010) aff'd in part sub nom. Estate of Kosakoff ex
4 rel. Kosakoff v. City of San Diego, 460 F. App'x 652 (9th
5 Cir. 2011); Ingram v. City of San Bernardino, EDCV
6 05-925-VAPSG LX, 2007 WL 5030226, at *9 (C.D. Cal. May 3,
7 2007) ("Viewing the facts in the light most favorable to
8 Plaintiffs, an officer shooting an unarmed suspect who
9 was turning away could establish that Officer Green's
10 purpose in shooting Ingram was unrelated to the
11 legitimate object of arrest, and thus represents
12 conscious disregard for Plaintiffs' familial
13 relationship").

14 Accordingly, a jury could conclude that the officers'
15 conduct "shocked the conscience," thereby violating
16 Plaintiffs' Fourteenth Amendment due process right to
17 familial association with their father. The Court
18 therefore DENIES summary judgment on Plaintiffs'
19 Fourteenth Amendment claim under 42 U.S.C. § 1983.

20

21 **2. California Preshooting Negligence**

22

23 A portion of Plaintiffs' third claim for relief is
24 based on the allegations that the officers used deficient
25 tactics leading up to Perez's death. Defendants argue
26 that under California law, a negligence claim cannot be
27 premised on the negligence of police officers'

28

1 preshooting tactics.

2 Two California Courts of Appeals have found that a
3 duty of care cannot be imposed on police in the
4 preshooting context for the police's failure to prevent
5 harm. See Munoz v. City of Union City, 120 Cal. App. 4th
6 1077 (2004); Adams v. City of Fremont, 68 Cal. App. 4th
7 243 (1998). The Munoz court weighed the benefits and
8 drawbacks of imposing liability on officers with respect
9 to the tactical decisions they used in responding to a 9-
10 1-1 call and determined that the "need to protect the
11 overall safety of the community by encouraging law
12 enforcement officers to exercise their best judgment"
13 vastly outweighed the value of imposing tort liability.
14 Munoz, 68 Cal. App. 4th at 1097 (finding the officer's
15 "decisions as to how to deploy his officers at the scene"
16 and "the efforts made in an attempt to defuse the
17 situation as safely as possible" cannot subject the
18 officers to liability). The court held, relying on
19 Adams, that "law enforcement officers are shielded from
20 ordinary negligence claims based on their response to
21 public safety emergencies when those efforts prove to be
22 ineffective in preventing . . . harm." Id. at 1077.

23 Plaintiffs seek to impose liability on the officers
24 for allegedly negligent tactics including Moreno's call
25 for less-lethal force, but failure to wait for said means
26 to arrive before entering and Moreno's failure to use a
27 taser. (Opp'n at 11-12.) To support their imposition of
28

1 liability, Plaintiffs point to the Ninth Circuit's
2 decision in Hayes v. Cnty. of San Diego, 658 F.3d 867,
3 868 (9th Cir. 2011) where the court certified the
4 following question to the California Supreme Court:
5 "Whether under California negligence law, sheriff's
6 deputies owe a duty of care to a suicidal person when
7 preparing, approaching, and performing a welfare check on
8 him." Id. at 868. The court specifically noted that the
9 California Supreme Court has not decided "whether an
10 officer's lack of due care with respect to preshooting
11 tactical decisions can give rise to liability for
12 negligence," and found that there is a dispute over
13 whether the high court would follow the relevant
14 intermediate state appellate decisions in Munoz and
15 Adams. Id. at 870. The California Supreme Court has
16 not yet supplied an opinion on the issue.

17 When "there is relevant precedent from the state's
18 intermediate appellate court, the federal court must
19 follow the state intermediate appellate court decision
20 unless the federal court finds convincing evidence that
21 the state's supreme court likely would not follow it."
22 Ryman v. Sears, Roebuck & Co., 505 F.3d 993, 994 (9th
23 Cir. 2007). The Ninth Circuit's decision in Hayes
24 provides the Court with convincing evidence that the
25 California Supreme Court likely would not follow the
26 decisions in Munoz and Adams. See Hayes, 658 F.3d at 872
27 (noting that the California Supreme Court's extended
28

1 analysis in Hernandez v. City of Pomona, 46 Cal.4th 501
2 (2009) of whether the officers' preshooting conduct
3 breached the relevant standard of care indicated that it
4 would likely not adopt the broad rule from Adams and
5 Munoz that officers owe no such duty). Moreover, other
6 federal district courts have declined to follow Munoz and
7 Adams given the Ninth Circuit's decision to certify the
8 question to the California Supreme Court. See J.P. ex
9 rel. Balderas v. City of Porterville, 801 F. Supp. 2d
10 965, 990 (E.D. Cal. 2011) ("In light of the Hayes
11 certification opinion, the Court will assume without
12 deciding that Hall and Dowling owed Prieto a duty to use
13 due care with respect to their pre-shooting tactics.").

14 The Court declines to grant summary judgment as a
15 matter of law on Plaintiffs' preshooting negligence claim
16 given the lack of clear precedent foreclosing such
17 claims. However, the Court does not reach the issue of
18 whether the officers were negligent with respect to their
19 preshooting tactical decisions, as the parties have not
20 presented arguments on whether the officers preshooting
21 actions were reasonable. At this stage, the Court will
22 not foreclose Plaintiffs from seeking to impose liability
23 based on these actions, but the Court takes no position
24 as to whether the officers preshooting tactics were
25 reasonable.

26 Accordingly, the Court DENIES Defendants' motion for
27 summary judgment on Plaintiffs' preshooting negligence
28

1 claim.

2

3

IV. CONCLUSION

4

5 For the foregoing reasons, the Court DENIES
6 Defendants' motion for partial summary judgment on
7 portions of Plaintiffs' first and third claims for
8 relief. Due to Plaintiffs' withdrawal of the cause of
9 action, the Court also DISMISSES Plaintiffs' fourth cause
10 of action for violations of California Civil Code §§ 51,
11 51.7, 52, and 52.1.

12

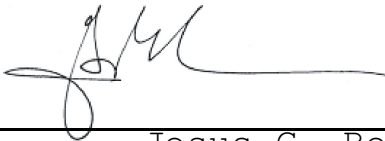
13

14

15

Dated: May 21, 2013

16



Jesus G. Bernal
United States District Judge

17

18

19

20

21

22

23

24

25

26

27

28