UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

RAUL JESSE GONZALEZ, JR.,

Plaintiff,

v.

JUAN ALVA, et al.,

Defendants.

CASE NO: 11-CV-2846 W (WVG)

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT [DOC. 33]

Pending before the Court is Defendants' motion for partial summary judgment. (*MPSJ* [Doc. 33]; *see also Reply* [Doc. 45].) Plaintiff Raul Jesse Gonzalez, Jr. ("Gonzalez") opposes. (*Opp'n* [Doc. 38].)

The Court decides the matter on the papers submitted and without oral argument pursuant to Civil Local Rule 7.1(d)(1). For the reasons stated below, the Court **GRANTS IN PART** and **DENIES IN PART** Defendants' motion.

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I. BACKGROUND

Plaintiff is a seventeen-year-old boy named Raul Jesse Gonzalez, Jr., from Escondido, California. (*Compl.* [Doc. 1] ¶ 11.) On the evening of July 28, 2011[1], Gonzalez's brother and father got into an altercation outside of the family's home, which Gonzalez attempted to break up. (*Id.* ¶ 12; *see also Opp'n* 1.) Gonzalez, accompanied by his three siblings and two other friends, walked away from the scene shortly after his mother called the Escondido Police Department ("EPD"). (*Compl.* ¶¶ 13-14.)

While en route to the Gonzalez home, several EPD officers, including Defendant Juan Alva ("Alva"), noticed Gonzalez walking down the street. (*Opp'n Ex. N Alva Deposition* 66:5-67:2.) Alva exited his police car and approached Gonzalez, who ran across the street into a parking lot of a shopping mall. (*MPSJ* 2; *Opp'n* 1.) Without warning, Alva deployed an X-26 Taser on Gonzalez while he ran away from Alva. (*Opp'n Ex. L Gonzalez Deposition* 128:12-17.) The Taser immobilized Gonzalez mid-run, causing him to fall face-first onto the pavement. (*Opp'n Ex. T-7 Incident Report*.) Gonzalez fractured several teeth, received abrasions to his face and hands, and broke his jaw. (*Compl.* ¶ 22.)

On December 7, 2011, Gonzalez commenced this action against Alva, the City of Escondido ("Escondido"), EPD chief Jim Maher ("Maher"), and DOES 1-20, alleging: (1) violation of Gonzalez's Fourth Amendment right to be free from excessive force; (2) battery; (3) failure to properly screen and hire; (4) failure to properly train; (5) failure to supervise and discipline; (6) Monell municipal liability;(7) intentional

[1] There is some uncertainty as to whether the relevant events occurred on July 28, 2011, or July 29, 2011. (*Compare Compl.* ¶ 11 with *MPSJ* 1.) However, because neither party addresses this discrepancy and because it does not appear to affect the substance of the pending motion, the Court will, for the purposes of this order, assume that the events occurred on July 28, 2011.

infliction of emotional distress; (8) negligence; and (9) violation of California Civil Code § 52.1.[2] The complaint also requests injunctive relief. (*Compl.* ¶¶ 94-96.)

On February 22, 2013, Escondido and Maher (collectively, "Defendants") moved for partial summary judgment pursuant to Federal Rule of Civil Procedure 56(c), contending that they are entitled to judgment given that: (1) Escondido did not have an unconstitutional policy causing a constitutional violation and therefore Defendants cannot be held liable for any injury or damages Gonzalez alleges; (2) Maher did not participate in the tasering, nor did he use, or cause to be used any force upon Gonzalez and therefore cannot be held personally liable for any injury or damages Gonzalez alleges; (3) there is no direct cause of action for negligence against Escondido; and (4) they are not liable for § 52.1 violations. (*See MSPJ* 6-7.)

II. LEGAL STANDARD

Summary judgment is appropriate under Rule 56(c) where the moving party demonstrates the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A fact is material when, under the governing substantive law, it could affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Freeman v. Arpaio, 125 F.3d 732, 735 (9th Cir. 1997). A dispute about a material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248.

A party seeking summary judgment always bears the initial burden of establishing the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. The moving party can satisfy this burden in two ways: (1) by presenting evidence that negates an

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[2] Plaintiff's first cause of action is brought under 42 U.S.C. § 1983 against Defendants Alva and DOES 1-20. Plaintiff's second and seventh causes of action are brought against Defendant Alva only. Plaintiff's third, fourth, and fifth causes of action are brought under 42 U.S.C. § 1983 against Defendants Escondido, Maher, and DOES 1-20. Plaintiff's sixth cause of action is brought under 42 U.S.C. § 1983 against Defendant Escondido only. Plaintiff's eight and ninth causes of action are brought against all named Defendants.

essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party's case on which that party will bear the burden of proof at trial. Id. at 322-23. "Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment." T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987).

"The district court may limit its review to the documents submitted for the purpose of summary judgment and those parts of the record specifically referenced therein." Carmen v. San Francisco Unified Sch. Dist., 237 F.3d 1026, 1030 (9th Cir. 2001). Therefore, the court is not obligated "to scour the record in search of a genuine issue of triable fact." Keenan v. Allen, 91 F.3d 1275, 1279 (9th Cir. 1996) (citing Richards v. Combined Ins. Co., 55 F.3d 247, 251 (7th Cir. 1995)).

If the moving party meets its initial burden, the nonmoving party cannot defeat summary judgment merely by demonstrating "that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); Triton Energy Corp. v. Square D Co., 68 F.3d 1216, 1221 (9th Cir. 1995) (citing Anderson, 477 U.S. at 252) ("The mere existence of a scintilla of evidence in support of the nonmoving party's position is not sufficient."). Rather, the nonmoving party must "go beyond the pleadings and by her own affidavits, or by 'the depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex, 477 U.S. at 324 (quoting Fed.R.Civ.P. 56(e)).

When making this determination, the court must view all inferences drawn from the underlying facts in the light most favorable to the nonmoving party. See Matsushita, 475 U.S. at 587. "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, [when] he [or she] is ruling on a motion for summary judgment." Anderson, 477 U.S. at 255.

III. DISCUSSION

A. Failure to Properly Screen and Hire

The Supreme Court has stated that it is unclear whether a single hiring decision due to inadequate screening can establish liability. See Board of County Comm'rs of Bryan County, Oklahoma v. Brown, 520 U.S. 397, 410 (1997). In cases where a plaintiff identifies only a single instance of inadequate screening, a municipality will face liability only if a full review of the hired officer's record reveals that the particular constitutional violation committed by the hired officer would have been a "plainly obvious consequence" of the hiring decision. Id. at 412-13. "[A] finding of culpability cannot depend on the mere probability that any officer inadequately screened will inflict any constitutional injury. Rather, it must depend on a finding that *this* officer was highly like to inflict the *particular injury* suffered by the plaintiff." Id. at 412.

Gonzalez alleges that Defendants' screening and hiring policies for EPD officers were deliberately indifferent to the constitutional rights of San Diego citizens, including his own. (*Compl.* ¶¶ 46-47.) Defendants contend that there is no evidence that Escondido had an unconstitutional policy of screening and hiring.[3] (*MPSJ* 9.) The Court agrees with Defendants.

The "plainly obvious consequence" standard is exceptionally stringent. In Brown, the Supreme Court found that the officer's record insufficiently related to an excessive force complaint even though it contained a conviction for assault and battery. Brown, 520 U.S. at 413-414. Other courts applying the rule have been equally strict in application of the "plainly obvious consequence" standard. See Morris v. Crawford Cnty., 299 F.3d 919, 924 (8th Cir. 2002) ("[M]unicipalities are not necessarily liable even when an applicant's background contains complaints of physical violence,

[3] In their reply, Defendants argue that the failure to properly screen and failure to properly hire police officers are two separate inquiries. However, given that Defendants fail to cite any authority directing such a two-prong analysis, this Court will proceed under the Supreme Court's seminal decision Board of County Comm'rs of Bryan County, Oklahoma v. Brown, 520 U.S. 397 (1997), which addresses inadequate screening and inadequate hiring simultaneously.

including acts of aggression and assault."); see also Gros v. City of Grand Prairie, 209 F.3d 431, 434 (5th Cir. 2000) ("[P]laintiffs cannot [defeat] summary judgment merely because there was a probability that a poorly-screened officer would violate their protected rights. . . they must show that the hired officer was highly likely to inflict the particular type of injury suffered by them.").

Here, Gonzalez argues that "when Defendants hired Juan Alva, there were numerous, obvious signs that he was not fit to perform the duties and functions of a police officer." (*Opp'n* 22.) Gonzalez suggests that "notable warnings" included "evidence of prior misconduct in past jobs, . . . Alva's termination as a security guard by Sears Department Store for his use of Oleoresin Capsicum spray on two individuals in violation of store policy; Escondido Police Department polygrapher Mark Martin's concerns regarding Alva's truthfulness, maturity and capability to perform as a police officer; glaring inconsistencies between Alva's employment application and his admissions during polygraph examination; and concerns regarding Alva's judgment and maturity noted by Escondido Police Department Gray, who conducted the background investigation of Alva." (*Opp'n Ex. G* 6; *Ex. N* 10-15.) Defendants do not dispute they were privy to this information before hiring Alva. Even assuming that all of the foregoing evidence is admissible, it does not meet the rigorous "plainly obvious consequence" standard.

Gonzalez has failed to explain to the Court how the evidence above shows that Alva's alleged unconstitutional tasering was the "plainly obvious consequence" of hiring Alva. Gonzalez does not demonstrate a direct causal link between Defendants' hiring decision and Gonzalez's specific constitutional injury. Evidence indicating that Alva had a violent past is not enough to show he was highly likely to inflict the particular type of injury suffered by Gonzalez here. Moreover, concerns about Alva's truthfulness and maturity fail to demonstrate that Alva's alleged use of excessive force on Gonzalez was a "plainly obvious consequence" of EPD's hiring decision. At most, Alva's record demonstrates that Defendants' alleged inadequate screening and hiring here may have

increased the possibility that *some* constitutional violation would occur. However, the record ultimately fails to show a direct link between the alleged screening and hiring inadequacy and the specific constitutional injury Gonzalez suffered.

Because Gonzalez has not demonstrated that Defendants decision to hire Alva "reflected a conscious disregard for a high risk that [Alva] would use excessive force in violation of [Gonzalez's] federally protected right," the Court **GRANTS** Defendants' motion for partial summary judgment on this ground. Brown, 520 U.S. at 415-16.

B. Failure to Properly Train

A municipality's decision not to train employees about their legal duty to avoid violating citizens' constitutional rights may constitute an official government policy for purposes of § 1983 in limited circumstances. Connick v. Thompson, 131 S. Ct. 1350, 1359 (2011). Where, as here, a plaintiff claims that the municipality has not *directly* inflicted an injury, but has nonetheless caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee. Bryan County, 520 U.S. at 405. To bring Escondido within the purview of § 1983, Gonzalez must prove that "(1) he was deprived of a constitutional right; (2) the City had a training policy that amounts to deliberate indifference to the constitutional rights of the persons with whom its police officers are likely to come into contact; and (3) his constitutional injury would have been avoided had the City properly trained those officers." Blankenhorn v. City of Orange, 485 F.3d 463, 484 (9th Cir. 2007) (internal quotations and alterations omitted).

Gonzalez alleges that Defendants Escondido and Maher failed to adequately train police officers as to the constituional rights of citizens and arrestees, including the proper and constitutional use of the X-26 Taser. (*Compl.* ¶¶ 52-53.) Defendants argue that Alva received constitutionally adequate Taser training pursuant to Escondido's written policies. (*MPSJ* 10.)

Defendants first contend that Gonzalez has produced no evidence that Escondido's training policy amounts to deliberate indifference to citizen's constitutional rights. Second, Defendants effectively challenge the causation element by arguing that Gonzalez has produced no evidence that shows that Alva received deficient Taser and Use of Force training. (*MPSJ* 10.)

1. *Deliberate Indifference*

For the purposes of § 1983, a municipality's failure to train its employees in a relevant respect must amount to "deliberate indifference to the rights of persons with whom the [untrained employees] come into contact." Connick 131 S.Ct. at 1359 (citing Canton, 489 U.S. at 388). Deliberate indifference is "a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." Bryan County, 520 U.S. at 410; see also Price v. Sery, 513 F.3d 962 (9th Cir. 2008) (requiring plaintiffs to "demonstrate a conscious or deliberate choice on the part of the municipality in order to prevail on a failure to train claim." (internal quotations omitted)). "Thus, when city policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights, the city may be deemed deliberately indifferent if the policy makers choose to retain that program." Connick, 131 S.Ct. at 1360 (citing Bryan County, 520 U.S. at 410).

Defendants argue that Gonzalez cannot establish that the EPD training program shows deliberate indifference to citizen's constitutional rights because there is no evidence that the City's training policies are unconstitutional. (*MPSJ* 10-11.) Gonzalez counters, suggesting that Defendants' failure to update its training policies, specifically Instruction No. 1.29, in light of the Ninth Circuit's decision in Bryan v. MacPherson, 630 F.3d 805 (9th Cir. 2010), demonstrates deliberate indifference.

Even assuming that Defendants' policy failure to update its training policies left these policies unconstitutional, there still must be evidence that the Defendants were

on notice of this deficiency. Connick, 131 S.Ct. at 1360. Here, issues of material fact exist regarding whether or not Defendants had notice of these deficiencies. Gonzalez suggests that "a two-year delay in updating its training to adhere to the Constitutional demands of a Ninth Circuit decision is unreasonable." (*Opp'n* 32.) However, Gonzalez's opposition is notably devoid of any evidence or argument as to when Defendants were put on actual or constructive notice of the Bryan decision. Similarly, Defendants have not presented any evidence regarding when they were put on notice of the Bryan decision. There is no question that Defendants became aware of the Bryan decision at some point, and eventually changed their policies in response thereto. (*Opp'n Ex. N* 52: 1-25; *Opp'n Ex. O* 83: 4-20) Nonetheless, neither party has presented any evidence or argument as to when Defendants received notice of this decision.

In light of the foregoing, the Court **DENIES** Defendants' motion for partial summary judgment on this ground.

2. *Causation*

California courts repeatedly affirm the Supreme Court's requirement of a "direct causal link" between an alleged constitutional deprivation and a municipal policy to find the municipality liable under § 1983. Canton, 489 U.S. at 385; see also Monell, 436 U.S. 694 ("[I]t is when execution of a government's policy . . . inflicts the injury that the government as an entity is responsible under § 1983."); Oviatt v. Pearce, 954 F.2d 1470, 1473-74 (9th Cir. 1992) ("A local government entity is liable under § 1983 when action pursual to official municipal policy of some nature causes a constitutional tort." (internal quotations and alterations omitted)); Thompson v. City of Los Angeles, 885 F.2d 1439, 1444 (9th Cir. 1989) ("Only if a plaintiff shows that his injury resulted from a permanent and well settled practice may liability attach for injury resulting from a local government custom.").

Defendants' argument that there is no evidence that Officer Alva did not receive deficient training is contradicted by the record. Gonzalez argues that Alva was not

trained in the constitutional use of a Taser when he shot Gonzalez, and therefore Alva deployed his Taser in a manner violating Bryan. (*Opp'n* 33.) In fact, Gonzalez argues that "Defendants had not provided training to Alva that Tasers should generally not be used on passive resistors or individuals fleeing from minor non-violent offenses," citing Bryan. (*Id.*) Gonzalez also argues that Defendants did not instruct Alva that the Taser should only be used when "the objective facts establish that a suspect poses an immediate threat to the safety of the officer, others or themselves or who if fleeing from a serious offense." (*Id.* (citing *Ex.* CC)). Defendant claims that if Alva had been properly trained in the aforementioned standards, he would not have used the Taser "in a manner that violated Bryan's standards." (*Id.*) Defendants do not seriously contest this theory of causation, as their argument hinges on the constitutionality of the underlying policy.

Therefore, the Court **DENIES** Defendants' motion for partial summary judgment on this ground.

C. Failure to Properly Supervise and Discipline

A plaintiff may establish municipal liability if it can prove that a municipality's omissions, such as a failure to supervise and discipline, render it responsible for a constitutional violation even though the municipality's policies are facially constitutional. Gibson v. County of Washoe, Nev., 290 F.3d 1175,1186 (9th Cir. 2002). In order to do so, a plaintiff must show that (1) the municipality's deliberate indifference to citizens' constitutional rights led to its failure to supervise or discipline, and (2) the failure to supervise or discipline caused a municipal employee to commit the constitutional violation the plaintiff suffered. Id. To prove a municipality's deliberate indifference, plaintiff must show that the municipality was on actual or constructive notice that its failure to supervise or discipline would likely result in a constitutional violation. Id.

Defendant's argument that "there is no evidence that the City had a custom or policy of failing to supervise or punish unconstitutional and excessive uses of force" is

contradicted by the record. (*MPSJ* 11.) Gonzalez claims that Defendants "ignored the information they had regarding the excessive and unconstitutional use of the Taser by their officers." (*Opp'n* 34.) Specifically, Gonzalez argues that Defendants were on notice of Alva's propensity to use his Taser inappropriately well before the incident in question. (*Opp'n* 34; *Opp'n Exs. V, W, Y, Z*). Indeed, these four instances of Taser use are arguably evidence of Alva's repeated violations of the Use of Force policy and Taser policy (Department Instruction No. 1.29) that was in effect at the time. Such evidence, when viewed in the light most favorable to Gonzalez, could lead a reasonable jury to conclude that Defendants were deliberately indifferent.

Defendants attempt to discredit Gonzalez's proffered evidence is unavailing. Defendants contend that these four instances of Taser use by Alva were never challenged and never "deemed unconstitutional or excessive" and thus provide no evidence that Alva's prior Taser uses should have lead to discipline. (*Reply* 9.) First, these instances of Taser use may provide notice to Defendants of Alva's propensity to deploy his Taser even if they were never challenged. Defendants do not and cannot seriously contend that their responsibility to supervise and discipline extends only to officer misconduct which is challenged. Second, these instances of Taser use need not be "deemed unconstitutional or excessive" to provide notice of potential future violations. The law does not require that these instances be illegal in and of themselves: it need only put defendants on notice. In light of this evidence, and because "[w]hether a local government has displayed a policy of deliberate indifference to the constitutional rights of its citizens is generally a jury question," summary judgment is inappropriate here. Gibson, 290 F.3d at 1195.

In light of the foregoing, the Court **DENIES** Defendants' motion for partial summary judgment on this ground.

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D. Maher's Liability for Constitutional Violations

A supervisory officer may be found liable in his individual capacity if he knowingly refused to terminate a series of acts by others, which he knew or reasonably should have known would cause others to inflict a constitutional injury. Dubner v. City & Cnty. of San Francisco, 266 F.3d 959, 968 (9th Cir. 2001); see also Watkins v. City of Oakland, 145 F.3d 1087, 1093 (9th Cir. 1998); Larez v. City of Los Angeles, 946 F.2d 630, 646 (9th Cir. 1991). Supervisory liability also applies against an officer in his individual capacity for the officer's "own culpable action or inaction in the training, supervision, or control of his subordinates," Clay v. Conlee, 815 F.2d 1164, 1170 (8th Cir. 1987), for his "acquiescence in the constitutional deprivations of which [the] complaint is made," Meade v. Grubbs, 841 F.2d 1512, 1528 (10th Cir. 1988) (internal quotations omitted); or for conduct that shows a "reckless or callous indifference to the rights of others." Bordanaro v. McLeod, 871 F.2d 1151, 1163 (1st Cir. 1989); see also Larez, 946 F.2d at 646.

Defendants argue that Defendant Maher is entitled to summary judgment as he is not liable in his individual or official capacity for constitutional injuries. (*MPSJ* 14-15.) Defendants further argue that Maher cannot be found liable in his individual capacity because there is no evidence indicating that he was personally involved in Gonzalez's tasering. (*MPSJ* 14.) Defendants also maintain that there is no evidence demonstrating that Maher was deliberately indifferent to possible constitutional violations committed by EPD officers. (*Id.*)

Although it is unclear whether Gonzalez intended to bring his allegations against Maher as an individual or as an official, (*See Compl.* ¶¶ 7, 45, 52, 59, 84, 89), the Supreme Court has noted that "[i]n many cases the complaint will not clearly specify whether officials are sued personally, in their official capacity, or both." Kentucky v. Graham, 473 U.S. 159, 167 n. 14 (1985). In such cases, such as the present matter, the "course of proceedings" will indicate the nature of the liability sought to be imposed. Id.; Brandon v. Holt, 469 U.S. 464, 469 (1985). Since this question of liability is

typically answered during "the usual process of pleadings and pretrial orders that occur in all litigation in federal district courts," McRorie v. Shimoda, 795 F.2d 780, 783 n. 5 (9th Cir. 1986), the Court will consider each theory of liability in turn.

Defendants arguments that there is no evidence demonstrating Maher's personal involvement in the tasering or deliberate indifference are unpersuasive. Maher's alleged lack of personal involvement in the tasering is irrelevant here because supervisory liability for an official in his individual capacity does not require personal involvement in the constitutional violation per se. See, e.g., Dubner, 266 F.3d at 968. Moreover, a reasonable jury could find that Maher, as Chief, "knew or reasonably should have known" about Alva's allegedly inappropriate Taser use leading up to the incident in question. Larez, 946 F.2d at 646. In addition, a reasonable jury could find that by not reviewing the Department's Use of Force Committee findings regarding Alva's use of force, Maher is culpable for constitutional violations due to his "inaction in the training, supervision or control of his subordinates." Id. When viewed in the light most favorable to Gonzalez, the fact that Maher arguably "knew or reasonably should have known" about all of the alleged constitutional violations exposes Maher to liability in his individual capacity for each alleged violation.

Therefore, the Court **DENIES** Defendants' motion for partial summary judgment with respect to Defendant Maher's liability in his individual capacity.

Defendants also argue that Maher cannot be found liable in his official capacity. (*MPSJ* 15.) Defendants argument rests on the assumption that "the City is not liable for any constitutional violations under the facts of this case." (*MPSJ* 15.) However, Gonzalez's constitutional claims have not been dismissed at this point in the litigation. In light of the foregoing, the Court **DENIES** Defendants' motion for partial summary judgment with respect to Defendant Maher's liability in his official capacity.

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E. Monell Liability

Under Monell, local governmental entities may be sued for constitutional deprivations suffered as a result of governmental custom. Monell, 436 U.S. at 690-691; see also Pitts v. Cnty. of Kern, 17 Cal. 4th 340, 349 (1998) (noting that local governmental entities include cities.) A plaintiff must demonstrate that the local governmental entity, through deliberate conduct, was the "moving force" between the constitutional injury suffered. Id.; see also Bryan County, 520 U.S. at 404. A plaintiff may show "deliberate conduct" by producing evidence establishing that the governmental entity was deliberately indifferent to the occurrence of constitutional violations. Id. Deliberate indifference "requir[es] proof that a municipal actor disregarded a known or obvious consequence of his action." Id. at 397.

In his sixth cause of action, Gonzalez appears to allege two separate theories of Monell liability. First, he accuses the City of Escondido of being deliberately indifferent to the widespread and allegedly inappropriate use of Tasers by its officers. (*Compl.* ¶ 70.) Next, he claims that Escondido was deliberately indifferent because it "failed to set forth appropriate policy regarding the use of the Taser as required by" Bryan. Defendants move for summary judgment, arguing that there is no evidence that the relevant policies are unconstitutional or have been implemented in an unconstitutional manner. (*MPSJ* 13-14.)

With respect to Defendant's alleged "deliberate indifference" in not adopting a Taser policy that comports with the requirements of Bryan, the Court has already explained that questions of fact surrounding notice remain unresolved. Namely, the present record does not conclusively demonstrate when Defendants became aware of the Bryan decision. Without any evidence as to the date of notice, the Court can not determine whether or not Defendants were deliberately indifferent to their heightened responsibilities under the Bryan decision.

Defendants argument that there is no evidence that its policy has been implemented in an unconstitutional way is refuted by evidence presented in Gonzalez's

opposition. Gonzalez claims that "defendant was deliberately indifferent to the widespread use of Tasers by its officers" and maintained a "*de facto* policy of allowing its officers to indiscriminately and improperly use the Taser gun." (*Opp'n* 36.) In support of these claims, Gonzalez submits a laundry list of alleged improper uses of Tasers by the various officers, including Alva. (*Id.* 9-17; *Opp'n Exs. T, V, W, X, Y, Z, BB*.) Defendants present no evidence to refute these alleged improper uses but instead argue that Plaintiffs have not provided proof, including expert testimony, that these alleged incidents were improper. (*Reply* 11.) Because Defendants fail to address any of the incidents in any detail, the record when viewed in the light most favorable to Gonzalez suggests that these alleged violations arguably violate the Defendants Taser policies in place at the time of the incidents. Thus, Defendants have not refuted Gonzalez's evidence that Defendants were not in fact implementing their policy.

In light of the foregoing, the Court **DENIES** Defendants' motion for summary judgment on this ground.

F. Negligence

The Government Claims Act governs all liability against public entities in California.[4] See Clark v. Optical Coating Lab., Inc., 165 Cal. App. 4th 150, 182 (2008); Cnty. of Los Angeles v. Super. Ct., 127 Cal. App. 4th 1263, 1267 (2005). Section 815 of the Act concerns the general liability of public entities and states that "a public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." Cal. Gov. Code § 815(a). This section applies "[e]xcept as otherwise provided by statute." Id. The Government Claims Act includes "city" in its definition of public entity. Cal. Govt. Code. § 811.2. Accordingly, in determining whether a city is directly liable for negligence, California courts consistently hold that liability must be based on a specific

[4] The Government Claims Act was formerly called the Tort Claims Act and includes California Government Code §§ 810 to 998.3. 35A Cal. Jur. 3d Government Tort Liability § 1.

statute which articulates the circumstances in which the city will be liable, or at least creates some specific duty of care apart from those of general tort principles. Eastburn v. Reg'l Fire Prot. Auth., 31 Cal. 4th 1175, 1183 (2003); see also de Villers v. Cnty. of San Diego, 156 Cal. App. 4th 238, 262 (2007); Zelig v. Cnty. of Los Angeles, 27 Cal. 4th 1112, 1127 (2002).

Gonzalez alleges that Defendants breached their duty of care to Alva by failing to properly train and supervise EPD officers with respect to Taser usage, resulting in Gonzalez's injuries. (*Compl.* ¶¶ 84-85.) Defendants argue that Escondido is entitled to summary judgment given Gonzalez's failure to allege a statutory basis for finding Escondido directly liable for negligence.[5] (*MPSJ* 15.)

Defendants accurately point out that Gonzalez failed to identify a statutory basis for a direct negligence claim. (*Reply* 12; *MPSJ* 15-16.) Therefore, this Court **GRANTS** Defendants' motion for partial summary judgment to the extent that Gonzalez claims that Escondido is directly liable for negligence.

G. California Civil Code § 52.1

Defendants' entire § 52.1 argument is based on the assumption that their motion would be granted with respect to Gonzalez's § 1983 claims. (*MPSJ* 16.) Because the Court has not made a final determination as to Gonzalez's § 1983 claims, the Court **DENIES** Defendants' motion on this ground.

IV. CONCLUSION AND ORDER

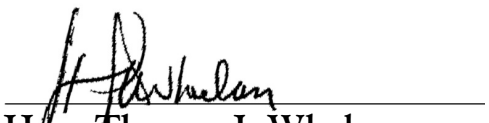
For the reasons discussed above, the Court **GRANTS IN PART** and **DENIES IN PART** Defendants' motion for partial summary judgment [Doc. 33], and **ORDERS** as follows:

[5] Since Defendants do not dispute whether Escondido may be vicariously liable for negligence and do not move for partial summary judgment on that ground, the Court will not consider a *respondeat superior* theory of liability for the purposes of this order.

- Defendants' motion for partial summary judgment with respect to failure to properly screen and hire is **GRANTED**.
- Defendants' motion for partial summary judgment with respect to failure to properly train is **DENIED**.
- Defendants' motion for partial summary judgment with respect to failure to properly supervise and discipline is **DENIED**.
- Defendants' motion for partial summary judgment with respect to Maher's liability in his individual and official capacity is **DENIED**.
- Defendants' motion for partial summary judgment with respect to Monell liability for maintaining unconstitutional policies is **DENIED**.
- Defendants' motion for partial summary judgment with respect to a direct liability theory of negligence is **GRANTED**.
- Defendants' motion for partial summary judgment with respect to California Civil Code § 52.1 is **DENIED**.

IT IS SO ORDERED.

DATED: July 19, 2013



Hon. Thomas J. Whelan
United States District Judge