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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

MOHAMAD ALI SAID,

Plaintiff,

vs.

COUNTY OF SAN DIEGO, DEPUTY  
SHERIFF PATRICK LOPATOWKY,  
DEPUTY SHERIFF BRIAN  
BUTCHER, DEPUTY SHERIFF LEE  
SCOTT, and DOES 1-50,  
INCLUSIVE,

Defendants.

CASE NO. 12cv2437-GPC(RBB)

**ORDER GRANTING IN PART AND  
DENYING IN PART  
DEFENDANTS' MOTION FOR  
PARTIAL SUMMARY JUDGMENT**

[Dkt. No. 52.]

Before the Court is Defendants County of San Diego, Patrick Lopatosky and Brian Butcher's motion for partial summary judgment filed on February 23, 2015. (Dkt. Nos. 52, 55<sup>1</sup>.) Plaintiff Mohamad Said filed an amended opposition on March 23, 2015. (Dkt. No. 55.) A reply was filed on April 1, 2015. (Dkt. No. 63.) After a review of the briefs, supporting documentation, and the applicable law, the Court GRANTS in part and DENIES in part Defendants' motion for partial summary judgment.

**Procedural Background**

On October 9, 2012, Plaintiff filed a 42 U.S.C. § 1983 civil rights complaint

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<sup>1</sup>On February 24, 2015, Defendants filed an amended memorandum of points and authorities and amended separate statement of undisputed material facts. (Dkt. No. 55.)

1 against County of San Diego (“County”), Deputy Sheriff Patrick Lopatowsky  
2 (“Lopatowsky”), Deputy Sheriff Brian Butcher (“Butcher”), and Deputy Sheriff Scott  
3 Lee (erroneously named as Lee Scott). (Dkt. No. 1.) On May 15, 2013, the Court  
4 granted Defendants’ motion to dismiss the complaint with leave to amend. (Dkt. No.  
5 16.) On June 12, 2013, Plaintiff filed a first amended complaint. (Dkt. No. 17.) On  
6 October 30, 2013, the Court granted Defendants’ motion to dismiss the first amended  
7 complaint with one final opportunity to amend. (Dkt. No. 22.) On November 19,  
8 2013, Plaintiff filed a second amended complaint (“SAC”). (Dkt. No. 23.) On January  
9 21, 2014, the Court granted in part and denied in part Defendants’ motion to dismiss.  
10 (Dkt. No. 31.) Specifically, the Court granted Defendants’ motion to dismiss the cause  
11 of action for equal protection and all causes of action against Defendant Scott Lee, and  
12 the Court denied Defendants’ motion to dismiss the causes of action for excessive  
13 force, false arrest, denial of medical attention, malicious prosecution, § 1983 cause of  
14 action against the County of San Diego and all state law causes of action.<sup>2</sup> (Id.)

15 Defendants now seek partial summary judgment on the causes of action against  
16 the County of San Diego for violation of 42 U.S.C. § 1983 and against Defendants  
17 Lopatowsky and Butcher for unlawful arrest, inadequate medical care, and malicious  
18 prosecution under § 1983 and state law claims for false arrest and violation of  
19 California Civil Code section 52.1.

### 20 **Factual Background**

21 On June 16, 2009, a domestic violence misdemeanor complaint for the use of  
22 force and violence and the infliction of injury on his spouse, Walla Said, aka Walaa  
23 Alqershi (“Alqershi”) was filed against Plaintiff in the Superior Court of California,  
24 County of San Diego, East County Division. (Dkt. No. 57, Ds’ NOL, Ex. 1.) The  
25 complaint alleged three counts consisting of: 1) corporal injury to spouse and/or  
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27 <sup>2</sup>The state law causes of action against all Defendants consist of negligence,  
28 battery, false arrest and violation of California Civil Code section 52.1. (Dkt. No. 23,  
SAC.)

1 roommate in violation of California Penal Code (“Penal Code”) section 17(b)(4); 2  
2 battery of a current or former significant other in violation of Penal Code section  
3 243(e)(1); and 3) battery in violation of Penal Code section 242. (Id.) A criminal  
4 protective order against Plaintiff in favor of Alqershi as the protected person was  
5 issued on July 13, 2009. (Id., Ex. 2.) On March 24, 2010, a jury found Plaintiff guilty  
6 of the crime of battery of a significant other in violation of Penal Code section  
7 243(e)(1), and simple battery in violation of Penal Code section 242. (Id., Ex. 4.) On  
8 May 24, 2010, Plaintiff was sentenced to, among other things, three years of summary  
9 probation, a condition of which was compliance with a criminal protective order that  
10 prohibited Plaintiff from having any personal, electronic, telephonic, or written contact  
11 with Alqershi or from coming within 100 yards of her. (Id., Exs. 4, 5.) The protective  
12 order was to expire on May 23, 2013. (Id., Ex. 5.)

13 Plaintiff was informed of the meaning of the protective order at his sentencing  
14 hearing. (Dkt. No. 52-4, Karnavas Decl., Ex. 7 (CD audio recording of Plaintiff’s  
15 sentencing on 5/24/10.)) The sentencing judge explained to Plaintiff that under the  
16 protective order, even if Alqershi called him, he must hang up the phone and walk  
17 away. (Id.) At his deposition, Plaintiff admitted that he understood his sentence and  
18 that he was subject to a full protective order and was to stay away from Alqershi. (Dkt.  
19 No. 52-4, Karnavas Decl., Ex 4, Said Depo. at 144:12-17; 146:21-24; 170:8-10;  
20 176:22-177:4; 177:24-178:24; 180:10-14; 185:2-7.) He was also aware that only the  
21 Court could rescind the protective order and that neither he nor Alqershi could do it on  
22 their own. (Id. at 185:2-7.) Plaintiff had an Arabic interpreter at his trial and  
23 sentencing. (Id. at 144:12-17.) Subsequently, Alqershi returned to Plaintiff and  
24 became pregnant with Plaintiff’s second child, a daughter, to whom she gave birth in  
25 October 2011. (Id. at 222:2-24.)

26 On January 24, 2012, at approximately 5:51p.m., the Sheriff’s Department  
27 communications center received a 911 call from a woman identifying herself as Walaa  
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1 Alqershi. (Dkt. No. 52-7, Harb Decl., Ex. A, 911 CD audio recording.) She stated that  
2 she was in the house with Plaintiff and lives with him. (Id.) She was fearful because  
3 he threatened to kill her if she called the cops, and then kill himself. (Id.) Alqershi  
4 explained that she had a restraining order against her husband, but was living with him  
5 and that he was driving her crazy, and she was afraid he was going to kill her. (Id.)  
6 She also said she just recently came back from a mental institution and it was her fault  
7 that she went back with him. (Id.) Alqershi requested law enforcement assistance and  
8 while on the phone, she indicated she was leaving her house located at 3755 El Canto  
9 Dr. and was walking to her neighbor's house located at 3725 El Canto Dr. (Id.)

10 On the evening of January 24, 2012, Butcher and Lopatosky received a radio call  
11 to respond to 3755 El Canto Dr., Spring Valley, California to contact an individual who  
12 may have been "5150", in other words, a person who, as a result of a mental health  
13 disorder, is a danger to others, or to himself or herself, or is gravely disabled. (Dkt. No.  
14 52-5, Butcher Decl. ¶ 2; Dkt. No. 52-6, Lopatosky Decl. ¶ 2.) At some point, the  
15 contact address was changed to 3725 El Canto Dr. which is a house a couple of houses  
16 down from the original address. (Dkt. No. 52-5, Butcher Decl. ¶ 2; Dkt. No. 52-6,  
17 Lopatosky Decl. ¶ 2.) Psychiatric Emergency Response Team ("PERT") clinician,  
18 Cynthia Van Lom ("Van Lom"), was assigned to work with Butcher and was riding  
19 with him in his patrol vehicle. (Dkt. No. 52-5, Butcher Decl. ¶ 2.) Butcher and Van  
20 Lom arrived first at 3725 El Canto Dr. and made contact with Alqershi. (Id.) They  
21 determined that Alqershi was not "5150" but was upset with her husband. (Id.)  
22 Butcher was aware that Alqershi and her husband had a history of domestic violence  
23 because he had arrested Plaintiff for spousal abuse in violation of Penal Code section  
24 273.5(a) back in April 2009. (Id.) Alqershi told Butcher and Van Lom that she and  
25 Plaintiff had been living together, and that on that evening, Plaintiff had threatened to  
26 kill her and any cops that showed up if she called the cops. (Id. ¶ 3.) Alqershi wanted  
27 Plaintiff arrested. (Id.) Lopatosky arrived at the scene shortly after Butcher and Van  
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1 Lom. (Id. ¶ 4.) Butcher told him that he had spoken with Alqershi, and that he believed  
2 this was a violation of a restraining order call. (Dkt. No. 52-5, Butcher Decl. ¶ 4; Dkt.  
3 No. 52-6, Lopatosky Decl. ¶ 2.) Lopatosky took over as the primary deputy on the  
4 scene and also spoke directly to Alqershi. (Dkt. No. 52-5, Butcher Decl. ¶ 4; Dkt. No.  
5 52-6, Lopatosky Decl. ¶ 2-3.) Alqershi told Lopatosky that she and Plaintiff had been  
6 married for about 5 years, that they currently live together, and have two children  
7 together, a four year old and a 3 month old. (Dkt. No. 52-6, Lopatosky Decl. ¶ 2-3.)  
8 Alqershi indicated that she had been the victim of domestic violence by her husband  
9 about a year and a half earlier, and that as a result of that incident, a restraining order  
10 was issued against him, that he had been served with the order, and that he was not to  
11 be within 100 yards of her. (Dkt. No. 52-6, Lopatosky Decl. ¶ 3.) Alqershi indicated  
12 that she had stayed at a shelter called Becky's House after the domestic violence  
13 incident but that after her stay at Becky's House, Plaintiff picked her up and they had  
14 been living together ever since, even though the restraining order was still in place.  
15 (Id.) Alqershi told Lopatosky that on that evening, her husband had threatened to kill  
16 her, kill any responding law enforcement, and then kill himself, but that he had not  
17 done anything to her physically. (Id.) Alqershi wanted Plaintiff arrested. (Id.)  
18 Lopatosky also confirmed that while Alqershi appeared upset by the circumstances  
19 with her husband, she did not appear to be suffering from any type of mental health  
20 disorder. (Id.)

21 Butcher conducted a records check through the Sheriff's inquiry channel, and the  
22 records check revealed there was an active domestic violence criminal protective order  
23 issued in case number C291668, listing Plaintiff as the restrained person, and Alqershi  
24 as the protected person. (Dkt. No. 52-5, Butcher Decl. ¶ 5.) The protective order was  
25 set to expire on May 23, 2013, and the terms of the order prohibited Plaintiff from  
26 having any contact with Alqershi. (Id.)

27 Lopatosky and Butcher went to contact Plaintiff at 3755 El Canto Dr. (Dkt. No.  
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1 52-5, Butcher Decl. ¶ 6; Dkt. No. 52-6, Lopatosky Decl. ¶ 5.) Plaintiff was handcuffed  
2 and thereafter complained of injury to his arm. (Dkt. No. 52-5, Butcher Decl. ¶ 6; Dkt.  
3 No. 52-6, Lopatosky Decl. ¶ 5.) Deputy Butcher immediately summoned the Fire  
4 Department for paramedic assistance. (Dkt. No. 52-5, Butcher Decl. ¶ 6; Dkt. No. 52-  
5 6, Lopatosky Decl. ¶ 5.) The paramedics arrived approximately five minutes later and  
6 Plaintiff was taken to the hospital for evaluation. (Dkt. No. 52-5, Butcher Decl. ¶ 6;  
7 Dkt. No. 52-6, Lopatosky Decl. ¶ 5.)

8 In his declaration, Plaintiff states that his ex-wife Alqershi was alcohol and drug  
9 dependent and she became uncontrollable and started running away from home. (Dkt.  
10 No. 60-3, Said Decl. ¶ 3.) He alleges she fabricated stories against him in order to  
11 show Plaintiff was a villain. (Id. ¶ 5.) Plaintiff also states that he was never served  
12 with a copy of the protective order and that he did not respond to the judge’s question  
13 asking whether he understood the order. (Id. ¶ 6.) In fact, Plaintiff claims he asked for  
14 an explanation but the judge stated that someone else will explain; however, Plaintiff  
15 was never contacted. (Id.) He also states that Alqershi did not live at the house and  
16 she was there for a few minutes because he did not allow her to be near the children  
17 because child protective services did not want her near the children. (Id. ¶ 8.) Plaintiff  
18 states that he never threatened his ex-wife or the officers. (Id. ¶ 9.)

## 19 Discussion

### 20 A. Legal Standard on Motion for Summary Judgment

21 Federal Rule of Civil Procedure 56 empowers the Court to enter summary  
22 judgment on factually unsupported claims or defenses, and thereby “secure the just,  
23 speedy and inexpensive determination of every action.” Celotex Corp. v. Catrett, 477  
24 U.S. 317, 325, 327 (1986). Summary judgment is appropriate if the “pleadings,  
25 depositions, answers to interrogatories, and admissions on file, together with the  
26 affidavits, if any, show that there is no genuine issue as to any material fact and that the  
27 moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). A fact  
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1 is material when it affects the outcome of the case. Anderson v. Liberty Lobby, Inc.,  
2 477 U.S. 242, 248 (1986).

3 The moving party bears the initial burden of demonstrating the absence of any  
4 genuine issues of material fact. Celotex Corp., 477 U.S. at 323. The moving party can  
5 satisfy this burden by demonstrating that the nonmoving party failed to make a  
6 showing sufficient to establish an element of his or her claim on which that party will  
7 bear the burden of proof at trial. Id. at 322-23. If the moving party fails to bear the  
8 initial burden, summary judgment must be denied and the court need not consider the  
9 nonmoving party's evidence. Adickes v. S.H. Kress & Co., 398 U.S. 144, 159-60  
10 (1970).

11 Once the moving party has satisfied this burden, the nonmoving party cannot rest  
12 on the mere allegations or denials of his pleading, but must "go beyond the pleadings  
13 and by her own affidavits, or by the 'depositions, answers to interrogatories, and  
14 admissions on file' designate 'specific facts showing that there is a genuine issue for  
15 trial.'" Celotex, 477 U.S. at 324. If the non-moving party fails to make a sufficient  
16 showing of an element of its case, the moving party is entitled to judgment as a matter  
17 of law. Id. at 325. "Where the record taken as a whole could not lead a rational trier  
18 of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). In  
19 making this determination, the court must "view[] the evidence in the light most  
20 favorable to the nonmoving party." Fontana v. Haskin, 262 F.3d 871, 876 (9th Cir.  
21 2001). The Court does not engage in credibility determinations, weighing of evidence,  
22 or drawing of legitimate inferences from the facts; these functions are for the trier of  
23 fact. Anderson, 477 U.S. at 255.

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25 **B. § 1983 Monell Claim as to County of San Diego**

26 Defendant County of San Diego argues that Plaintiff makes numerous allegations  
27 of unlawful policies, customs and habits but has provided no evidentiary facts to  
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1 support the elements of a Monell<sup>3</sup> claim. Plaintiff opposes.

2 Cities, counties and other local government entities are subject to claims under  
3 42 U.S.C. § 1983. Monell v. New York City Dep’t of Social Servs., 436 U.S. 658  
4 (1978). While municipalities, their agencies and their supervisory personnel cannot be  
5 held liable under § 1983 on any theory of respondeat superior or vicarious liability,  
6 they can, however, be held liable for deprivations of constitutional rights resulting from  
7 their formal policies or customs. Monell, 436 U.S. at 691-693. Plaintiffs must  
8 establish that “the local government had a deliberate policy, custom, or practice that  
9 was the moving force behind the constitutional violation [they] suffered.” AE ex rel.  
10 Hernandez v. Count of Tulare, 666 F.3d 631, 636 (9th Cir. 2012) (citing Whitaker v.  
11 Garcetti, 486 F.3d 572, 581 (9th Cir. 2007)).

12 The elements of a Monell claim are (1) plaintiff was deprived of a constitutional  
13 right; (2) the municipality has a policy; (3) the policy amounts to deliberate  
14 indifference to plaintiff’s constitutional right; and (4) the policy is the moving force  
15 behind the constitutional violation. Dougherty v. City of Covina, 654 F.3d 892, 900  
16 (9th Cir. 2011) (quoting Plumeau v. Sch. Dist. No. 40 Cnty. of Yamhill, 130 F.3d 432,  
17 438 (9th Cir.1997)).

18 A public entity and supervisory officials may be held liable when  
19 “implementation of . . . official policies or established customs inflicts the  
20 constitutional injury” or when a failure to act amounts to “deliberate indifference to a  
21 constitutional right” or when “an official with final policy-making authority . . .ratifies  
22 a subordinate’s unconstitutional decision or action. Clouthier v. County of Contra  
23 Costa, 591 F.3d 1232, 1249 (9th Cir. 2010).

24 A “policy” is a “deliberate choice to follow a course of action . . . made from  
25 among various alternatives by the official or officials responsible for establishing final  
26 policy with respect to the subject matter in question.” Fogel v. Collins, 531 F.3d 824,  
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28 <sup>3</sup>Monell v. New York City Dep’t of Social Servs., 436 U.S. 658 (1978).



1 834 (9th Cir. 2008); Long v. Cnty. of Los Angeles, 442 F.3d 1178, 1185 (9th Cir.  
2 2006). A “custom” for purposes of municipal liability is a “widespread practice that,  
3 although not authorized by written law or express municipal policy, is so permanent  
4 and well-settled as to constitute a custom or usage with the force of law.” St. Louis v.  
5 Praprotnik, 485 U.S. 112, 127 (1988); Los Angeles Police Protective League v. Gates,  
6 907 F.2d 879, 890 (9th Cir. 1990); see also Bouman v. Block, 940 F.2d 1211, 1231–32  
7 (9th Cir. 1991). Random acts or isolated events are not sufficient to establish custom.  
8 Gates, 907 F.2d at 890.

9 In the second amended complaint, Plaintiff alleges that the County has “unlawful  
10 policies, customs and habits of improper and inadequate hiring, training, retention,  
11 discipline and supervision of its sheriff’s deputies, proximately causing the  
12 constitutional deprivations, injuries and damages alleged in the First Cause of Action.”  
13 (Dkt. No. 23 SAC ¶ 39.) He also alleges that the Defendant has an unlawful policy,  
14 custom or habit of permitting unlawful searches and seizures, false arrests and the  
15 unnecessary and excessive use of force by sheriff deputies and failing to take action  
16 against deputies who commit acts of excessive force. (Id. ¶ 40.) He further specifically  
17 complains that the County has inadequate policies relating to “1) enlisting domestic  
18 violence victims to participate in contacting and arresting domestic violence suspects.  
19 2) warrantless detentions and arrests of citizens for mere suspicions and without  
20 probable cause. 3) use of excessive force by deputies and 4) writing false police reports  
21 as a method of covering up acts of excessive force and other improprieties by sheriff’s  
22 deputies.” (Id. ¶ 41.) Plaintiff also alleges that County and its sheriff’s department  
23 “have refused to investigate, or have inadequately investigated, numerous complaints  
24 of false arrest, excessive force and unlawful searches and seizures made by citizens  
25 against its sheriff’s deputies over many years, including complaints that resulted in  
26 substantial jury verdicts against the deputies and the County.” (Id. ¶¶ 39, 42.)

27 Defendant County argues that Plaintiff asserts numerous allegations of “unlawful  
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1 policies, customs and habits” but has presented no evidentiary support during  
2 discovery. In support, the County cites to the Plaintiff’s unresponsive, argumentative  
3 answers to interrogatories that asked Plaintiff to state the facts to support his Monell  
4 claim against the County. (Dkt. No. 52-4, Karnavas Decl., Ex. 1.) In opposition,  
5 Plaintiff fails to oppose the motion for partial summary judgment with specific facts  
6 from affidavits, depositions, answers to interrogatories, and/or admissions on file  
7 showing that there is a genuine issue for trial. See Celotex, 477 U.S. at 324. First,  
8 Plaintiff’s brief does not address any of the allegations presented in his complaint.<sup>4</sup>  
9 Second, he merely presents argument and presents a conclusory statement that “much  
10 more evidence and facts were discovered consequently that make Defense argument  
11 futile.” (Dkt. No. 60-1, P’s Response to Ds’ SUF at 1.) No facts are alleged to support  
12 any of the allegations in the second amended complaint against the County for a § 1983  
13 cause of action.

14 In his own statement of undisputed facts, Plaintiff cites to the arrest report and  
15 deposition of Butcher and Lopatosky<sup>5</sup> and presents his interpretation of the facts and  
16 summarily asserts that Defendants misreported or falsified the incident. (Dkt. No. 60-  
17 2, P’s SUF Nos. 1-7.) However, even if Plaintiff’s interpretation of the arrest report  
18 is correct, the arrest report, itself, concerning this incident is not sufficient to  
19 demonstrate the County had a widespread custom or policy that deprived Plaintiff of  
20 his constitutional rights. See Gates, 907 F.2d at 890.

21 Here, Plaintiff has failed to produce any factual support of his claim of a Monell

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23 <sup>4</sup>In fact, he appears to raise a new allegation that the County of San Diego “failed  
24 to train its officers and prosecutors adequately about their duty to produce exculpatory  
25 evidence such as the name of an eye witness or the reason for the initial visit which has  
26 caused this new attorney a lot of time wasted to get information readily available.”  
(Dkt. No. 60 at 6.) Even if this allegation were in the second amended complaint,  
Plaintiff has failed to provide any factual support.

27 <sup>5</sup>The Court notes that while Plaintiff cites to Lopatosky’s deposition, the relevant  
28 portions of his deposition are not contained in the Shashaty declaration. (Dkt. No. 60-  
4.) While some portions of Lopatosky’s deposition are provided in Defendants’  
motion, many citations to support Plaintiff’s arguments are not.

1 claim against the County of San Diego. See Celotex, 477 U.S. at 324-25. Accordingly,  
2 the Court GRANTS Defendant County of San Diego’s motion for partial summary  
3 judgment on the § 1983 cause of action.

4 **C. 42 U.S.C. § 1983 Causes of Action as to Defendants Lopatosky and Butcher**

5 Defendants Butcher and Lopatosky seek summary judgment on the causes of  
6 action for unlawful arrest, deliberate indifference to serious medical needs, and  
7 malicious prosecution under 42 U.S.C. § 1983.

8 **1. Unlawful Arrest**

9 “A claim for unlawful arrest is cognizable under § 1983 as a violation of the  
10 Fourth Amendment, provided the arrest was without probable cause or other  
11 justification.” Lacey v. Maricopa Cnty., 693 F.3d 896, 918 (9th Cir. 2012). Probable  
12 cause exists when the officer has “a reasonable belief, evaluated in light of the officer’s  
13 experience and the practical considerations of everyday life, that a crime has been, is  
14 being, or is about to be committed.” Hopkins v. City of Sierra Vista, 931 F.2d 524, 527  
15 (9th Cir. 1991) (citation and internal quotations omitted). “Probable cause exists if the  
16 arresting officers ‘had knowledge and reasonably trustworthy information of facts and  
17 circumstances sufficient to lead a prudent person to believe that [the arrestee] had  
18 committed or was committing a crime.’ ” Maxwell v. Cnty. of San Diego, 697 F.3d  
19 941, 951 (9th Cir. 2012) (quoting United States v. Ricardo D., 912 F.2d 337, 342 (9th  
20 Cir.1990)).

21 “In establishing probable cause, officers may not solely rely on the claim of a  
22 citizen witness that he was a victim of a crime, but must independently investigate the  
23 basis of the witness’ knowledge or interview other witnesses.” Arpin v. Santa Clara  
24 Valley Transp. Agency, 261 F.3d 912, 925 (9th Cir. 2001) (citing Fuller v. M.G.  
25 Jewelry, 950 F.2d 1437, 1444 (9th Cir. 1991)). A sufficient basis of knowledge is  
26 established if the victim provides “facts sufficiently detailed to cause a reasonable  
27 person to believe a crime had been committed and the named suspect was the  
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1 perpetrator.” Peng v Mei Chin Penghu, 335 F.3d 970, 979 (9th Cir. 2003) (quoting  
2 Fuller, 950 F.2d at 1444).

3 The “presence of a factual dispute regarding a victim’s complaint at the scene  
4 of an alleged domestic disturbance does not defeat probable cause if: 1) the victim’s  
5 statements are sufficiently definite to establish that a crime has been committed; and  
6 2) the victim’s complaint is corroborated by either the surrounding circumstances or  
7 other witnesses.” Id.

8 In this case, Plaintiff was arrested, among other things, for violating a protective  
9 order pursuant to California Penal Code section 166(c)(1),<sup>6</sup> and 273.6(a).<sup>7</sup> (Dkt. No.  
10 57, Ds’ NOL, Ex. 6.) In support of Defendants’ argument that they had probable cause  
11 to arrest Plaintiff, they cite to California Penal Code section 836(c).

12 California Penal Code Section 836(c) provides:

13 When a peace officer is responding to a call alleging a violation of a  
14 domestic violence protective or restraining order . . .and the peace  
15 officer has probable cause to believe that the person against whom the  
16 order is issued has notice of the order and has committed an act in  
17 violation of the order, the officer shall . . . make a lawful arrest of the  
18 person without a warrant and take that person into custody whether or  
19 not the violation occurred in the presence of the arresting officer. The  
20 officer shall, as soon as possible after the arrest, confirm with the  
21 appropriate authorities or the Domestic Violence Protection Order  
22 Registry . . .that a true copy of the protective order has been registered,  
23 unless the victim provides the officer with a copy of the protective  
24 order.

20 Cal. Penal Code § 836(c)(1). Under state law, a peace officer may make a lawful arrest  
21 without a warrant if the officer has probable cause to believe that the offender has

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23 <sup>6</sup>California Penal Code section 166(c)(1) provides, “[n]otwithstanding paragraph  
24 (4) of subdivision (a), a willful and knowing violation of a protective order or  
25 stay-away court order described as follows shall constitute contempt of court, a  
26 misdemeanor . . . .” Cal. Penal Code § 166(c)(1).

26 <sup>7</sup>California Penal Code section 273.6(a) provides: (a) Any intentional and  
27 knowing violation of a protective order . . . is a misdemeanor punishable by a fine of  
28 not more than one thousand dollars (\$1,000), or by imprisonment in a county jail for  
not more than one year, or by both that fine and imprisonment. Cal. Penal Code §  
273.6(a)

1 notice of the protective order and has committed an act in violation of the protective  
2 order, even if the violation did not occur in the officer's presence. Id.

3 Alqershi called 911 and reported that she needed help because she was afraid  
4 Plaintiff was going to kill her because he threatened to kill her and kill himself if she  
5 called the cops. According to the 911 call, she initially called from inside the home  
6 where Plaintiff was in another room, located at 3755 El Canto Drive, and then during  
7 the call, she walked two houses down to 3725 El Canto Drive to go to a neighbor's  
8 house where she told the dispatcher she would be waiting. She informed the dispatcher  
9 that she had a restraining order against Plaintiff but that she was living with him.  
10 When the Deputy Defendants arrived, Alqershi told them that she and Plaintiff were  
11 living together and had two young children. She informed them that she was the victim  
12 of a domestic violence by her husband about a year and a half earlier, and as a result,  
13 a restraining order was issued against him. She informed them that Plaintiff was aware  
14 of the protective order. She told them that Plaintiff had threatened to kill her, kill any  
15 officers if she called them and then kill himself. She wanted him arrested. Defendant  
16 Butcher then conducted a records check through the Sheriff's inquiry channel, and the  
17 records check revealed there was an active domestic violence criminal protective order  
18 issued in case number C291668, listing Plaintiff as the restrained person, and Alqershi  
19 as the protected person which was set to expire on May 23, 2013. (Dkt. No. 52-5,  
20 Butcher Decl. ¶ 5.) The terms of the protective order prohibited Plaintiff from having  
21 any contact with Alqershi. (Id.)

22 At the time of the arrest, the Deputy Defendants were told that there was a  
23 protective order against Plaintiff in favor of Alqershi, Alqersi informed them that  
24 Plaintiff threatened to kill her if she called the police, and that Plaintiff had notice of  
25 the protective order. Moreover, Defendant Butcher was aware that Plaintiff had been  
26 arrested in 2009 for domestic violence. Based on this information, Defendants  
27 conducted a records search to corroborate Alqershi's allegations concerning the  
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1 protective order. A records search confirmed Alqershi had an active domestic violence  
2 protective order against Plaintiff which was still effective on the date of the incident.  
3 The Deputy Defendants had a sufficient basis of knowledge based on the detailed facts  
4 provided by Alqershi and had corroborating evidence of the protective order to have  
5 a reasonable belief that Plaintiff violated the protective order. Thus, the Court  
6 concludes that Deputy Defendants had probable cause to arrest Plaintiff.

7 In his opposition brief, Plaintiff only addresses the legal standard on false arrest  
8 without citation to authority. (Dkt. No. 60 at 3-4.) He does not dispute Defendants'  
9 statement of undisputed facts with specific evidence in the record and only presents  
10 arguments. In his declaration, Plaintiff states that he was at home minding his own  
11 business and taking care of his children and did not violate the protective order. It was  
12 Alqershi who came to his house and initiated the contact and made the 911 call.  
13 According to Plaintiff, the Deputy Defendants did not provide any proof of any  
14 misconduct. He also alleges that he did not affirmatively respond to the judge's  
15 question whether he understood the protective order and in fact was unable to  
16 comprehend what was happening. Therefore, he did not agree to the full protective  
17 order sentenced by the state court judge. However, Plaintiff's undisputed facts are not  
18 supported.

19 The Court listened to the 911 recordings and the state court sentencing  
20 proceeding. At sentencing, although very faint, the interpreter responded, "yes" to the  
21 judge's question whether Plaintiff understood the contents of the protective order.  
22 (Dkt. No. 52-4, Karnavas Decl., Ex. 7.) At the hearing, contrary to his declaration,  
23 Plaintiff did not ask for an explanation of the protective order but asked for  
24 clarification regarding the public works he was sentenced to. Therefore, Plaintiff has  
25 not created a genuine issue of fact as to whether he consented to and was aware of the  
26 protective order.

27 Despite Plaintiff's facts concerning his version of what happened prior to the  
28

1 Deputy Defendants’ arrival, the Court looks at the facts at the time of the arrest. See  
2 Peng, 335 F.3d at 978 (whether threat of force was in fact used by offender is not  
3 material as to what officer knew at the time of arrest). At the time of the arrest, Alqershi  
4 told the Deputy Defendants that Plaintiff threatened to kill her if she called the police,  
5 that there was a protective order against Plaintiff even though she was now living with  
6 him, and that Plaintiff was aware of the protective order. The Deputy Defendants were  
7 also aware that Plaintiff had previously been involved in a prior domestic violence  
8 incident as Defendant Butcher had arrested Plaintiff in the prior incident. The facts  
9 were corroborated with a records check which revealed that there was an active full  
10 protective order protecting Alqershi from Plaintiff. Deputy Defendants had knowledge  
11 and reasonably trustworthy information of the facts to lead a prudent person to believe  
12 that Plaintiff had committed an offense. See Maxwell, 697 F.3d at 951; see also Peng,  
13 335 F.3d at 978 (“an officer who is investigating a domestic dispute must make snap  
14 decisions regarding whether there is probable cause to arrest. Where, as here, the victim  
15 alleges that force, or a threat of force, existed, it is important for officers to err on the  
16 side of safety for the victim in order to prevent further violence and allow the parties to  
17 cool down.”).

18 Plaintiff has not shown a genuine issue of material fact as to whether there was  
19 probable cause to arrest Plaintiff. Accordingly, the Court GRANTS Defendants Butcher  
20 and Lopotasky’s motion for partial summary judgment on the § 1983 claim for false  
21 arrest.

## 22 **2. Deliberate Indifference to Serious Medical Needs**

23 Defendants Butcher and Lopatosky argue that Plaintiff has failed to demonstrate  
24 that they were deliberately indifferent to Plaintiff’s serious medical needs. Plaintiff  
25 does not oppose Defendants’ argument.

26 “The due process clause requires responsible governments and their agents to  
27 secure medical care for persons who have been injured while in police custody.”  
28

1 Maddox v. City of Los Angeles, 792 F.2d 1408, 1415 (9th Cir. 1986) (citing City of  
2 Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983)). The Due Process Clause of the  
3 Fourteenth Amendment guarantees a pretrial detainee the right to receive adequate  
4 medical care, and that right is violated if officials are deliberately indifferent to the  
5 detainee’s serious medical needs. Clouthier v. Cnty. of Contra Costa, 591 F.3d 1232,  
6 1242–43 (9th Cir. 2010). Deliberate indifference exists when an official knows of and  
7 disregards a serious medical condition, i.e., when an official is “aware of facts from  
8 which the inference could be drawn that a substantial risk of serious harm exists” and  
9 actually draws that inference. Farmer v. Brennan, 511 U.S. 825, 837 (1994).

10 Here, the second amended complaint states that Defendants used unreasonable  
11 force when they twisted his right arm and caused his elbow to become dislocated. (Dkt.  
12 No. 23, SAC ¶ 53.) He alleges that Defendants were deliberately indifferent to  
13 Plaintiff’s medical needs when Lopatosky knew that the forceful twisting caused the  
14 injury, and elected to keep the handcuffs on and then proceeded with the other officers  
15 to pull Plaintiff barefoot outside the house to his wife's location. (Id. ¶ 55.) He alleges  
16 that Lopatosky and the other officers should have called the paramedics immediately  
17 but they chose to ignore and subject Plaintiff to unnecessary pain and possible  
18 exacerbation of his injury. (Id.) Moreover, the ambulance did not arrive until two hours  
19 later even though the defendants knew he was suffering from excruciating pain. (Id. ¶  
20 21.)

21 Defendants present the uncontradicted declarations of Defendants Butcher and  
22 Lopatosky who state that as soon as Plaintiff complained his arm had been injured,  
23 Butcher immediately summoned the Fire Department for paramedic assistance. (Dkt.  
24 No. 52-5, Butcher Decl. ¶ 6; Dkt. No. 52-6, Lopatosky Decl. ¶ 5.) The paramedics  
25 arrived about five minutes later and Plaintiff was taken to the hospital via ambulance.  
26 (Id.) Plaintiff also testified that the ambulances came within minutes of the call. (Dkt.  
27 No. 52-4, Karnavas Decl., Ex. 4, Said Depo. at 88:2-8.) Therefore, Defendants have  
28



1 demonstrated that there are no genuine issues of material fact on this cause of action.  
2 Accordingly, the Court GRANTS Defendants motion for partial summary judgment on  
3 the § 1983 claim for deliberate indifference to serious medical needs.

### 4 **3. Malicious Prosecution**

5 Defendants assert that they are entitled to summary judgment because Plaintiff  
6 has provided no evidence that Defendants took any action to compromise the  
7 prosecutor’s independent judgment to overcome the Smiddy<sup>8</sup> presumption. Plaintiff  
8 opposes.

9 In the Ninth Circuit, a claim for malicious prosecution is not cognizable under 42  
10 U.S.C. § 1983 if process is available within the state judicial system to provide a  
11 remedy. Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987) (citations  
12 omitted). However, if malicious prosecution is “conducted with the intent to deprive  
13 a person of equal protection of the laws or is otherwise intended to subject a person to  
14 a denial of constitutional rights”, a malicious prosecution claim under § 1983 is  
15 available. Id. at 562 (citing Bretz v. Kelman, 773 F.2d 1026, 1031 (9th Cir. 1985)).  
16 To state a claim for malicious prosecution in California under § 1983, a plaintiff must  
17 plead the “(a) the initiation of criminal prosecution, (b) malicious motivation, and (c)  
18 lack of probable cause.” Id.

19 The filing of a criminal complaint by the district attorney gives rise to a  
20 presumption that a decision to file a criminal complaint is presumed to result from an  
21 independent decision on the part of the district attorney and would preclude liability for  
22 those who participated in the investigation or filed a report that resulted in the initiation  
23 of proceedings. Smiddy v. Varney, 665 F.2d 261, 266 (9th Cir. 1981) (“Smiddy I”  
24 overruled on other grounds by Beck v. City of Upland, 527 F.3d 853, 865 (9th Cir.  
25 2008)). However, the presumption can be rebutted if the investigating official  
26 “improperly exerted pressure on the prosecutor, knowingly provided misinformation to  
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28 <sup>8</sup>Smiddy v. Varney, 665 F.2d 261 (9th Cir. 1981).

1 him, concealed exculpatory evidence, or otherwise engaged in wrongful or bad faith  
2 conduct that was actively instrumental in causing the initiation of legal proceedings.”  
3 Awabdy v. City of Adelanto, 368 F.3d 1062, 1067 (9th Cir. 2004) (applying Smiddy I  
4 presumption to malicious prosecution case). A “plaintiff’s account of the incident in  
5 question, by itself, does not overcome the presumption of independent judgment.”  
6 Newman v. County of Orange, 457 F.3d 991, 994 (9th Cir. 2006).

7 In the second amended complaint, Plaintiff alleges that Defendants Butcher and  
8 Lopatosky illegally arrested him, falsified the police reports and as a result, criminal  
9 proceedings were initiated. (Dkt. No. 23 SAC ¶¶ 62-64.) Eventually, the criminal  
10 charges were dropped before trial. (Id. ¶ 62.) The SAC also asserts that Defendant  
11 Lopatosky fabricated many lies to cover his and his partners’ use of excessive force that  
12 led to his injury. (Dkt. No. 23, SAC ¶ 61.) By doing so, Lopatosky knew that Plaintiff  
13 would be maliciously prosecuted. (Id.) Three charges were filed against Plaintiff to  
14 deter and scare him from filing this action. (Id. ¶ 62.)

15 On January 22, 2012, Plaintiff was charged with violation of California Penal  
16 Code sections 69 for resisting executive officer; section 273.6(a) for disobeying court  
17 order and section 166(c)(1) for violating the protective order in connection with the  
18 incident that is subject to this lawsuit. (Dkt. No. 57, Ds’ NOL, Ex. 6.) On April 16,  
19 2012, on motion by the People, the case was dismissed. (Dkt. No. 60-4, Shashaty Decl.,  
20 Ex. 8.)

21 In opposition, Plaintiff, in his brief, makes summary conclusions that Defendants’  
22 arrest report prompted the filing of the criminal action, the criminal case ended in  
23 Plaintiff’s favor, there was no probable cause and the action was brought with malice  
24 toward the victim. (Dkt. No. 60 at 4.) Plaintiff only cites to the arrest report to oppose  
25 Defendants’ motion and makes arguments in support. He does not provide any other  
26 admissible evidence to support his opposition. Plaintiff even fails to provide a  
27 declaration as to these issues. Moreover, the citation to Lopatosky’s deposition does  
28 not support Plaintiff’s statements.

1 Plaintiff's allegations that Defendants falsified their arrest reports by solely citing  
2 to the arrest report is not sufficient to rebut the Smiddy presumption. See Newman, 457  
3 F.3d at 994; see also Cervantes v. County of Los Angeles, No. CV 12-9889 DDP  
4 (MRWx), 2014 WL 5528342, at \*6 (C.D. Cal. Oct. 31, 2014). Therefore, the Smiddy  
5 presumption applies, and Plaintiff has not demonstrated a genuine issue of material fact  
6 that Defendants are liable for malicious prosecution. Accordingly, the Court GRANTS  
7 Defendants Lopatosky and Butcher's motion for partial summary judgment on the §  
8 1983 claim based on malicious prosecution.

9 **D. State Law Causes of Action as to all Defendants**

10 **1. False Arrest**

11 Defendants Butcher and Lopatowsky argue that their actions are supported by  
12 probable cause under California common law and their actions are statutorily immune  
13 under California Penal Code section 847(b). The County argues it is statutorily immune  
14 under California Government section 815.2. Plaintiff opposes.

15 Under California law, an officer has probable cause for a warrantless arrest "if the  
16 facts known to him would lead a [person] of ordinary care and prudence to believe and  
17 conscientiously entertain an honest and strong suspicion that the person is guilty of a  
18 crime." People v. Adams, 175 Cal. App. 3d 855, 861 (1985) (citation and quotations  
19 omitted); see also People v. Lewis, 109 Cal. App. 3d 599 (1980). The test under federal  
20 law and state law are similar. Peng, 335 F.3d at 976. Penal Code section 847(b) states  
21 that a peace officer shall not be civilly liable for false arrest if the "arrest was lawful or  
22 the officer, at the time of the arrest, had reasonable cause to believe the arrest was  
23 lawful." Cal. Penal Code § 847(b). "Reasonable cause to arrest exists when the facts  
24 known to the arresting officer would lead a reasonable person to have a strong suspicion  
25 of the arrestee's guilt." O'Toole v. Super. Ct., 140 Cal. App. 4th 488, 511 (2006). This  
26 is an objective standard and where the facts are not disputed, reasonable cause for an  
27 arrest can be decided as a question of law. Id.

28 As discussed above on the § 1983 false arrest cause of action, because Deputy

1 Defendants had reasonably sufficient, trustworthy information to establish probable  
2 cause to arrest Plaintiff, the Court concludes that Plaintiff's state law false arrest claim  
3 also fails. Accordingly, the Court GRANTS Defendants Butcher and Lopatosky's  
4 motion for partial summary judgment on the state law false arrest claim.

5 As to the County, it argues it is entitled to summary judgment pursuant to  
6 California Government Code section 815.2. Section 815.2 provides,

7 (a) A public entity is liable for injury proximately caused by an act or  
8 omission of an employee of the public entity within the scope of his  
9 employment if the act or omission would, apart from this section, have  
given rise to a cause of action against that employee or his personal  
representative.

10 (b) Except as otherwise provided by statute, a public entity is not liable  
11 for an injury resulting from an act or omission of an employee of the  
public entity where the employee is immune from liability.

12 Cal. Gov't Code 815.2. Public entities are liable for the actions of their employees.  
13 Rivera v. County of Los Angeles, 745 F.3d 384, 393 (9th Cir. 2014) (citing California  
14 Government Code section 815.2(a)). However, if the employees are immune from  
15 liability, the public entities are also immune. Id. (citing California Government Code  
16 section 815.2(b)).

17 Here, since Deputy Defendants are entitled to summary judgment on the state law  
18 false arrest claim, the County is also entitled to summary judgment. See Cal. Gov't  
19 Code § 815.2(b). Accordingly, the Court GRANTS all Defendants' motion for  
20 summary judgment on the state law false arrest cause of action.

## 21 **2. California Civil Code Section 52.1**

22 Defendants argue that Plaintiff cannot prevail on a violation of California Civil  
23 Code section 52.1 cause of action because the undisputed facts demonstrate that  
24 Plaintiff can prove no constitutional violation based on unlawful arrest, inadequate  
25 medical care, malicious prosecution and excessive force.

26 The second amended complaint asserts that Plaintiff's rights under the federal and  
27 state constitutions were committed by threats, intimidation and/or coercion by  
28

1 Defendants. (Dkt. No. 23, SAC ¶ 79.)

2 While Plaintiff does not address this issue in his brief, he raises facts in support  
3 of his separate statement of undisputed facts on this issue. (Dkt. No. 60-2.) However,  
4 these facts are not material to a cause of action under section 52.1 and do not support  
5 Plaintiff's allegations. In essence, Plaintiff has not opposed or met his burden in  
6 opposing Defendants' motion for partial summary judgment for violation of section  
7 52.1.

8 California Civil Code section 52.1 establishes a private right of action for  
9 damages and other relief against a person who "interferes by threats, intimidation, or  
10 coercion," or attempts to interfere, with the exercise or enjoyment of a individual's  
11 constitutional or other legal right. Cal. Civ. Code § 52.1. If there are no federal  
12 constitutional violations and no conduct that constitutes a state constitutional violation,  
13 there is no conduct upon which to base a claim for liability under California Civil Code  
14 section 52.1. Reynolds v. Cnty. of San Diego, 84 F.3d 1162, 1170–71 (9th Cir. 1996),  
15 overruled on other grounds by Acri v. Varian Associates, Inc., 114 F.3d 999 (9th Cir.  
16 1997) (en banc)). Section 52.1 does not provide any substantive protections; it allows  
17 individuals to sue for damages due to constitutional violations. Id. at 1170.

18 Here, the Court concluded that Plaintiff has failed to demonstrate a federal  
19 constitutional violation as to false arrest, inadequate medical care, and malicious  
20 prosecution. Therefore, to the extent that the section 52.1 claim is based on these three  
21 constitutional causes of action, the Court GRANTS Defendants' motion for partial  
22 summary judgment. Defendants further argue, without legal authority, that there can  
23 be no section 52.1 liability for excessive force, by itself. Since the excessive force  
24 cause of action is not before the Court, it is not clear how Plaintiff will raise the section  
25 52.1 issue as to excessive force. Accordingly, the Court DENIES Defendants' motion  
26 for partial summary judgment as to section 52.1 on the excessive force cause of action.

27 **E. Qualified Immunity**

28 Alternatively, Defendants argue that they are entitled to qualified immunity.

1 Since the Court finds that Plaintiff has not demonstrated a genuine issue of material fact  
2 as to all causes of action brought on Defendants' motion for partial summary judgment,  
3 the Court need not address whether Defendants are entitled to qualified immunity.

4 **F. Evidentiary Objections**


5 Defendants filed evidentiary objections to evidence submitted by Plaintiff. (Dkt.  
6 No. 63.) The Court notes their objections. To the extent that the evidence is proper  
7 under the Federal Rules of Evidence, the Court considered the evidence. To the extent  
8 that the evidence is not proper, the Court did not consider it.

9 **Conclusion**

10 Based on the above, the Court GRANTS in part and DENIES in part Defendants  
11 County of San Diego, Lopatosky and Butcher's motion for partial summary judgment.  
12 The Court GRANTS the entirety of Defendants' motion for partial summary judgment  
13 with the exception that the Court DENIES all Defendants' motion on the state law cause  
14 of action for violation of section 52.1 based on excessive force. The hearing date set  
15 for April 10, 2015 shall be **vacated**.

16 IT IS SO ORDERED.

17  
18 DATED: April 9, 2015

19   
20 HON. GONZALO P. CURIEL  
21 United States District Judge  
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