IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

ESTATE OF SHANE TASI, by and through his Widow and Personal Representative of Estate, Jean Taualo-Tasi, et al.,

Plaintiffs,

v.

MUNICIPALITY OF ANCHORAGE, et al.,

Defendants.

Case No. 3:13-cv-00234-SLG

ORDER RE PENDING MOTIONS

Before the Court at Docket 32 is Defendant Officer Boaz Gionson's Motion for Summary Judgment. Plaintiffs opposed at Docket 71, and Defendant replied at Docket 93. Defendants Anchorage Police Department (APD), Municipality of Anchorage (MOA), Officer Joshua Vance, and Officer James Williams also filed a Motion for Summary Judgment at Docket 43. Plaintiffs opposed at Docket 73, and Defendants replied at Docket 94. Oral argument on both of the summary judgment motions was held on July 27, 2015.

Also pending before the Court is Plaintiffs' Motion in Limine at Docket 51. Defendants opposed at Docket 59, and Plaintiffs replied at Docket 66. Oral argument was not requested and was not necessary to the Court's determination of that motion.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of the June 9, 2012 shooting death of Shane Tasi by APD Officer Gionson. Viewed in the light most favorable to the non-moving party for the purposes of these motions, the facts are as follows.

The day of the shooting, Mr. Tasi, his wife Jean Taualo-Tasi, and their three children went to a party at Mr. Tasi's cousin's home.[1] Over the course of the day, Mr. Tasi used Spice, smoked marijuana, and drank alcohol. By the time the family left the party that evening at around 8:00 p.m., Mr. Tasi was very intoxicated.[2]

Ms. Taualo-Tasi drove the family home. Once the family reached their neighborhood, Mr. Tasi climbed out of the passenger window of the vehicle. Ms. Taualo-Tasi left him to walk the remaining blocks home.[3] Immediately after leaving the vehicle, Mr. Tasi began yelling at people on the street and in passing vehicles, and a witness called 911.[4] Mr. Tasi also yelled at a dog in a neighbor's yard, trying to get the dog to fight with him. Neighbors again called 911, and Mr. Tasi moved on once he was told that the police had been called.[5] Next Mr. Tasi attempted to get into the passenger side of

[1] *See* Docket 34-1 (Ms. Taualo-Tasi Depo.) at Tr. 11–17, 28–36. The parties do not appear to substantially dispute the background facts leading up to the shooting. The parties strenuously dispute the majority of the facts beginning when Officer Gionson arrived at the apartment complex.

[2] Docket 34-1 (Ms. Taualo-Tasi Depo.) at Tr. 24, 36–42.

[3] Docket 34-1 (Ms. Taualo-Tasi Depo.) at Tr. 41–56.

[4] Docket 35-3 (Flores Depo.) at Tr. 12–15.

[5] Docket 35-4 (Ham Depo.) at Tr. 11, 16–17; Docket 35-5 (Masalta Depo.) at Tr. 23–34; Docket 35-6 (Ms. Masalta Depo.) at Tr. 20–21.

another person's car.[6] After these brief confrontations Mr. Tasi crossed the street and rejoined Ms. Taualo-Tasi and the children, who had just exited the vehicle.

The following events surrounding the shooting were caught by various surveillance video systems outside the apartment complex, but the time stamps on the videos do not reflect the actual time of day. Thus, Mr. Tasi entered the apartment at roughly 13:19 on the video feed, despite the fact that the events happened close to 10:00 p.m.[7]

Dispatch issued reports on the two 911 calls. The first report stated that a Samoan male wearing black shorts and no shirt was yelling at cars on Bunn Street; roughly a minute later dispatch reported that the man was now yelling at people and attacking a dog.[8] Office Gionson responded and drove around Mountain View trying to find the subject of the reports.[9]

Meanwhile, inside the apartment, Mr. Tasi began to throw objects through the kitchen window. He also overturned the couch and the refrigerator.[10] Multiple witnesses heard the noise that this generated. Bronson Birdsell, Jason Netter, and Willie Emry all heard the commotion and ran to the apartment building at 13:29 on the video.[11]

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[6] Docket 36-3 (Sagapolutele Depo.) at Tr. 20–23.

[7] Docket 80-7 (Exh. 6, Channel 7) (the parties have labeled each camera at the scene a different "channel"); Docket 32-2 (map of camera locations); Docket 34-1 (Ms. Taualo-Tasi Depo.) at Tr. 11.

[8] Docket 37-2 (Incident Report) at 1.

[9] Docket 37-1 (Gionson Depo.) at Tr. 27–28.

[10] Docket 34-1 (Ms. Taualo-Tasi Depo.) at Tr. 68–74.

[11] Docket 36-5 (Birdsell Depo.) at Tr. 13–15, 20; Docket 36-6 (Emry Depo.) at Tr. 14–16; Docket 80-7 (Exh. 6, Channel 7).

Mr. Birdsell looked inside through the apartment's front door, which was ajar. He testified that he saw a man holding a stick who had what looked like a bloody thumbprint on his forehead.[12]

The three men hailed Officer Gionson as he was driving by. Officer Gionson parked his marked patrol car across the street from the apartment and exited the vehicle, leaving his pepper spray behind. The officer was not carrying a Taser. The three men told Officer Gionson that there was a man with a stick inside the apartment who was "acting violent" and was bloody. Officer Gionson also learned that there were children in the apartment, making the situation a possible incident of domestic violence.[13] At all relevant times prior to the shooting, Officer Gionson was unaware that Mr. Tasi had been drinking or had used drugs.[14]

While talking to the three men, Officer Gionson drew his gun, at approximately 13:30:24 on the video.[15] At that time, Officer Gionson was standing behind a roughly three-foot high chain-link fence, which separated the apartment complex from the sidewalk. On the other side of the fence was a paved walkway, which abutted grass that ran up to the apartments. Officer Gionson was approximately 30 feet from the entrance to the Tasis' apartment.[16]

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[12] Docket 36-5 (Birdsell Depo.) at Tr. 17–19, 124–29.

[13] Docket 71-2 (Gionson Interview) at Tr. 7–8, 16–17; Docket 37-1 (Gionson Depo.) at Tr. 29, 55, 58, 61, 209–12, 455–56; Docket 80-7 (Exh. 6, Channel 7).

[14] *See* Docket 59 (Mot. in Limine Opp'n) at 2; Docket 71-2 (Gionson Interview) at Tr. 7–8; Docket 37-1 (Gionson Depo.) at Tr. 354.

[15] Docket 80-7 (Exh. 6, Channel 7) at 13:30:23–24; Docket 80-2 (Sarna Report) at 3.

[16] Docket 80-2 (Sarna Report) at 3, 23.

Seconds later, at 13:30:37 on the video, Mr. Tasi exited the apartment.[17] There is considerable conflicting testimony from the moment Mr. Tasi exited his apartment. For purposes of these summary judgment motions, the Court reviews the evidence in the light most favorable to Plaintiffs, and has reviewed and relied in part on the security camera footage of the incident.

When Mr. Tasi walked out of his apartment, he was holding a broomstick from which the broom portion had been removed.[18] He walked across the grass towards the paved walkway on the opposite side of the fence from Officer Gionson. As Mr. Tasi walked, he tapped the broomstick on the ground twice.[19] Once he reached the walkway, roughly four seconds after exiting the apartment, Mr. Tasi walked along the walkway, still on the opposite side of the fence from Officer Gionson. At this point Mr. Tasi was walking in Officer Gionson's direction, along a paved walkway behind the fence. At no point did Mr. Tasi make eye contact with or look at Officer Gionson; instead he was focused on the three men, one of whom had just attempted to enter his family's apartment.[20] Mr. Tasi then raised the broomstick over his head, grasped at both ends.[21] At this point two of the men had run down the street and one may have retreated along a vehicle.[22] Officer

[17] Docket 80-5 (Exh. 4, Channel 3); Docket 80-6 (Exh. 5, Channel 5).

[18] Docket 80-2 (Sarna Report) at 1, 8; Docket 37-1 (Gionson Depo.) at Tr. 150.

[19] Docket 80-5 (Exh. 4, Channel 3); Docket 80-2 (Sarna Report) at 16.

[20] Docket 80-5 (Exh. 4, Channel 3); Docket 80-2 (Sarna Report) at 1, 5–6, 11, 14–15, 23; Docket 71-4 (Huntley Depo.) at Tr. 36, 104–108, 115, 120–21, 157–58.

[21] Docket 80-5 (Exh. 4, Channel 3); Docket 80-2 (Sarna Report) at 16.

[22] *See* Docket 42 (Gionson Mot.) at 36; Docket 71 (Opp'n) at 46; Docket 80-5 (Exh. 4, Channel 3).

Gionson twice stated a command along the lines of "drop the stick," but Mr. Tasi did not appear to hear and did not comply.[23]

At this point, Officer Gionson—still behind the fence and outside of Mr. Tasi's striking distance with the broomstick—fired three shots at Mr. Tasi.[24] The shots were fired approximately seven seconds after Mr. Tasi first emerged from the front door of the apartment.[25] The three bullets entered Mr. Tasi's body on the left side, indicating that he was not facing Officer Gionson when he was shot.[26] When the shots were fired, Mr. Tasi was roughly 11 feet from Officer Gionson and had not reached the end of the chain link fence that ran between them.[27] Had Mr. Tasi reached the end of the fence, Mr. Tasi could have turned and would have had an unobstructed path towards Officer Gionson.

Ms. Taualo-Tasi exited the apartment when she heard the shots.[28] Officers Vance and Williams were among the officers that arrived on the scene immediately after the shooting. Officer Vance testified that he did not think Ms. Taualo-Tasi needed to witness the emotional scene, so he asked her to go back inside the apartment.[29] Ms. Taualo-

[23] Docket 71-2 (Gionson Interview) at Tr. 10; Docket 71-1 (Gionson Depo.) at Tr. 42–43.

[24] Docket 80-5 (Exh. 4, Channel 3); Docket 80-2 (Sarna Report) at 1, 5–6, 11, 14–15, 23–24; Docket 71-4 (Huntley Depo.) at Tr. 36, 104–108, 115, 120–21, 157–58; Docket 71-1 (Gionson Depo.) at Tr. 111.

[25] *See* Docket 80-5 (Exh. 4, Channel 3); Docket 80-6 (Exh. 5, Channel 5).

[26] Docket 80-4 (Sarna Depo.) at 81.

[27] Docket 80-2 (Sarna Report) at 8, 22 n.15.

[28] Docket 73-4 (Video, Ms. Taualo-Tasi exits).

[29] Docket 71-13 (Vance Depo.) at Tr. 70–71.

Tasi answered, "No. I want to know if my husband's alright."[30] Nonetheless, the officers led Ms. Taualo-Tasi back to the apartment. But upon seeing the condition of the apartment, the officers decided that it could be a crime scene such that Ms. Taualo-Tasi should not remain in the apartment; they then asked her to move with the children to the apartment building's laundry room. Officer Williams told Ms. Taualo-Tasi that they "were going to be interviewing you, each and every one of you," and that it was "probably going to be hours." Officer Williams testified that he told Ms. Taualo-Tasi that after he interviewed her, she could leave if the Sergeant allowed it.[31] Both officers testified that Ms. Taualo-Tasi was not free to leave during the exchange.[32] Ms. Taualo-Tasi's detention in the laundry room lasted approximately 10 minutes; the total time from the shooting until Ms. Taualo-Tasi was taken to the police station was roughly 30 minutes, which included the time in the apartment, the time moving between the various locations, and the time spent transferring the children to a family member so that Ms. Taualo-Tasi could go to the station.[33]

When Officer Gionson gave his first statement—three days after the incident—he stated that he shot Mr. Tasi after he had moved around the fence into the yard and between Mr. Tasi and the three men, directly in Mr. Tasi's path. In that statement Officer Gionson also asserted that when he fired his gun, Mr. Tasi was so close to him that the

[30] Docket 71-18 (Exh. 18, Audio) (second recording) at 00:30–00:44.

[31] Docket 71-18 (Exh. 18, Audio) at 0:05–0:40, 03:20–03:50; Docket 71-13 (Vance Depo.) at Tr. 70–72.

[32] Docket 71-13 (Vance Depo.) at Tr. 103–04; Docket 71-14 (Williams Depo.) at Tr. 72–73.

[33] Docket 71-18 (Exh. 18, Audio).

officer had to take a step back or Mr. Tasi would have fallen on him.[34] However, at deposition about two years later, Officer Gionson admitted that these recollections of the incident were not in accord with the videotapes, which showed that Officer Gionson had not moved around the end of the fence and that there was considerably more distance between him and Mr. Tasi at the time of the shooting.[35]

Plaintiffs filed this suit on November 21, 2013 in Anchorage Superior Court.[36] Plaintiffs are Jean Taualo-Tasi, as representative of Mr. Tasi's estate and individually, and Mr. Tasi's children. On December 23, 2013, Defendants filed a Notice of Removal to this Court.[37] Plaintiffs filed a Corrected Amended Complaint on December 31, 2014.[38] After Defendants moved to add another child to the Complaint, Plaintiffs filed a Second Amended Complaint (SAC) on March 27, 2015, which is the operative complaint for purposes of the motions for summary judgment.[39]

DISCUSSION

I. Jurisdiction

The Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331 because the SAC alleges violations of Mr. Tasi's, Ms. Taualo-Tasi's, and the children's federal

[34] Docket 71-2 (Gionson Interview) at Tr. 11–12, 23, 27–28.

[35] Docket 71-1 (Gionson Depo.) at Tr. 111–12, 179–80.

[36] *See* Docket 1-1 (State Court Complaint).

[37] Docket 1 (Notice of Removal).

[38] Docket 27 (Corrected Amended Complaint).

[39] Docket 44 (SAC); Docket 31 (Order); Docket 29 (Mot.).

constitutional rights. The Court has supplemental jurisdiction over the state law claims under 28 U.S.C. § 1367.

II. Summary Judgment Standard

Federal Rule of Civil Procedure 56(a) directs a court to "grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." When considering a motion for summary judgment, a court must accept as true all evidence presented by the non-moving party and draw "all justifiable inferences" in the non-moving party's favor.[40] The burden of showing the absence of a genuine dispute of material fact initially lies with the moving party.[41] If the moving party meets this burden, the non-moving party must present specific evidence demonstrating the existence of a genuine issue of fact.[42] The non-moving party may not rely on mere allegations or denials. To reach the level of a genuine dispute, the evidence must be such "that a reasonable jury could return a verdict for the non-moving party."[43] If the evidence provided by the non-moving party is "merely colorable" or "not significantly probative," summary judgment to the moving party is appropriate.[44]

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[40] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158–59 (1970)).

[41] *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010).

[42] *Anderson*, 477 U.S. at 250; *Oracle*, 627 F.3d at 387.

[43] *Anderson*, 477 U.S. at 248.

[44] *Id.* at 249–50 (citing *Dombrowski v. Eastland*, 387 U.S. 82, 84–85 (1967); *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 290 (1968)).

III. Qualified Immunity

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"[45] The purpose of qualified immunity is to "balance[] two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[46]

Government officials are not entitled to qualified immunity on summary judgment if (1) the facts taken in the light most favorable to the plaintiff show that the officials' conduct violated a constitutional right, and (2) that right was clearly established at the time of the alleged violation.[47] Both prongs of the analysis must be satisfied, so that if a court determines that one prong is not met, qualified immunity applies. A court may consider either prong first.[48]

"For a constitutional right to be clearly established, its contours 'must be sufficiently clear that a reasonable official would understand that what he is doing violates

[45] *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

[46] *Pearson*, 555 U.S. at 231.

[47] *Saucier v. Katz*, 533 U.S. 194, 201 (2001), *receded from by Pearson*, 555 U.S. at 232–36.

[48] *Pearson*, 555 U.S. at 236 ("The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.").

that right.'"[49] Courts should not define clearly established law at a high level of generality; otherwise, qualified immunity becomes no immunity at all if the only prerequisite is a constitutional violation.[50]

IV. Officer Gionson's Motion for Summary Judgment at Docket 32

Plaintiffs' SAC includes Officer Gionson in Counts One, Two, Three, Five, Seven, and Eight.[51] Counts One and Two allege § 1983 claims related to the excessive force allegedly used on Mr. Tasi under the Fourth, Fifth, and Fourteenth Amendments. "To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law."[52] In Count Three Plaintiffs allege a claim related to the excessive force allegedly used on Mr. Tasi under Article I, § 7 and § 14 of the Alaska Constitution.[53] Count Five is a claim for violations of the Fifth and Fourteenth Amendments of the United States Constitution and Article 1, § 14 of the Alaska Constitution. Count Seven alleges a tort claim under state law for "False Arrest

[49] *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

[50] *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2084 (2011).

[51] Officer Gionson is named in the body of Count Nine, but based on that count's heading it appears the claim was intended for Officers Vance and Williams.

[52] *West v. Atkins*, 487 U.S. 42, 48 (1988).

[53] Count Three references § 1983, but under that statute, the violated right must be a federal one, not a state constitutional violation. *See West*, 487 U.S. at 48.

and/or Imprisonment" against all "Defendants." Finally, Count Eight alleges "State Law Negligence" claims against Officer Gionson.[54]

The Court will first address Plaintiffs' Fourteenth and Fifth Amendment claims contained in Counts One, Two, and Five. Counts One and Two allege violations of those two Constitutional Amendments, as well as a violation of the Fourth Amendment, all based on Officer Gionson's use of allegedly excessive force against Mr. Tasi. "Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims."[55] Accordingly, the Court will grant summary judgment to Officer Gionson on the Fourteenth and Fifth Amendment claims in Counts One and Two and focus on the Fourth Amendment claims. Plaintiffs do not dispute this in their opposition.[56] Count Five appears to allege a substantive due process claim against Officer Gionson by Ms. Taualo-Tasi and the children for loss of companionship under the Fourteenth Amendment.[57] Although Defendant's motion is directed at "all claims," Defendant's briefing does not discuss these Fourteenth Amendment claims, so the issue is not before the Court.[58] The

[54] Docket 44 (SAC) at 10–15.

[55] *Graham v. Connor*, 490 U.S. 386, 393–95 (1989) (holding that the first step in § 1983 analysis should be "identifying the specific constitutional right allegedly infringed," which will usually be the Fourth Amendment or the Eighth Amendment).

[56] *Compare* Docket 42 (Gionson Mot.) at 15 (addressing summary judgment of Fifth and Fourteenth Amendment claims), *with* Docket 71 (Plaintiffs Opp'n) (absence).

[57] *See* Docket 44 (SAC) at 12.

[58] *See* Docket 42 (Gionson Mot.) at 15–17.

Court will deny summary judgment as to the Fourteenth Amendment claims in Count Five.[59]

With regard to the claims under the Alaska Constitution, Alaska has not recognized a *Bivens*-type private right of action for constitutional torts under its constitution. The Alaska Supreme Court has indicated that a state constitutional claim for damages will not be allowed except in cases of flagrant constitutional violations where little or no alternative remedies are available.[60] In this case, Plaintiffs have ample alternative remedies and have pled such in their SAC. Accordingly, the Court will grant summary judgment to Officer Gionson on the Alaska Constitutional claims pled in Counts Three and Five. As with the Fifth and Fourteenth Amendment claims in Counts One and Two, Plaintiffs do not dispute that summary judgment in that regard is appropriate in their opposition briefing.[61]

Regarding the two state law tort claims, Officer Gionson reads Count Seven as applying to Officers Vance and Williams, not Officer Gionson.[62] Plaintiffs do not dispute this reading in their opposition brief.[63] As the weight of Plaintiffs' allegations against Officers Vance and Williams go to Ms. Taualo-Tasi's alleged unreasonable detention and

[59] The Court will grant summary judgment on the Fifth Amendment claim in Count Five because Plaintiffs allege no facts relevant to self-incrimination or a coerced confession. *See Crowe v. Cty. of San Diego*, 608 F.3d 406, 427 (9th Cir. 2010).

[60] *Larson v. State, Dep't of Corr.*, 284 P.3d 1, 10 (Alaska 2012).

[61] *Compare* Docket 42 (Gionson Mot.) at 16–17 (addressing summary judgment of Alaska Constitutional claims), *with* Docket 71 (Plaintiffs Opp'n) (absence).

[62] Docket 42 (Gionson Mot.) at 16.

[63] Docket 71 (Plaintiffs Opp'n) (absence).

the weight of Plaintiffs' allegations against Officer Gionson go to excessive force, the Court will accept this uncontested reading of the SAC. Thus, the Court grants summary judgment on any residual claims against Officer Gionson in Count Seven. Officer Gionson asserts that Count Eight is a state law claim for excessive force that is mislabeled as a negligence claim.[64] Plaintiffs do not clarify this in their opposition.[65] This reading of the count is logical, so the Court will accept the interpretation.

Thus, the remaining claims against Officer Gionson are the § 1983 claims in Counts One and Two for the alleged violation of Mr. Tasi's Fourth Amendment rights, the Alaska state law claim for excessive force at Count Eight, and the Fourteenth Amendment claim at Count Five that is not currently before the Court. With respect to the excessive force claims, the central issue presented by Officer Gionson's motion is whether Officer Gionson is entitled to qualified immunity.

As discussed above, Officer Gionson is entitled to qualified immunity on summary judgment on the two § 1983 claims if he can demonstrate—under the facts taken in the light most favorable to Plaintiffs—that either (1) he did not violate Mr. Tasi's Fourth Amendment rights, or that (2) at the time of the violation it was not clearly established that he was violating Mr. Tasi's rights. Alaska's qualified immunity doctrine follows a functionally similar analysis for excessive force claims.[66] The Court will address the federal constitutional claims first.

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[64] Docket 42 (Gionson Mot.) at 16.

[65] *See* Docket 71 (Plaintiffs Opp'n).

[66] *See Maness v. Daily*, 307 P.3d 894, 901 (Alaska 2013) (Alaska "chose to follow federal precedent for determining whether qualified immunity should be conferred for [official] acts alleged to contravene a statutory or constitutional mandate." (alteration in original) (internal quotation

Plaintiffs' federal constitutional claims of excessive force are analyzed under the Fourth Amendment's prohibition on unreasonable seizures.[67] "Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake."[68] In weighing these interests, courts consider "the government's interests by assessing (1) the severity of the crime; (2) whether the suspect posed an immediate threat to the officers' or public's safety; and (3) whether the suspect was resisting arrest or attempting to escape."[69] The officer's actions are measured against an objective reasonableness standard, so a court should consider whether a reasonable officer would have believed that the suspect was an imminent threat to the officer or a bystander.[70] The Supreme Court has also considered the suspect's culpability in relation to innocent bystanders.[71] And "an officer's failure to warn, when it is plausible to do so, weighs in

marks omitted)); *see also Russell ex rel. J.N. v. Virg-In*, 258 P.3d 795, 802–04 (Alaska 2011) (discussing and applying qualified immunity standard).

[67] *Deorle v. Rutherford*, 272 F.3d 1272, 1279 (9th Cir. 2001); *see also Graham v. Connor*, 490 U.S. 386, 388 (1989).

[68] *Graham*, 490 U.S. at 396 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)) (internal quotation marks omitted).

[69] *Espinosa v. City of San Francisco*, 598 F.3d 528, 537 (9th Cir. 2010); *see also Graham*, 490 U.S. at 396 (holding that imminent threat factor is the most important in the inquiry).

[70] *Deorle*, 272 F.3d at 1279 (citing *Graham*, 490 U.S. at 397); *see also Espinosa*, 598 F.3d at 537.

[71] *See, e.g.*, *Scott v. Harris*, 550 U.S. 372, 384 (2007) (considering culpability of defendant in creating situation where innocent bystanders, with no culpability, could be hurt).

favor of finding a constitutional violation."[72] Courts also "consider whether there were less intrusive means of force that might have been used." This includes considering what other means are available, and if there was a clear, reasonable, less intrusive alternative.[73] Finally, because situations involving domestic violence are unpredictable, this should factor into a court's decision.[74] "When officers respond to a domestic abuse call, they understand that violence may be lurking and explode with little warning. Indeed, more officers are killed or injured on domestic violence calls than on any other type of call."[75]

Officer Gionson asserts that his decision to use deadly force was not unreasonable because Mr. Tasi (1) was culpable because he had violated his terms of probation by using alcohol and drugs; (2) was an imminent threat to Officer Gionson and the three men; (3) was resisting Officer Gionson's directives to drop the broomstick; and (4) was committing felony assault on either Officer Gionson or the three men. Officer Gionson does not maintain that he told Mr. Tasi that he was a police officer. Rather, he asserts that either there was insufficient time to state that he was a police officer or that it was unnecessary because Mr. Tasi could see his officer's badge and marked police vehicle.

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[72] *Mattos v. Agarano*, 661 F.3d 433, 451 (9th Cir. 2011); *see also Glenn v. Wash. Cty.*, 673 F.3d 864, 876 (9th Cir. 2011) ("Appropriate warnings comport with actual police practice and such warnings should be given, when feasible, if the use of force may result in serious injury." (quoting *Deorle*, 272 F.3d at 1284) (internal quotation marks omitted)).

[73] *Glenn*, 673 F.3d at 876.

[74] *Marquez v. City of Phoenix*, 693 F.3d 1167, 1175 (9th Cir. 2012).

[75] *United States v. Martinez*, 406 F.3d 1160, 1164 (9th Cir. 2005) (citation omitted) (quoting *Fletcher v. Clinton*, 196 F.3d 41, 50 (1st Cir.1999); *Hearings before Senate Judiciary Committee*, 1994 WL 530624 (F.D.C.H.) (Sept. 13, 1994) (statement on behalf of National Task Force on Domestic Violence)).

And Officer Gionson asserts that because he believed this was a potential domestic violence situation, the situation was inherently more volatile.[76]

Plaintiffs assert that Officer Gionson had the time to give a warning that he was about to use deadly force and such a warning was crucial because the evidence shows that Mr. Tasi may not have been aware of Officer Gionson's presence.[77] From the video, it is not clear if Mr. Tasi looked at or even saw the officer.[78] Viewing the evidence in the light most favorable to Plaintiffs, Officer Gionson had time to issue a warning as to his intended use of deadly force in the seven seconds that Mr. Tasi was walking towards him, and a reasonable officer would have done so.[79] In an excessive force case involving Tasers, the Ninth Circuit held that "the fact that [the officer] gave no warning to [the plaintiff] before tasing her pushes this use of force far beyond the pale."[80] This factor weighs in favor of finding that a constitutional violation occurred in this case.

Officer Gionson asserts that Mr. Tasi is culpable because he was drinking and using Spice in violation of his probation conditions.[81] In *Mattos v. Agarano*, the Ninth Circuit noted that when "weighing the *Graham* governmental interests in a situation where someone is likely to get hurt—either a fleeing suspect or innocent bystanders—it is

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[76] Docket 42 (Gionson Mot.) at 46–58.

[77] Docket 71 (Plaintiffs Opp'n) at 4.

[78] *See* Docket 80-5 (Exh. 4, Channel 3); Docket 80-2 (Sarna Report) at 1, 5–6, 11, 14–15, 23; Docket 71-4 (Huntley Depo.) at Tr. 36, 104–108, 115, 120–21, 157–58.

[79] Docket 80-2 (Sarna Report) at 24.

[80] *Mattos v. Agarano*, 661 F.3d 433, 451 (9th Cir. 2011).

[81] Docket 42 (Gionson Mot.) at 57.

'appropriate in this process to take into account . . . relative culpability.'"[82] Here, had the three men stayed at the end of the fence they might have been within Mr. Tasi's striking range, but the facts favorable to Plaintiffs show that those three men appeared to be retreating such that Mr. Tasi did not pose a threat to them.[83] And it is undisputed that the probation violation that Officer Gionson asks the Court to consider was not within Officer Gionson's knowledge at the time of the incident.[84] Thus, it cannot have any bearing on whether his decision, based on what he knew at the time, was reasonable. The Court declines to weigh Mr. Tasi's culpability heavily.

Officer Gionson's remaining arguments relate to possible domestic violence, Mr. Tasi resisting, and consideration of the crime that Mr. Tasi was suspected of committing. The Court agrees that the information known to Officer Gionson would have been viewed by a reasonable officer as a probable incident of domestic violence within the home. Officer Gionson knew that there were children inside and that a man in the apartment was acting violently and was bloody.[85] This factor weighs in favor of finding that the use of deadly force was reasonable. And yet, Mr. Tasi was leaving the premises when he was shot, such that there was no *ongoing* domestic violence at that time. Officer Gionson concedes that Mr. Tasi was not actively resisting arrest but still asks the Court

[82] *Mattos*, 661 F.3d at 450 (quoting *Scott v. Harris,* 550 U.S. 372, 384 (2007)) (omission in original).

[83] Docket 80-5 (Exh. 4, Channel 3); Docket 80-2 (Sarna Report) at 24.

[84] *See* Docket 59 (Mot. in Limine Opp'n) at 2; Docket 37-1 (Gionson Depo.) at Tr. 354.

[85] Docket 71-2 (Gionson Interview) at Tr. 7–8, 16–17; Docket 37-1 (Gionson Depo.) at Tr. 29, 55, 58, 61, 209–12, 455–56.

to hold that failing to follow a police command is a sufficient basis for a finding that Mr. Tasi was resisting in some sense. But here the officer was not in close quarters with an actively resisting individual, subjecting the officer to more danger. Finally, Officer Gionson asserts that Mr. Tasi was committing a serious crime—felony assault.[86] But even if Mr. Tasi's conduct could constitute felony assault,[87] the facts, when viewed in the light most favorable to Plaintiffs, do not present high risk conduct by Mr. Tasi that placed other individuals at clear risk. Mr. Tasi was wielding a broomstick; he was not, for example, brandishing a firearm or driving a motor vehicle in a high speed car chase.

Turning to imminent threat, Plaintiffs assert that Mr. Tasi was not a threat to the three men because the three men had retreated as Mr. Tasi came towards them, and a reasonable officer would have been aware of this fact.[88] Plaintiffs' use of force expert, Peter Sarna, testified that a reasonable officer would have been aware of the three men's movements, and the video shows two of the men running away.[89] It is unclear where the third man moves, but Plaintiffs allege that he retreated along a parked vehicle.[90] Additionally, the video shows that Mr. Tasi did not break into a run as he left his home to

[86] Docket 42 (Gionson Mot.) at 48–49.

[87] *See* AS 11.41.220(a) ("A person commits the crime of assault in the third degree if that person (1) recklessly (A) places another person in fear of imminent serious physical injury by means of a dangerous instrument . . . .").

[88] Docket 71 (Plaintiffs Opp'n) at 39, 42–43.

[89] Docket 80-5 (Exh. 4, Channel 3); Docket 80-2 (Sarna Report) at 24.

[90] Docket 80-2 (Sarna Report) at 6, 10, 24.

begin chasing the three men when they retreated.[91] Under the facts when viewed most favorable to Plaintiffs, Mr. Tasi was not an imminent threat to the three men.

Plaintiffs also assert that Mr. Tasi was not an imminent threat to Officer Gionson. The video appears to show that Officer Gionson was positioned behind the three-foot high fence and possibly out of Mr. Tasi's striking distance. A reasonable jury could find that Mr. Tasi was not looking at Officer Gionson and thus not advancing on him. Mr. Sarna testified that due to the fence barrier, Mr. Tasi would not become an imminent threat to Officer Gionson until he made some indication that he planned to attack the officer.[92] A reasonable jury could credit this testimony and find from the video and other evidence that Mr. Tasi had made no such move to attack. Officer Gionson argues that there was no way to use the fence as a barrier without retreating, but a reasonable jury could find otherwise. The Court concludes that under the facts viewed in the light most favorable to Plaintiffs, Mr. Tasi was not an imminent threat to Officer Gionson when Officer Gionson made the decision to shoot.

The Ninth Circuit has held that summary judgment is appropriate when "the material, historical facts are not in dispute, and the only disputes involve what inferences properly may be drawn from those historical facts."[93] This is not such a case. Many of the material historical facts *are* in dispute, including where Mr. Tasi was located when the decision to shoot was made, what Mr. Tasi's movements with the stick signified, and

[91] Docket 80-5 (Exh. 4, Channel 3).

[92] Docket 80-2 (Sarna Report) at 23.

[93] *Conner v. Heiman*, 672 F.3d 1126, 1131 (9th Cir. 2012) (quoting *Peng v. Mei Chin Penghu*, 335 F.3d 970, 979–80 (9th Cir. 2003), *cert. denied* 540 U.S. 1218 (2004)).

where he was looking and facing as he was walking. Resolving all of these disputes favorably to Plaintiffs as required on a defendant's motion for summary judgment, a reasonable jury could find that Officer Gionson's use of force was constitutionally impermissible under the circumstances.

Having concluded that a reasonable jury could find a constitutional violation, the Court must consider whether Officer Gionson is still entitled to qualified immunity because it was not clearly established that he was violating Mr. Tasi's rights. Officer Gionson asserts that the law was not clearly established in June 2012 that he could not use deadly force when Mr. Tasi "attacked [him] and the three men with [the broomstick] by brandishing it and position[ing] himself to swing it."[94]

Officer Gionson cites to *DeLuna v. City of Rockford*.[95] In *DeLuna*, a police officer responded to a 911 call from DeLuna's residence. The officer had responded to a call from the same home eight days earlier, and from that call had learned that DeLuna was very violent, was known to carry weapons and sell weapons, had an extensive arrest history, and that a minor lived in the home. When the officer arrived at the residence the second time, he did not immediately see DeLuna, but then saw "movements in the dark" at a corner of the house. DeLuna then walked towards the officer with his arms outstretched stating, "I've got something for you. You are going to have to kill me." DeLuna continued walking towards the officer, not heeding the officer's commands to "stop," while the officer backed up approximately 40 feet. The officer finally shot DeLuna

[94] Docket 42 (Gionson Mot.) at 59.

[95] 447 F.3d 1008 (7th Cir. 2006).

after the officer stumbled over a pipe and DeLuna "lunged" at him at the same time. The Seventh Circuit held that "[t]he facts undisputed by [the decedent's wife] are themselves sufficient to establish imminent danger to [the officer] so as to render deadly force reasonable." The court relied heavily on the officer's knowledge of DeLuna's history, DeLuna's statement that he "had something [for him]," the fact that DeLuna backed the officer up until the officer stumbled, and that DeLuna then lunged at the officer in a possible attempt to get his weapon.[96]

DeLuna is readily distinguishable from this case. Here, it was not "clear that the suspect was advancing on the officer in what reasonably appeared to be an effort to get his weapon."[97] And Officer Gionson had no knowledge that Mr. Tasi was habitually violent or prone to carrying weapons, and no knowledge of any prior drinking or drug use; Officer Gionson did know that Mr. Tasi (1) may have been the man involved in the earlier dispatches that day; (2) was carrying a broomstick; (3) was "acting violent" and was bloody; and that (4) there were children in the apartment. DeLuna had backed the officer up for 40 feet and had then lunged towards the officer, whereas under Plaintiffs' rendition of the facts here, Mr. Tasi never walked directly towards Officer Gionson and did not lunge at or otherwise make any direct action towards the officer. Therefore, *DeLuna* is not on point.

The cases that Plaintiffs cite are also not directly on point in showing a constitutional violation based on facts similar to those at issue in this case such that the

[96] *DeLuna*, 447 F.3d at 1010–13.

[97] *Id.* at 1013 (citing *Blossom v. Yarbrough*, 429 F.3d 963 (10th Cir. 2005)).

violation could be clearly established. And yet, although the facts in each case are different, certain aspects of them are helpful. Moreover, an officer should not always escape liability when a constitutional violation has occurred, but that violation is novel. Rather, if an officer's conduct is obviously unconstitutional, then qualified immunity should be denied.[98] Plaintiffs' cases discuss as relevant that the suspect was not facing towards the officer when shot.[99] Others discuss that the suspect was simply walking towards the officer at a steady gait and not charging.[100] *Deorle v. Rutherford*, cited by Plaintiffs, noted that the officer "was stationed in a secure position behind a tree, [and] his line of retreat was clear."[101] Many of Plaintiffs' cases note that the suspect was not given a warning that force was about to be used, even though there was sufficient time to do so.[102]

The Court holds that under the circumstances of this case, it was clearly established that a constitutional violation occurred when Officer Gionson shot Mr. Tasi if

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[98] *Deorle v. Rutherford*, 272 F.3d 1272, 1274–75 (9th Cir. 2001) ("[N]otwithstanding the absence of direct precedent, the law may be, as it was here, clearly established. Otherwise, officers would escape responsibility for the most egregious forms of conduct simply because there was no case on all fours prohibiting that particular manifestation of unconstitutional conduct." (citation omitted)). In *Deorle*, the officer shot the plaintiff in the face with a "beanbag" round even though the officer was safe behind a tree and Deorle had made no attempt to attack or touch any of the officers, despite yelling at them that he would "kick [the officer's] ass" and asking the officers to kill him. *Id.* at 1276–77, 1286–86. A "beanbag" round is lead-filled round that is less lethal than a traditional bullet. *Id.* at 1272.

[99] *Bryan v. MacPherson*, 630 F.3d 805, 827 (9th Cir. 2010); *Curnow v. Ridgecrest Police*, 952 F.2d 321, 325 (9th Cir. 1991).

[100] *Deorle*, 272 F.3d at 1277 (noting officer testimony that Mr. Deorle "walk[ed] directly at me at a steady gate [sic] . . . . He didn't run at me, he didn't take his time getting to me, it was just a steady walk directly at me" (alterations in original)); *Hayes v. Cnty. of San Diego*, 736 F.3d 1223, 1234 (9th Cir. 2013) ("[Hayes's girlfriend] stated that Hayes was not charging Deputy King and described Hayes's expression as 'clueless' when walking towards the deputies.").

[101] *Deorle*, 272 F.3d at 1282.

[102] *Id.* at 1278; *Mattos v. Agarano*, 661 F.3d 433, 451 (9th Cir. 2011).

the facts are viewed in the light most favorable to Plaintiffs: with Mr. Tasi wielding only a broomstick, with Mr. Tasi not facing or charging towards the officer, with the three men in retreat, with Officer Gionson having a tactical advantage of being behind a fence and outside of striking distance, and with no warning that deadly force was going to be used.

For the foregoing reasons, Officer Gionson has not established that as a matter of law he is entitled to qualified immunity. Accordingly, the Court denies summary judgment to Officer Gionson with respect to the § 1983 claims in Counts One and Two.

Turning to the state law excessive force claim at Count Eight, the use of excessive force is a statutory violation under Alaska law. Alaska Statute 12.25.070 provides that "[a] peace officer or private person may not subject a person arrested to greater restraint than is necessary and proper for the arrest and detention of the person." Alaska employs a test that is functionally equivalent to the federal qualified immunity analysis for this type of statutorily based claim.[103] The Alaska Supreme Court has "observed that [its] approach to qualified immunity in excessive force cases 'comports in all essential respects' with that of the United States Supreme Court."[104]

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[103] *See Russell ex rel. J.N. v. Virg-In*, 258 P.3d 795, 803 (Alaska 2011). After the United States Supreme Court's decision in *Saucier v. Katz*, 533 U.S. 194 (2001), Alaska reshaped its test to ask "if the officer's conduct was objectively reasonable or the officer reasonably believed that the conduct was lawful, even if it was not." *Olson v. City of Hooper Bay*, 251 P.3d 1024, 1032 (Alaska 2011). Like federal law, Alaska law requires the court to look to law in its own jurisdiction and others to determine whether the officer could have had a reasonable belief his conduct was lawful. *Id*. The Alaska Supreme Court has held that its decisions "comport[] in all essential respects with the Supreme Court's decision in *Saucier*, especially in its concern to grant immunity in cases where an officer might have reasonably believed that his conduct was lawful." *Sheldon v. City of Ambler*, 178 P.3d 459, 466 (Alaska 2008).

[104] *Maness*, 307 P.3d at 902 (quoting *Sheldon*, 178 P.3d at 466).

Applying the same federal qualified immunity concepts to the state law claim, the Court finds that Officer Gionson has also failed to prove that he is entitled to summary judgment on the state law excessive force claim. Viewing the facts in the light most favorable to the non-moving party, a reasonable jury could find that Officer Gionson's actions were not objectively reasonable, and he could not have reasonably believed that they were lawful.[105] Accordingly, the Court will deny summary judgment to Officer Gionson on the state law excessive force claim at Count Eight.

V. Defendants' Motion for Summary Judgment at Docket 43

Defendants filed a combined summary judgment motion encompassing the claims against Officer Vance, Officer Williams, MOA, and APD.

A. Claims against Officers Vance and Williams

The SAC clearly includes Officers Vance and Williams in Counts Three, Seven, Nine, and Ten.[106] Count Nine appears to be directed at Officers Vance and Williams, but references Officer Gionson in the text. The count is best read a one for vicarious liability for MOA in the event that Officers Vance and Williams are found to have violated any

[105] *See Olson*, 251 P.3d at 1032.

[106] Officers Vance and Williams may also be included in Count One, because the SAC states that it applies to "Officer(s)," but that count does not include any allegations specific to Officers Vance and Williams; all of the allegations are directed towards Officer Gionson. *See* Docket 44 (SAC) at 10–11. Because the SAC fails to lay out any specific allegations as to Officers Vance and Williams in Count One, the Court will grant summary judgment to those two officers on that count. Count Five is styled against "Defendants," but is a Fourteenth Amendment claim by Ms. Taualo-Tasi and the children for loss of Mr. Tasi's companionship. *Id.* at 12–13. Plaintiffs do not allege that Officers Vance and Williams are responsible for Mr. Tasi's death. The Court will grant summary judgment to Defendants on any claims against Officers Vance and Williams in Count Five.

common law rights.[107] Otherwise, Count Nine would be redundant with Count Seven. And, as discussed above, the proper vehicle for the resolution of the alleged federal constitutional violations in this case is the Fourth Amendment.[108] Accordingly, the Court will grant summary judgment to Officers Vance and Williams on Plaintiffs' Fifth and Fourteenth Amendment claims in Count Ten. The Court also grants summary judgment to Defendants on the claims under the Alaska Constitution (Count Three) because, as discussed above, there is no private right of action for a violation of the Alaska Constitution when alternative remedies exist.[109] As in the briefing on Officer Gionson's motion, Plaintiffs do not dispute the foreclosure of these claims.[110] Thus, the Court is left with Count Seven (state law claims for false imprisonment/arrest) and Count Ten (§ 1983 action for unlawful seizure).

Defendants assert that Jean Taualo-Tasi and the children were not seized under the Fourth Amendment in the laundry room because Ms. Taualo-Tasi went there voluntarily and the officers did not have to use force. Alternatively, Defendants argue that if these Plaintiffs were seized, Officers Vance and Williams are protected by qualified immunity.[111]

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[107] *See* Docket 44 (SAC) at 15 ("The Defendants MOA and APD are therefore liable to compensate all the Plaintiffs for the damages described above, and punitive damages as set out below.").

[108] *Graham v. Connor*, 490 U.S. 386, 393–95 (1989).

[109] *Larson v. State, Dep't of Corr.*, 284 P.3d 1, 10 (Alaska 2012).

[110] *See* Docket 73 (Plaintiffs Opp'n) (absence).

[111] Docket 50 (Defendants Mot.) at 26–27.

"[N]ot all personal intercourse between policemen and citizens involves 'seizures' of persons."[112] Under the Fourth Amendment, a seizure occurs "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen."[113] A seizure can be found if a reasonable person would believe that she was not free to leave.[114] Similarly, under Alaska law, false imprisonment requires a restraint upon a plaintiff's freedom.[115]

Viewing the facts in the light most favorable to Plaintiffs, a reasonable jury could find that Ms. Taualo-Tasi and the children were seized for purposes of the Fourth Amendment and Alaska state law false imprisonment when they were held in the laundry room. Immediately after the shooting, Ms. Taualo-Tasi was asked to go back into the apartment by Officer Vance, to which she replied, "No. I want to know if my husband's alright."[116] Ms. Taualo-Tasi was then moved, over this objection, to the apartment and then into the laundry room with her children. Once in the laundry room, Officer Williams told Ms. Taualo-Tasi that she could leave once he was done questioning her only "if that's

[112] *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968).

[113] *Id*.

[114] *California v. Hodari D.*, 499 U.S. 621, 628 (1991).

[115] *Waskey v. Municipality of Anchorage*, 909 P.2d 342, 345 (Alaska 1996) ("False arrest and false imprisonment are not separate torts. A false arrest is one way to commit false imprisonment; since an arrest involves restraint, it always involves imprisonment." (quoting *City of Nome v. Ailak*, 570 P.2d 162, 168 (Alaska 1977))).

[116] Docket 71-18 (Exh. 18, Audio) (second recording) at 00:30–00:44.

what [the] Sergeant allowe[d]."[117] And both Officer Vance and Officer Williams testified that Ms. Taualo-Tasi was not free to leave during their contacts with her.[118]

If Ms. Taualo-Tasi and the children were seized when kept in the laundry room, Officers Vance and Williams could still be entitled to qualified immunity so long as either the seizure was reasonable or it was not clearly established that by seizing Ms. Taualo-Tasi and the children the officers were violating the law.[119] The Fourth Amendment allows officers to detain non-suspect witnesses on a temporary basis, but any such detention must be reasonable.[120] "[I]n judging reasonableness, [a court] look[s] to 'the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.'"[121] "Although detention of witnesses for investigative purposes can be reasonable in certain circumstances, such detentions must be minimally intrusive." This is because "in the hierarchy of state interests justifying detention, the interest in detaining witnesses for information is of relatively low value."[122]

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[117] Docket 71-18 (Exh. 18, Audio) at 03:40–03:50.

[118] Docket 71-13 (Vance Depo.) at Tr. 103–04; Docket 71-14 (Williams Depo.) at Tr. 72–73.

[119] *See Saucier v. Katz*, 533 U.S. 194, 201 (2001), *receded from by Pearson*, 555 U.S. at 232–36.

[120] *Illinois v. Lidster*, 540 U.S. 419, 426–27 (2004); *see also United States v. Ward*, 488 F.2d 162 (9th Cir.1973).

[121] *Lidster*, 540 U.S. at 427 (quoting *Brown v. Texas*, 443 U.S. 47, 51 (1979)); *see also Maxwell v. Cnty. of San Diego*, 708 F.3d 1075, 1083 (9th Cir. 2013).

[122] *Maxwell*, 708 F.3d at 1083–84.

In *Maxwell v. County of San Diego*, the Ninth Circuit noted that the Supreme Court, when considering a detention without suspicion of criminal activity, had found that a particular detention was reasonable because "[t]he overall delay was 'a very few minutes at most,' contact with the police 'lasted only a few seconds,' and the contact 'consisted simply of a request for information and the distribution of a flyer.'"[123] That Supreme Court case—*Illinois v. Lidster*—analyzed a police checkpoint that was set up to gather information about an accident that had happened the previous week.[124]

When viewing the facts in the light most favorable to Plaintiffs for purposes of this summary judgment motion, the Court holds that a reasonable jury could find that the seizure of Ms. Taualo-Tasi and the children in the laundry room was unreasonable, and therefore would have violated their Fourth Amendment rights.[125] Ms. Taualo-Tasi was not suspected of committing any crime and she had not witnessed the shooting. Ms. Taualo-Tasi was prevented from going to her husband in the final moments of his life and prevented from following him to the hospital in order to be near him. Nor was she informed of his condition when held in the laundry room. While the alleged 10 minute seizure in the laundry room may not have been for a long duration, it was by no means "minimal" in light of the timing of the seizure relative to the shooting of her spouse. Although clearly there is a public interest in thoroughly investigating a shooting, it may not outweigh the severe intrusion on Ms. Taualo-Tasi's liberty in these circumstances.

[123] *Id.* at 1084 (quoting *Lidster*, 540 U.S. at 427–28).

[124] *Lidster*, 540 U.S. at 421–22.

[125] *See* U.S. CONST. amend. IV.

Particularly as Ms. Taualo-Tasi did not witness the shooting, a reasonable jury could conclude that the seizure did not advance the public interest in crime investigation to any great degree.

Defendants argue that it was of vital importance for Ms. Taualo-Tasi to be interviewed immediately because she was one of the only people present at the apartment.[126] But this argument is undercut by the fact that Officer Gionson, arguably the witness with the most relevant information, was not interviewed at the scene. Instead, he was not interviewed until a few days after the shooting. The Court holds that when viewing the facts in the light most favorable to Plaintiffs, a reasonable jury could find that Officers Vance and Williams violated Ms. Taualo-Tasi and the children's constitutional right to be free from an unreasonable seizure when they were held in the laundry room.

The Court must then determine whether, despite this possible constitutional violation, qualified immunity applies because the law was not clearly established. Both parties cite to *Maxwell v. County of San Diego*.[127] In that case, Kristin Maxwell-Bruce was shot in the jaw by her husband in her parents' home. Kristin was transported to a waiting air taxi but died en route. Her parents repeatedly asked to be able to follow Kristin to the hospital, but they were instead separated and interrogated for roughly five hours. Kristin's parents sued, arguing that their detention violated the Fourth Amendment's prohibition on unreasonable seizures. The Ninth Circuit observed that there was a dearth of cases examining the detention of witnesses for only investigative purposes, and opined

[126] Docket 50 (Defendants Mot.) at 27.

[127] 708 F.3d 1075 (9th Cir. 2013).

that this fact alone would ordinarily compel a grant of qualified immunity. But the Circuit Court held that "in an obvious case, [general] standards can clearly establish the answer, even without a body of relevant case law."[128]

The Ninth Circuit held that *Maxwell* was this type of "obvious case" to which qualified immunity would not apply because the detention was not minimally intrusive as required by *Illinois v. Lidster*.[129] The court concluded that after *Lidster*, the officers "were on notice that they could not detain, separate, and interrogate the Maxwells for hours."[130] The court reasoned that even had the crime not been "solved," the officers still could not compel the Maxwells to stay and answer questions as they did. The court distinguished *Walker v. City of Orem*,[131] a Tenth Circuit case that found qualified immunity after holding that there was no precedent to put officers on notice that they could not interrogate a man's family for 90 minutes after the officers had shot him. The Ninth Circuit noted that unlike *Walker*, the events in *Maxwell* occurred after the Supreme Court's 2004 holding in *Lidster*, so the officers should have been on notice in 2006 that witness detentions were subject to the Fourth Amendment's reasonableness test. In sum, the Ninth Circuit held

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[128] *Id.* at 1079–83 (alteration in original) (quoting *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004)) (internal quotation marks omitted).

[129] *Id.* at 1084 (citing *Lidster*, 540 U.S. at 427–28). In *Lidster*, the Supreme Court considered a highway checkpoint set up to ask drivers about a recent hit-and-run accident. *Lidster*, 540 U.S. at 421–22. The checkpoint yielded the arrest of Mr. Lidster, who nearly hit an officer as he swerved at the stop. *Id.* at 422. Mr. Lidster appealed his conviction for driving under the influence, arguing that the evidence gathering checkpoint was unlawful. *Id.* at 422–23. The Court upheld his conviction, finding that the seizure was reasonable because the delay was "a very few minutes at most," police contact "lasted only a few seconds," and the contact "consisted simply of a request for information and the distribution of a flyer." *Id.* at 427–28.

[130] *Maxwell*, 708 F.3d at 1084.

[131] 451 F.3d 1139 (10th Cir. 2006).

that it was obvious that the right was clearly established in December 2006, when the events in *Maxwell* transpired.[132]

The events of this case occurred in June of 2012—before *Maxwell* was published but long after *Lidster*. Thus, the *Maxwell* decision itself could not have given notice to Officers Vance and Williams that it could be constitutionally impermissible to hold Ms. Taualo-Tasi and the children in the laundry room. But if the facts here are sufficiently analogous to *Maxwell*, then Defendants should have been on notice that there was a constitutional violation: the Ninth Circuit held that the facts of *Maxwell* constituted an obvious violation in 2006, and the events here occurred in 2012.[133]

Plaintiffs argue that *Maxwell* is analogous because the officers here detained and interrogated Ms. Taualo-Tasi even when she did not witness the shooting and the officers already knew who had shot Mr. Tasi. Plaintiffs argue that there was no crime to be solved and it should have been obvious, as in *Maxwell*, that the officers could not interrogate Ms. Taualo-Tasi for a long period of time while her husband lay dying.[134] Defendants

[132] *Maxwell*, 708 F.3d at 1079, 1084–85. The first *Maxwell* opinion was issued in September 2012. *See Maxwell v. Cnty. of San Diego*, 697 F.3d 941 (2012). This opinion contained the same analysis as to the seizure issue as the 2013 opinion. *Compare Maxwell*, 697 F.3d at 949–51, *with Maxwell*, 708 F.3d at 1083–85. The Ninth Circuit denied the petition for rehearing but released the amended opinion in September 2013. *Maxwell*, 708 F.3d at 1079.

[133] *Maxwell* held that the conduct at issue was clearly established to be a violation in 2006. *See Maxwell*, 708 F.3d at 1083–85. The Court notes that the Supreme Court has never explicitly held that a circuit court decision is sufficient to create clearly established law. *See, e.g.*, *City of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1776 (2015) ("[E]ven if 'a controlling circuit precedent *could* constitute clearly established federal law in these circumstances,' it does not do so here." (emphasis added) (citation omitted)). Even if the Supreme Court were to hold that circuit court decisions cannot create clearly established law, the Court bases its decision on the obviousness of the violation, not the issuance of the *Maxwell* decision itself.

[134] Docket 73 (Plaintiffs Opp'n) at 41–43.

distinguish *Maxwell* by arguing that here the crime had not been "solved," they needed a search warrant, and the detention was not as long as in *Maxwell*.[135]

The Court finds that the facts of this case are considerably closer to *Maxwell* than Defendants maintain. In both cases, the officers' actions prevented the witnesses from being with their loved ones during a critical time. In both cases, witnesses who had not viewed the events firsthand were detained. And here there is the added fact that the officer who shot the decedent was allowed to leave without being interviewed. While the laundry room portion of Ms. Taualo-Tasi's detention that is at issue in this case was much shorter than the detention in *Maxwell*, it was still intrusive. Defendants also do not explain how detaining Ms. Taualo-Tasi would have furthered their effort to get a search warrant.

Accordingly, the Court holds that when viewing the facts in the light most favorable to Plaintiffs, a reasonable jury could find that the alleged seizure of Ms. Taualo-Tasi and the children in the laundry room was unreasonable and that reasonable officers would have known they were violating clearly established law by their conduct. Therefore, the Court will deny Defendants' Motion for Summary Judgment on Count Ten as to Officers Vance and Williams.

Turning to the state law claim, in Alaska, immunity for false arrest/false imprisonment is analyzed differently than immunity from a state law claim of excessive force.[136] A state law excessive force claim is a claim that the public official violated a

[135] Docket 50 (Defendants Mot.) at 29.

[136] Both Plaintiffs and Defendants analyze the state law claim as one with the § 1983 analysis, but in the Court's view this is incorrect. *See Crawford v. Kemp*, 139 P.3d 1249, 1255–56, 1258–59 (Alaska 2006) (noting that alleged constitutional and statutory violations evaluated using federal analysis, while state law tort claims analyzed under a subjective standard); *Maness v. Daily*, 307 P.3d 894, 903 (Alaska 2013) (citing *Prentzel v. State, Dep't of Pub. Safety*, 169 P.3d

statute—AS 12.25.070. The Alaska Supreme Court has addressed immunity in the context of statutory violations under a federal-type analysis.[137] But for the violation of common law rights, Alaska courts apply the qualified immunity contained in AS 09.65.070 pursuant to a test laid out in *Aspen Exploration Corp. v. Sheffield*.[138] In Count Seven, Plaintiffs are alleging a common law claim of false arrest/false imprisonment.

Alaska Statute 09.65.070(d)(2) provides that "[a]n action for damages may not be brought against a municipality or any of its agents, officers, or employees if the claim . . . is based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty by a municipality or its agents, officers, or employees, whether or not the discretion involved is abused." Discretionary acts under discretionary function official immunity are acts "that require personal deliberation, decision, and judgment."[139] They "refer[] to decisions involving questions of policy, that is, the evaluation of factors such as the financial, political, economic, and social effects of a given plan or policy."[140] "[A] public official is shielded from liability . . . when discretionary acts

573, 586 (2007)) (noting that the court applied the test from *Aspen Exploration Corp. v. Sheffield*, 739 P.2d 150 (Alaska 1987), to allegations of false arrest and false imprisonment).

[137] *Breck v. Ulmer*, 745 P.2d 66, 71–72 (Alaska 1987); *see also Maness*, 307 P.3d at 903 n.32.

[138] *Maness*, 307 P.3d at 903; *see also Aspen Exploration Corp. v. Sheffield*, 739 P.2d 150 (Alaska 1987).

[139] *Pauley v. Anchorage Sch. Dist.*, 31 P.3d 1284, 1286 (Alaska 2001) (quoting *Samaniego v. City of Kodiak*, 2 P.3d 78, 83 (Alaska 2000)) (internal quotation marks omitted). Discretionary function official immunity is different from discretionary function sovereign immunity. See *Aspen Expl. Corp.*, 739 P.2d at 155, for a discussion of the two tests applied to these different types of immunity.

[140] *State v. Abbott*, 498 P.2d 712, 720 (Alaska 1972).

within the scope of the official's authority are done in good faith and are not malicious or corrupt."[141]

The decision to detain Ms. Taualo-Tasi and the children was a discretionary decision made within the scope of the officers' employment.[142] To make out a claim, Plaintiffs must demonstrate a triable issue of material fact that the decision to detain Ms. Taualo-Tasi and the children was not done in good faith or was corrupt or malicious. They have failed to do so. Accordingly, the Court will grant summary judgment to Officers Vance and Williams on Count Seven.

B. Claims Against MOA and APD

Plaintiffs have included MOA and APD in all ten counts of the Complaint. The parties have briefed the case as though MOA and APD are one entity, and the Court shall refer to them both as MOA.[143]

The Supreme Court has held that municipal entities may be subject to § 1983 liability, but not on the basis of respondeat superior.[144] Rather, "a plaintiff seeking to impose liability on a municipality under § 1983 [must] identify a municipal policy or custom

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[141] *Estate of Logusak ex rel. Logusak v. City of Togiak*, 185 P.3d 103, 109 (Alaska 2008) (quoting *Pauley*, 31 P.3d at 1286).

[142] *See Prentzel*, 169 P.3d at 583–84 (making arrest is discretionary and within scope of employment, even when alleged to be unconstitutional).

[143] APD has also been sued as an independent entity in Alaska. *See, e.g.*, *Grant v. Anchorage Police Dep't*, 20 P.3d 553 (Alaska 2001) (suing APD).

[144] *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 694 (1978) ("[A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.").

that caused the plaintiff's injury."[145] Therefore, to state a viable § 1983 cause of action against these Defendants, Plaintiffs must specifically allege an independent basis for MOA liability in each § 1983 count. Plaintiffs allege no such independent cause of action in Counts One, Two, Three, Five, and Ten. Accordingly, the Court will grant summary judgment to MOA on each of these counts. Counts Four, Six, Seven, Eight, and Nine remain. Counts Four and Six are denominated *Monell* Actions under § 1983 for failure to train, supervise, equip, or for ratification. Counts Seven through Nine are state law claims.[146]

A municipality can be liable under § 1983 if there is a violation of a federal right and the violation is due to a municipal policy or practice.[147] But the municipal policy or practice must be "the moving force of the constitutional violation."[148] For an allegation of failure to train, a plaintiff "must show 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."[149] "A municipality's culpability for a deprivation of rights is at its most tenuous

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[145] *Hunter v. Cnty. of Sacramento*, 652 F.3d 1225, 1232–33 (9th Cir. 2011) (quoting *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 403 (1997)) (internal quotation marks omitted).

[146] *See* Docket 44 (SAC) at 12–15.

[147] *Collins v. City of Harker Heights*, 503 U.S. 115, 120–22 (1992).

[148] *Monell*, 436 U.S. at 694.

[149] *Blankenhorn v. City of Orange*, 485 F.3d 463, 484 (9th Cir. 2007) (quoting *Lee v. City of Los Angeles*, 250 F.3d 668, 681 (9th Cir. 2001)) (internal quotation marks omitted); *see also City of Canton v. Harris*, 489 U.S. 378, 388 (1989).

where a claim turns on a failure to train."[150] "[A]bsent evidence of a 'program-wide inadequacy in training,' any shortfall in a single officer's training 'can only be classified as negligence on the part of the municipal defendant—a much lower standard of fault than deliberate indifference.'"[151] The policy makers must be on "actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights."[152]

Plaintiffs advance two grounds for their failure to train claims: that at the time of the shooting MOA policy did not require officers to identify themselves as police officers and give a warning before using force, and that MOA was training its officers to perceive an imminent threat before there actually was one.[153] Mr. Sarna equivocated regarding whether the training violated industry standards, but he stated that (1) the formulation of an imminent threat as testified to by APD's lead weapons trainer, Sergeant Henry, would be "a cause for great concern," and (2) the lack of a directive in MOA policy to verbally identify oneself as a police officer and give a warning such as "stop or I'll shoot" did not accord with standard police practices.[154] The Court will consider each training issue in turn.

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[150] *Connick v. Thompson*, 563 U.S. 51, 61 (2011).

[151] *Blankenhorn*, 485 F.3d at 485 (quoting *Alexander v. City of San Francisco*, 29 F.3d 1355, 1367 (9th Cir. 1994)).

[152] *Connick*, 563 U.S. at 61.

[153] Docket 73 (Plaintiffs Opp'n) at 34–36.

[154] Docket 80-2 (Sarna Report) at 9, 24; Docket 40-4 (Sarna Depo.) at Tr. 29, 48, 168–70, 212–14.

Sergeant Henry was deposed as MOA's 30(b)(6) witness.[155] He testified—in the original deposition—that Mr. Tasi was an imminent threat the moment he stepped outside the apartment. Sergeant Henry also testified that this view was consistent with APD training policy.[156] When asked whether "it was the policy and procedure of APD at the time of the shooting that [when] Mr. Tasi first came out of the apartment with a broomstick, there was a sufficient threat of imminent deadly – imminent death or bodily injury that the officer could have shot," Sergeant Henry answered, "Yes. It is consistent with policy and training, yes."[157] Plaintiffs assert that Officer Gionson articulated the same

[155] Docket 94-1 (Henry Depo.) at 1. Under Federal Rule of Civil Procedure 30(b)(6), after a party directs a deposition request at a governmental agency, "[t]he named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify."

[156] Docket 71-10 (Henry Depo.) Tr. 22–24. The Court notes that Sergeant Henry later changed this deposition testimony. Under Civil Rule 30(e), "[o]n request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which: (A) to review the transcript or recording; and, (B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them." Here, the deposition was taken on October 30, 2014, and changed on January 9, 2015, far beyond the 30-day deadline, even had MOA requested that changes be allowed. Docket 94-1 at 1, 9. Moreover, "[w]hile the language of FRCP 30(e) permits corrections 'in form or substance,' this permission does not properly include changes offered solely to create a material factual dispute in a tactical attempt to evade an unfavorable summary judgment." *Hambleton Bros. Lumber Co. v. Balkin Enterprises, Inc.*, 397 F.3d 1217, 1225 (9th Cir. 2005) (analogizing to sham affidavits to hold that district court did not abuse discretion by striking correction). The same limitation should apply to a party seeking summary judgment, as is the case here. A proposed change may be only "corrective," not "contradictory." *Id.* at 1226. The Court finds that this change goes beyond a corrective nature. Accordingly, Defendants' argument that the Court should not accord weight to the original sworn testimony is without merit.

[157] Docket 71-10 (Henry Depo.) at Tr. 22–24. Sergeant Henry's testimony as to MOA's training is excerpted below:

> A. . . . . I can tell you from what I saw in the video, that from the minute I first saw Mr. Tasi appear in the video, he was an imminent threat to the officer based on the distance that was there and his behavior.

understanding, which would be consistent with being trained in that manner.[158] Mr. Sarna testified that if Sergeant Henry was training officers consistently with his formulation of imminent threat it would be "a cause for great concern."[159]

> Q. Okay. So its your testimony then, as a 30(b)(6) witness, as the policies and procedures of APD at the time of the shooting, that Mr. Tasi could have been shot as soon as you first saw him in the video?
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> . . . .
>
> A. Yes. From everything in the video and the distance involved and his speed and the assaultive nature of him in the video, . . . that's the thing, you don't know what would happen, they're all hypotheticals, but I never saw from when he first appears in the video until the end of what I saw, I never saw a time when he wasn't an imminent threat to the officer.
>
> . . . .
>
> Q. So apparently then, if I understand you correctly then, its your testimony that, as a 30(b)(6) witness, that it was the policy and procedure of APD at the time of the shooting that [when] Mr. Tasi first came out of the apartment with a broomstick, there was a sufficient threat of imminent deadly – imminent death or bodily injury that the officer could have shot?
>
> . . . .
>
> A. Yes. It is consistent with policy and training, yes.

[158] Docket 73 (Plaintiffs Opp'n) at 34–35.

[159] Docket 80-2 (Sarna Report) at 24; Docket 40-4 (Sarna Depo.) at Tr. 212–14. The deposition exchange is repeated below:

> A: [Sergeant Henry] didn't use the term "shootable." He said he was an immediate threat which impliedly says that you can use deadly force against an immediate threat. I read his deposition and what concerns me most about his recanting is that in the deposition he is asked repeatedly and he says repeatedly so this isn't some offhand remark, this is -- he is questioned about it and he repeats his understanding more than once.
>
> Q. He was in the capacity as testifying as the most knowledgeable person on training in that regard?
>
> A. As I understand his role.
>
> Q. If a jury was to find that the Anchorage Police Department was training officers in accord with Mr. Henry's opinion, would that give you some information to the effect that the Anchorage Police Department, that is, the Municipality of Anchorage, bears responsibility in that regard?
>
> . . . .

While Plaintiffs have presented evidence that could lead a reasonable jury to find that in this case Officer Gionson was incorrectly trained, that is insufficient to demonstrate *Monell* liability. Instead, Plaintiffs must show "deliberate indifference," which requires a showing that policy makers were on "actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights."[160] And "absent evidence of a 'program-wide inadequacy in training,' any shortfall in a single officer's training 'can only be classified as negligence on the part of the municipal defendant—a much lower standard of fault than deliberate indifference.'"[161]

Even taking the evidence in the light most favorable to Plaintiffs, there is insufficient evidence for a jury to find MOA liable for its training on imminent threat. Had Sergeant Henry's characterization of APD training policy been the moving force behind Officer Gionson's alleged constitutional violation, Officer Gionson would have shot Mr. Tasi as soon as he exited the apartment building. Instead, he waited until Mr. Tasi advanced upon him. More importantly, Plaintiffs have presented no evidence that Sergeant Henry's alleged deficient training has actually resulted in a pattern of unconstitutional use of force within the Department and that policy makers were on actual or constructive notice that

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> A. It would be a cause for great concern.
>
> Q. And why would it be a cause for great concern if a jury was to find or a judge was to find there was evidence that the Anchorage Police Department was propounding the policy as expressed by Mr. Henry?
>
> A. Because the policy as being expressed . . . is inaccurate. It misrepresents the law, it basically informs officers that they can use deadly force when, in fact, they can't by law. The fact that Officer Gionson articulated the same understanding in his deposition as a former police chief would be of great concern to me.

[160] *Connick*, 563 U.S. at 61.

[161] *Blankenhorn*, 485 F.3d at 485 (quoting *Alexander*, 29 F.3d at 1367).

his training caused APD officers to violate citizens' constitutional rights. Thus, the Court will grant MOA's motion for summary judgment on this basis.

Plaintiffs' next basis for *Monell* liability is the APD verbal warning policy. The APD policy on verbal warnings at the time of Mr. Tasi's death stated, "When possible, officers should continue to attempt to gain compliance by means of verbal directives or commands."[162] After these events APD policy was amended to state, "[W]hen tactically feasible, an officer will *identify himself or herself as a police officer* and issue verbal commands and *warnings* prior to the use of force."[163] Mr. Sarna stated that he believed the policy in place at the time of the shooting should have required the officer to identify himself and issue a warning if feasible. He also stated that these warnings work, so it would not be speculation that a proper warning would have affected this case.[164] But Plaintiffs have not provided any evidence that policy makers were on "actual or constructive notice that [this] particular omission in their training program causes city employees to violate citizens' constitutional rights."[165] And the statement of Mr. Sarna, alone—that warnings work—does not establish that the warning policy then in place was the driving force behind the alleged constitutional violation. [166]

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[162] Docket 39-10 (Training Policy) at 1.

[163] Docket 94-1 (Henry Depo.) at 3 (emphasis added).

[164] Docket 40-4 (Sarna Depo.) at Tr. 214–15, 225–30.

[165] *Connick*, 563 U.S. at 61.

[166] Defendants assert that Plaintiffs' expert, Mr. Sarna, did not explicitly testify that the APD training fell below industry standards. Defendants assert that without expert testimony, Plaintiffs cannot show any deficiency in training. Because the Court holds that Plaintiffs have failed to provide sufficient facts to support an independent basis for MOA liability, the Court does not reach this issue.

Plaintiffs also allege MOA liability for failure to equip its officers with Tasers or mandate they carry pepper spray.[167] However, Plaintiffs' own use-of-force expert, Mr. Sarna, testified that he believed that Officer Gionson's decision to point the gun at Mr. Tasi was reasonable under the circumstances.[168] And Plaintiffs have not introduced other evidence that would show Officer Gionson used deadly force because he did not have a Taser or his pepper spray. The opposite is true: Officer Gionson testified that he would not have considered using less deadly alternatives.[169] Thus, the failure to issue a Taser or to require officers to carry pepper spray on their persons cannot be the driving force behind the alleged constitutional violation because Officer Gionson would not have used them in these circumstances even had he been carrying them.

For the foregoing reasons, the Court will grant summary judgment on the § 1983 claims against MOA for failure to train and failure to equip.

The Court will now turn to the state law claims against MOA. Count Nine appears to be a vicarious liability claim for the actions of Officers Vance and Williams.[170] Because

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[167] Docket 73 (Plaintiffs Opp'n) at 36–37. Plaintiffs also allege a supervisory basis for MOA's liability in their complaint. Docket 44 (SAC) at 12–13. For a supervisory basis of liability under § 1983, Plaintiffs must show that the supervisor "set in motion a series of acts by others, or knowingly refused to terminate a series of acts by others, which he knew or reasonably should have known, would cause others to inflict the constitutional injury." *Blankenhorn*, 485 F.3d at 485 (quoting *Watkins v. City of Oakland*, 145 F.3d 1087, 1093 (9th Cir.1998)) (internal quotation marks omitted). This claim usually pertains to a supervisor's failure to dismiss an officer after receiving prior excessive force complaints. *See, e.g.*, *Id.* (alleging supervisor failed to dismiss officer after three prior excessive force complaints). Plaintiffs have provided no evidence pertinent to a supervisory basis for MOA's liability, and MOA is entitled to summary judgment on this basis as well.

[168] Docket 40-4 (Sarna Depo.) at Tr. 173.

[169] Docket 71-3 (Gionson Second Interview) at Tr. 35–37.

[170] *See* Docket 44 (SAC) at 15. Under Alaska law, a municipality may be subject to vicarious liability for the actions of its employees, agents, or officers if that individual was acting within the

the Court found that Officers Vance and Williams are entitled to summary judgment for the claim of state law false imprisonment/false arrest at Count Seven, there can be no vicarious liability for MOA stemming from this claim. Thus, the Court will grant summary judgment on any vicarious liability claim Plaintiffs have against MOA for the actions of Officers Vance and Williams. Count Eight appears to also include a vicarious liability claim under state law for Officer Gionson's actions. Because the Court denied Officer Gionson's motion for summary judgment that qualified immunity applies to his alleged violation of AS 12.25.070, the vicarious liability claim against MOA under state law at Count Eight will also survive summary judgment.

The SAC is unclear regarding what independent state law claims are alleged against MOA.[171] Plaintiffs assert in their briefing that although MOA's equipment decisions may have been "discretionary decisions," they needed to be implemented "non-negligently," and MOA has identified Counts Seven though Nine as independent claims against MOA for failure to equip or train Officer Gionson.[172] Thus, in an abundance of caution, the Court will address these potential claims.

As laid out above, AS 09.65.070(d)(2) provides that "[a]n action for damages may not be brought against a municipality . . . if the claim (2) is based on the exercise or

scope of his employment. *Taranto v. N. Slope Borough*, 909 P.2d 354, 358 (Alaska 1996). Although Officer Gionson is named in the body of the claim, it appears from the inclusion of Officers Vance and Williams in the title of Count Nine that this claim may have been intended as a vicarious liability claim for Officers Vance and Williams.

[171] *See* Docket 44 (SAC).

[172] Docket 73 (Plaintiffs Opp'n) at 38–39; Docket 50 (Defendants Mot.) at 16, 25–26. Plaintiffs have not alleged any claims as to any MOA failure to train or equip Officers Vance and Williams.

performance or the failure to exercise or perform a discretionary function or duty by a municipality . . . whether or not the discretion is abused."[173] Discretionary acts "refer[] to decisions involving questions of policy, that is, the evaluation of factors such as the financial, political, economic, and social effects of a given plan or policy."[174] In contrast, ministerial acts are acts "amounting 'only to obedience of orders, or the performance of a duty in which the officer is left with no choice of his own.'"[175] Under Alaska law, a municipality is shielded from liability for state law claims stemming from discretionary acts so long as such acts are "done in good faith and are not malicious or corrupt."[176]

Plaintiffs assert that because at the time of events MOA had a policy directing officers to first try lesser force alternatives, it was not discretionary for MOA to provide less lethal instrumentalities like Tasers and pepper spray.[177] Plaintiffs' arguments are unpersuasive. The choice of equipment is discretionary because it involves "questions of policy, that is, the evaluation of factors such as the financial, political, economic, and

[173] The Court applies this statute because, for the violation of common law rights, the Alaska courts apply the qualified immunity contained in AS 09.65.070, which applies to municipalities. *Maness v. Daily*, 307 P.3d 894, 903 (Alaska 2013); *see also Aspen Expl. Corp. v. Sheffield*, 739 P.2d 150 (Alaska 1987). Here, Plaintiffs are alleging common law negligence against MOA, so the statutory immunity provided by AS 09.65.070 under the *Aspen* test would be appropriate. *See Russell ex rel. J.N. v. Virg-In*, 258 P.3d 795, 809 & n.75 (Alaska 2011).

[174] *State v. Abbott*, 498 P.2d 712, 720 (Alaska 1972) (quoting *Swanson v. United States*, 229 F.Supp. 217, 220 (N.D. Cal. 1964)).

[175] *Aspen Expl. Corp.*, 739 P.2d at 155 (quoting *State v. Haley*, 687 P.2d 305, 316 (Alaska 1984)) (internal quotation marks omitted).

[176] *Estate of Logusak ex rel. Logusak v. City of Togiak*, 185 P.3d 103, 109 (Alaska 2008) (quoting *Pauley v. Anchorage Sch. Dist.*, 31 P.3d 1284, 1286 (Alaska 2001)).

[177] Docket 73 (Plaintiffs Opp'n) at 38–39.

social effects of a given plan or policy."[178] Plaintiffs presented no evidence that the failure to issue Tasers or require officers to wear pepper spray was motivated by bad faith or was malicious or corrupt.[179] And the APD training policies are replete with lesser force alternatives, including the use of a baton and different types of holds.[180] To the extent that Plaintiffs are also alleging state law claims for deficiencies in training, they have also failed to allege or present any evidence that APD's training on the use of lethal force was conducted in bad faith or was malicious or corrupt. Accordingly, the Court will grant summary judgment to MOA on any independent state law claims.

VI. Plaintiffs' Motion in Limine at Docket 51

Plaintiffs have moved to exclude certain evidence at the upcoming trial. They ask the Court to exclude evidence of (1) Mr. Tasi's use of alcohol, marijuana, and Spice on the day of the shooting; (2) the condition of the apartment at the time of the shooting; and (3) Mr. Tasi's prior arrests and convictions. Plaintiffs argue that none of these considerations were relevant to Officer Gionson when he decided to shoot Mr. Tasi and, as such, the prejudice to Mr. Tasi would substantially outweigh any probative value.[181]

Federal Rule of Evidence 402 allows the admission of relevant evidence. Under Rule 401, "[e]vidence is relevant if: (a) it has any tendency to make a fact more or less

[178] *Abbott*, 498 P.2d at 720 (quoting Swanson, 229 F.Supp. at 220); *see Regner v. N. Star Volunteer Fire Dep't, Inc.*, 323 P.3d 16, 22 (Alaska 2014) (holding that the amount of equipment to purchase was a discretionary decision).

[179] *See Estate of Logusak*, 185 P.3d at 109.

[180] Docket 39-10 (Training Policy) at 3–4.

[181] Docket 51 (Mot. in Limine) at 2–4.

probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Rule 403 provides a restriction on the admission of relevant evidence, providing that a court "may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice."

Officer Gionson did not have knowledge of Mr. Tasi's intoxication or the state of the apartment. Nonetheless, some evidence of these facts will be permitted because it is necessary to give the jury a complete picture of events.[182] Otherwise it would be difficult to explain the three men's conduct in hailing Officer Gionson, Mr. Tasi's apparent lack of reaction to Officer Gionson's commands, or the officers' decision to place Ms. Taualo-Tasi in the laundry room. Moreover, the evidence of intoxication may be relevant to any apportionment of fault.[183] There is a danger of prejudice to Plaintiffs, but that danger does not substantially outweigh the probative value of this evidence, and it may be contained through the use of a limiting instruction as warranted. The Court will deny the motion in limine insofar as it seeks to preclude all evidence of intoxication and the condition of the apartment.[184]

The Court will grant Plaintiffs' motion with regard to the evidence of Mr. Tasi's

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[182] *See Menjivar v. Trophy Properties IV DE, LLC*, No. C 06-03086 SI, 2006 WL 2884396, at *22 (N.D. Cal. Oct. 10, 2006) ("The Court is not convinced that any resulting prejudice to defendants outweighs the value of presenting a complete picture of the dispute.").

[183] *See* Docket 59 (Defendants Opp'n) at 2–3.

[184] The Court, however, is not according to Defendants the right to present unlimited evidence on these topics. Rather, the Court will permit Defendants to use this evidence as necessary and warranted to describe the events of the day to the jury. If Plaintiffs become of the view that Defendants are overusing the evidence, they may motion the Court to limit its use at trial pursuant to Rule 403.

probation status and any prior arrests or convictions. This evidence was not within Officer Gionson's knowledge and is only marginally relevant to the jury's determination. Admitting evidence of Mr. Tasi's probation status and criminal record would be very prejudicial to Plaintiffs. Here the danger of prejudice substantially outweighs the marginal relevance of this evidence, and the Court will exclude it.

If either party seeks to revisit these rulings during trial, that party may do so, but shall make application *outside the presence of the jury*.

CONCLUSION

Based on the foregoing, IT IS ORDERED that Plaintiffs' Motion in Limine at Docket 51 is GRANTED with respect to evidence of Mr. Tasi's probation status and prior arrests or convictions and is DENIED with respect to evidence of his intoxication and the condition of the apartment.

The motions for summary judgment—at Docket 32 and 43—are GRANTED in part and DENIED in part, as follows:

With respect to Officer Gionson:

1. The Court GRANTS summary judgment to Officer Gionson on the Fifth and Fourteenth Amendment excessive force claims (in Counts 1 and 2).
2. The Court DENIES summary judgment to Officer Gionson on the Fourth Amendment § 1983 claims (in Counts 1 and 2).
3. The Court GRANTS summary judgment to Officer Gionson on the state constitutional claims (Counts 3 and 5).
4. The Court DENIES summary judgment to Officer Gionson on the Fourteenth Amendment loss of companionship claim (Count 5).
5. The Court GRANTS summary judgment to Officer Gionson on the Fifth Amendment claims in Count 5.

6. The Court GRANTS summary judgment to Officer Gionson on any claims brought against Officer Gionson for false arrest/false imprisonment under state law (Count 7).
7. The Court DENIES summary judgment to Officer Gionson on the state law excessive force claim (Count 8).

With respect to Officers Vance and Williams:

1. The Court GRANTS summary judgment to Officers Vance and Williams on any excessive force claim against them in Count 1.
2. The Court GRANTS summary judgment to Officers Vance and Williams on the state constitutional claims (Count 3).
3. The Court GRANTS summary judgment to Officers Vance and Williams on any claims relating to them in the Fourteenth Amendment loss of companionship claim (Count 5).
4. The Court GRANTS summary judgment to Officers Vance and Williams on the state law false arrest/false imprisonment claim (Count 7) and any claims against them personally in Count 9.
5. The Court GRANTS summary judgment to Officers Vance and Williams on the Fifth and Fourteenth Amendment detention claims (in Count 10).
6. The Court DENIES summary judgment to Officers Vance and Williams on the Fourth Amendment § 1983 claim (in Count 10).

With respect to MOA and APD:

1. The Court GRANTS summary judgment to MOA and APD on the § 1983 counts that fail to allege an independent basis for liability (Counts 1, 2, 3, 5, and 10).
2. The Court GRANTS summary judgment to MOA and APD on the *Monell* claims (Counts 4 and 6).

3. The Court GRANTS summary judgment to MOA and APD on any claims against MOA and APD for false arrest/false imprisonment or vicarious liability for the same (Counts 7 and 9).
4. The Court DENIES summary judgment on the vicarious liability claim for Officer Gionson's actions under state law. (Count 8).
5. The Court GRANTS summary judgment on any independent claims asserted against MOA and APD not explicitly pled in the SAC.

As a result of the foregoing, the following claims remain in the case:

1. The § 1983 claims against Officer Gionson for his alleged use of excessive force against Mr. Tasi under the Fourth Amendment (Counts 1 and 2).
2. The state law excessive force claim against Officer Gionson and the related vicarious liability claim against MOA and APD (Count 8).
3. The § 1983 claim against Officer Gionson under the Fourteenth Amendment for loss of companionship (Count 5).
4. The § 1983 claim against Officers Vance and Williams for the alleged violation of Ms. Taualo-Tasi and the children's Fourth Amendment rights (Count 10).
5. The claims for punitive damages.[185]

DATED this 28th day of January, 2016.

/s/ Sharon L. Gleason
UNITED STATES DISTRICT JUDGE

[185] Although MOA and the officers have directed the briefing at "all claims," Docket 42 at 15, neither party mentioned punitive damages in the briefs, and the Court declines to reach the issue.