

1 UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF CALIFORNIA
3

4 MAUREEN ABSTON, individually, and
5 as Personal Representative of the
6 Estate of RICHARD ABSTON; COREY
7 ABSTON; JACY ABSTON; LINDA ABSTON,

8 Plaintiffs,

9 vs.

10 CITY OF MERCED, a municipal
11 corporation; RUSS THOMAS, in his
12 capacity as Sheriff for the CITY
13 OF MERCED; J. HART, individually
14 and in his capacity as a police
15 officer for CITY OF MERCED; B.
16 DALIA, individually, and in his
17 capacity as a police officer for
18 the CITY OF MERCED; N. ARELLANO,
19 individually and in her capacity
20 as a police officer for the CITY
21 OF MERCED; S. KESNEY,
22 individually; and DOES 1-10,
23 inclusive,

24 Defendants.

1:09-cv-00511 OWW DLB

MEMORANDUM DECISION AND ORDER
RE DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT, OR IN THE
ALTERNATIVE, SUMMARY
ADJUDICATION.

(DOC. 44)

25 I. INTRODUCTION

26 Maureen Abston, individually, and as personal representative
27 of the Estate of Richard Abston, Corey Abston, Jacy Abston, and
28 Linda Abston ("Plaintiffs") proceed with this action against the
City of Merced, Sheriff Russ Thomas, Officer Jason Hart, Officer
Bernard Dalia, and Officer Naomi Arellano ("Defendants")¹
alleging (1) civil rights violations pursuant to 42 U.S.C. § 1983

¹ Defendant Officer Shandra Kesney was voluntarily dismissed without prejudice on March 31, 2010. Doc. 32.

1 and the Fourth and Fourteenth Amendments of the Constitution; (2)
2 assault and battery; (3) negligence - wrongful death; and (4)
3 negligent hiring, retention, training, supervision, and
4 discipline.² Before the court is Defendants' Motion for Summary
5 Judgment, or in the Alternative, Summary Adjudication (Doc. 44).
6 Plaintiffs filed an opposition (Doc. 51), to which Defendants
7 replied (Doc. 54).
8

9 II. FACTUAL BACKGROUND

10 A. Undisputed Facts

11 1. The Incident

12 On the morning of February 7, 2008, Officer Hart was stopped
13 in traffic on the Childs Avenue overpass above Highway 99 in the
14 City of Merced. Defendants' Statement of Undisputed Facts ("DUF")
15 ¶ 1. Officer Hart was wearing a black polo shirt with an
16 embroidered Merced Police Department badge, khaki-colored cargo
17 pants, and a red baseball cap. DUF ¶ 2.
18

19 While stopped on Childs Avenue, Officer Hart observed a
20 silver or gray pickup truck traveling southbound at a high rate
21 of speed in a northbound lane of Highway 99. DUF ¶ 3. He
22 subsequently learned that decedent Richard Abston ("Decedent")
23 was driving the pickup truck. DUF ¶ 4. The pickup truck stopped
24 on the median of the highway. DUF ¶ 5. Officer Hart initiated his
25

26
27 _____
28 ² Plaintiffs' Fifth Cause of Action for violation of California Civil Code
Section 52.1, The Bane Civil Rights Act, was dismissed with prejudice on
January 15, 2010. Doc. 30.

1 vehicle's emergency lights, exited traffic and pulled onto an
2 island on the on-ramp to the highway. DUF ¶ 6.

3 California Highway Patrol ("CHP") Officer Shane Kensey was
4 assigned to patrol Highway 99 in the Merced area that morning.
5 DUF ¶ 7. While on the highway, Officer Kensey received a radio
6 broadcast of a motorist driving the wrong way on Highway 99. DUF
7 ¶ 8. At that time, he was approximately eight miles away from
8 where the driver had been observed. DUF ¶ 9. Officer Kensey began
9 proceeding northbound on Highway 99. DUF ¶ 10. As he approached
10 Martin Luther King, Jr. Way, Officer Kensey observed a silver
11 pickup truck traveling southbound on northbound Highway 99 at
12 approximately 35 to 45 miles per hour. DUF ¶ 12.

13
14
15 Officer Kensey, whose lights and siren were on, approached
16 Decedent's vehicle, which slowed and pulled into the center
17 median of the highway. DUF ¶ 13. Officer Kensey exited his
18 vehicle and contacted Decedent through the driver's side door of
19 Decedent's vehicle. DUF ¶ 14. Decedent was yelling something
20 incomprehensible to Officer Kensey regarding his son being in a
21 hotel and not able to breathe. DUF ¶15. Officer Kensey ordered
22 Decedent to exit his vehicle four or five times, but Decedent did
23 not comply. DUF ¶ 16. Officer Kensey opened the door, undid
24 Decedent's seatbelt and pulled Decedent out of the pickup truck.
25 DUF ¶17. Decedent resisted violently, swinging his arms and fists
26 as he was being pulled out of the truck. DUF ¶18. Officer Kensey
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1 struck Decedent between two to five times in the thigh area with
2 a side-handle baton, but it had no effect. DUF ¶¶ 19, 20.

3 Decedent began running southbound in the traffic lanes,
4 roughly in the middle of the road. DUF ¶ 20. At that point,
5 traffic was stopped on northbound Highway 99. DUF ¶ 21. Officer
6 Kensey pursued Decedent, who started to climb up the cab of a
7 stopped tractor trailer. DUF ¶ 22.

9 Officer Hart exited his vehicle. By the time Officer Hart
10 reached the lanes of traffic, Decedent had climbed on top of a
11 tractor trailer's cab. DUF ¶ 23. Officers Kensey and Hart gave
12 verbal commands to Decedent to come down from the truck. DUF ¶
13 24. Officer Kensey sprayed pepper spray into Decedent's face in
14 multiple bursts until his entire, relatively large can of spray
15 was empty. DUF ¶ 25. Officer Kensey asserts that the pepper spray
16 had no effect on Decedent. DUF ¶ 26. Decedent wiped the spray
17 from his chest and licked it off of his fingers. DUF ¶ 27.

19 At approximately the time Decedent climbed onto the cab of
20 the tractor trailer, Officer Arellano arrived at the scene. DUF ¶
21 28. She had responded to a dispatch call regarding a vehicle
22 traveling in the wrong direction on Highway 99. DUF ¶ 29. All
23 three officers climbed onto the cab of the tractor trailer. DUF ¶
24 30. Decedent lay on top of the cab. DUF ¶ 31. The officers
25 grabbed hold of Decedent and attempted to pull him down. DUF ¶
26 32. Decedent first passively resisted their attempts, and then
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28

1 began resisting actively, flailing his arms. DUF ¶ 33. Officer
2 Hart asserts that Decedent was very strong. DUF ¶ 34.

3 Decedent was not wearing a shirt by the time he was on the
4 cab of the tractor trailer. DUF ¶ 37. Officers Hart and Kensey
5 testified that they believed Decedent may have been under the
6 influence of an intoxicating substance such as alcohol and/or
7 methamphetamine, due to the glazed look in his eyes, his
8 fidgeting, his extreme strength, and his tolerance to pain. DUF ¶
9 40.

11 After reaching the ground from the cab of the tractor
12 trailer, Decedent began running southwest on Highway 99 again,
13 toward the center divider. DUF ¶ 41. A metal barrier
14 approximately three to four feet high was on the median,
15 separating the northbound from southbound lanes of traffic. DUF ¶
16 42. Officer Hart pursued Decedent on foot. DUF ¶ 43. Officer Hart
17 testified that he was concerned that Decedent might cross the
18 median into southbound traffic on Highway 99, which was still
19 moving. DUF ¶ 44.

21 Officer Hart testified that he continued to tell Decedent to
22 stop. DUF ¶ 45. Officer Hart drew his X26 Taser and told Decedent
23 once that he would tase him. DUF ¶ 46. Decedent did not stop. DUF
24 ¶ 47. Officer Hart deployed his Taser at Decedent from eight to
25 twenty feet away; the Taser darts struck Decedent in the upper
26 back and lower back. DUF ¶¶ 48, 49. Decedent immediately fell to
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1 the ground. DUF ¶ 50. Officer Hart testified that after the first
2 Taser cycle of five seconds, Decedent attempted to get up. DUF ¶
3 51. Officer Hart testified that he told Decedent to get back down
4 and put his hands behind his back or he would be tased again. DUF
5 ¶ 52. Officer Hart testified that Decedent began to crawl. DUF ¶
6 53.

7
8 Officer Hart began wrestling with Decedent. DUF ¶ 55.
9 Officers Kensey and Arellano arrived. DUF ¶ 56. Officer Kensey
10 testified that Decedent was lying on his stomach, with his hands
11 clasped underneath his chest. DUF ¶ 57. Officer Kensey ordered
12 Decedent to comply. DUF ¶ 58. Officer Kensey testified that
13 Decedent was violently resisting: kicking, yelling and screaming.
14 DUF ¶ 59. All three officers attempted to subdue Decedent, with
15 Officer Kensey toward his head, Officer Hart near his mid-section
16 and Officer Arellano at his feet. DUF ¶ 60. Decedent continued to
17 resist, and banged his head on the pavement. DUF ¶ 61.

18
19 Officer Hart warned Decedent that he would be tased again.
20 DUF ¶ 62. He deployed the Taser for another five-second cycle
21 near Decedent's left shoulder blade. DUF ¶ 63. Officer Hart
22 believes that he applied the Taser a fourth time, also for a
23 five-second cycle. DUF ¶ 64. Officer Hart testified that because
24 Decedent was so strong, the officers were still unable to gain
25 control of his hands. DUF ¶ 65. Officer Kensey was eventually
26 able to free one of Decedent's arms and apply a handcuff to it.
27
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1 DUF ¶ 66. The officers handcuffed Decedent in front to gain
2 custody of his hands. DUF ¶ 67.

3 Officer Dalia responded to Officer Hart's radio call that
4 someone had been tased. DUF ¶ 68. The officers attempted to gain
5 control of Decedent's legs. DUF ¶ 69. Officers Hart and Kensey
6 testified that Decedent continued to kick violently. DUF ¶ 70.
7 One kick struck Officer Arellano. DUF ¶ 71. As Officer Hart
8 attempted to gain control of Decedent's legs, Decedent kicked him
9 hard in the right shoulder, resulting in a torn rotator cuff that
10 later required surgery. DUF ¶ 72. Officer Dalia attempted to help
11 Officer Hart keep Decedent down, while Decedent was kicking and
12 squirming. DUF ¶ 73. Decedent kicked at Officer Dalia, pushing
13 him backward with enough force to jolt him. DUF ¶ 74.

14
15
16 California Department of Corrections ("CDC") Officer Rowdy
17 Kyle approached the officers and asked if they needed a leg
18 restraint. DUF ¶ 75. Officer Hart testified that he held
19 Decedent's head in place so that Decedent could not strike anyone
20 with his head while the leg shackles were being placed on him.
21 DUF ¶ 76. Officers Hart and Arrellano testified that the officers
22 did not strike Decedent, but attempted to hold him in place. DUF
23 ¶ 77.

24
25 Other CHP officers arrived at the scene, relieving the
26 Merced police officers. DUF ¶ 78. Officer Dalia checked Officer
27 Hart's injury while CHP officers remained with Decedent. DUF ¶
28

1 79.

2 Derrick Olzack, paramedic with Riggs Ambulance service, was
3 dispatched to the scene. DUF ¶ 80. When he arrived, he was
4 directed to Decedent, who was struggling with the officers
5 attempting to restrain him. DUF ¶ 81. Mr. Olzack helped to push
6 Decedent's hips down to keep him on the ground. DUF ¶ 82. At some
7 point after he was restrained, Decedent appeared to stop
8 breathing. DUF ¶ 83. After Decedent was placed in handcuffs and
9 leg shackles, Officers Hart and Dalia assisted CHP officers and
10 Mr. Olzack in pinning Decedent down against his further
11 resistance. Officers Hart and Dalia left the situation to the CHP
12 officers and Mr. Olzack at least two minutes before Mr. Olzack
13 rolled Decedent over to perform an assessment. DUF ¶ 84. Decedent
14 died shortly following the incident.

15
16
17 A bystander, Joe Spivey, captured video footage of the
18 incident, although it is unclear how much of the incident he
19 captured. DUF ¶ 36.

20 2. Defendant Officers' Training

21 Officer Hart received basic Taser training at the POST
22 (Commission on Peace Officer Standards and Training) Academy, as
23 provided by the Anaheim Police Department, at some time between
24 2004 and 2007. DUF ¶ 85. When he was hired by the Merced Police
25 Department in 2007, Officer Hart received some additional basic
26 training, including Taser training. DUF ¶ 86. Officer Hart
27
28

1 received pain-compliance training for people under the influence
2 of methamphetamine or other drugs. DUF ¶ 87. Officer Hart had
3 been trained to avoid deploying a Taser to the head, neck or
4 groin areas, as well as to areas of preexisting injuries. DUF ¶
5 89.

6
7 Officer Dalia attended police academy and other training
8 from 1994 to 1996. DUF ¶ 90. He received updated annual training
9 through the Merced Police Department. DUF ¶ 91. Before this
10 incident, he had been trained once in the use of a Taser through
11 the Merced Police Department. DUF ¶ 92.

12
13 Officer Arellano was trained in the user of a Taser through
14 the Merced Police Department in approximately 2005. DUF ¶ 93.

15 B. Disputed Facts

16 1. The Incident

17
18 Officer Kensey testified that traffic is typically moderate
19 to heavy around the area of Martin Luther King Way around the
20 time of day the incident occurred, flowing between 60 and 65
21 miles per hour. Doc. 47, Ex. D, 22. Plaintiffs point to Joe
22 Spivey's deposition, where he described traffic at the time of
23 the incident as "moderately light. No heavy traffic."

24
25 Pointing to Officer Kyle's deposition, Plaintiffs assert
26 that Officer Kyle stopped his car, got out and observed a
27 physical altercation between Officer Kensey and Decedent, where
28 they were both throwing blows at one another—Decedent with his
hands and Officer Kensey with his baton. Doc. 53, Ex. B, 8-9, 21-

1 22. Decedent then turned and started running away. Officer Kensey
2 chased after him and tackled Decedent, causing both of them to
3 fall to the ground. *Id.* at 9, 23-24. The men struggled while on
4 the ground. Officer Kensey had a grip on Decedent who tore out of
5 his shirt in his attempt to be freed from Officer Kensey's grasp.
6 *Id.* at 10-11, 22-23. Plaintiffs assert that Officer Kensey
7 testified that at some point during the encounter Decedent had
8 his shirt off but did not recall how he came to be topless and
9 did not testify to tackling Decedent to the ground. Doc. 53, Ex.
10 A, 17.
11

12 Plaintiffs assert that Decedent had an obvious 9-inch well-
13 healed scar on his chest, where he had had open heart surgery and
14 a pacemaker implanted two years before the incident. Defendants
15 contend that Officer Hart and Officer Kensey did not notice a
16 scar on Decedent's chest when he was shirtless on the hood of the
17 truck. DUF ¶ 38. Plaintiffs point to Officer Kensey's police
18 interview, in which Officer Kensey states that Officer Arellano
19 told the officers she observed that Decedent had a large scar on
20 his chest and told them not to use a Taser on him. Doc. 53, Ex.
21 E, ¶ 9. Officer Arellano testified that she did not recall giving
22 this warning or ever seeing a scar on Decedent's chest. Doc. 53,
23 Ex. D, 24-25. Officer Hart testified that he did not hear anyone
24 say that Decedent had a scar on his chest. DUF ¶ 39.
25

26 The amount of force Officer Defendants used to get Decedent
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1 off the big rig is in dispute. Pointing to Officer Kensey's
2 deposition, Defendants contend that the officers either pulled
3 Decedent or he slipped down to the hood of the cab, then to the
4 ground. DUF ¶ 35. Plaintiffs point to Officer Arellano's
5 deposition, where she testified that the Officers simply let go
6 of Decedent. Doc. 53, Ex. D, 29.

8 Pointing to Officer Hart's deposition, Plaintiffs assert
9 that after Decedent was first tased, he fell to the ground on his
10 face and was bleeding from his face. Doc. 52, Ex. C, 84-85.

11 Defendants assert that Officer Hart activated the Taser for
12 a second five-second cycle but concluded that it was not
13 functioning effectively. DUF ¶ 54. Pointing to Officer Hart's
14 deposition, Plaintiffs contend that Officer Hart testified that
15 the second cycle made some form of contact. Doc. 53, Ex. C, 90-
16 91.

18 2. Defendant Officers' Training

19 Defendants contend that with respect to responding to
20 mentally impaired subjects, Officer Hart testified that Merced
21 Police Department policy is to protect the mentally impaired
22 person as well as the general public, taking into account the
23 totality of the circumstances. DUF ¶ 88. Plaintiffs point out
24 that Officer Hart testified that a subject's mental impairment is
25 taken into account, but it doesn't always dictate what they do.
26 Doc. 53, Ex. C, 23. Plaintiffs assert that Officer Hart testified
27

1 that while he has been trained generally with responding to
2 suspects who appear to be under the influence, he has not had any
3 direct training on use of force against subjects who appear
4 mentally impaired. *Id.* at 22-23.

5 Plaintiffs assert that Officer Hart testified that he was
6 not aware that the Taser should not be applied on people with
7 implanted pacemakers or defibrillators, or who have apparent
8 heart conditions. *Id.* at 17-18, 114-115. Nor has Officer Hart
9 been trained that Taser exposure should be limited on those
10 suffering from excited delirium symptoms and has received no
11 training on responding to suspects with excited delirium. *Id.* at
12 17, 117-118.

13 Plaintiffs assert that Officer Arellano testified that she
14 received brief Taser training at police academies. Doc. 53, Ex.
15 D, 16. Officer Arellano testified that she did not recall
16 receiving: any subsequent training through the Merced Police
17 Department, updated materials or bulletins on Taser use, any
18 training on avoiding Taser use on preexisting injuries, prolonged
19 or extended use, or use on suspects showing symptoms of excited
20 delirium. *Id.* at 16-18. Officer Arellano testified that she had
21 no real knowledge of the excited delirium condition and did not
22 recall being trained on encountering suspects with excited
23 delirium symptoms. *Id.* at 17-18.

1 III. LEGAL STANDARD

2 Summary judgment is proper if "the pleadings, the discovery
3 and disclosure materials on file, and any affidavits show that
4 there is no genuine issue as to any material fact and that the
5 movant is entitled to judgment as a matter of law." Fed. R. Civ.
6 P. 56.

7
8 The moving party bears the initial burden of "informing the
9 district court of the basis for its motion, and identifying those
10 portions of the pleadings, depositions, answers to
11 interrogatories, and admissions on file, together with the
12 affidavits, if any, which it believes demonstrate the absence of
13 a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477
14 U.S. 317, 323, 106 S.Ct. 2548 (1986) (internal quotation marks
15 omitted). A fact is material if it could affect the outcome of
16 the suit under the governing substantive law; "irrelevant" or
17 "unnecessary" factual disputes will not be counted. *Anderson v.*
18 *Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505 (1986).

19
20 If the moving party would bear the burden of proof on an
21 issue at trial, it must "affirmatively demonstrate that no
22 reasonable trier of fact could find other than for the moving
23 party." *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th
24 Cir. 2007). In contrast, if the non-moving party bears the burden
25 of proof on an issue, the moving party can prevail by "merely
26 pointing out that there is an absence of evidence" to support the
27
28

1 non-moving party's case. *Id.*

2 When the moving party meets its burden, the "adverse party
3 may not rest upon the mere allegations or denials of the adverse
4 party's pleadings, but the adverse party's response, by
5 affidavits or as otherwise provided in this rule, must set forth
6 specific facts showing that there is a genuine issue for trial."
7 Fed. R. Civ. P. 56(e).
8

9 In ruling on a motion for summary judgment, a court does not
10 make credibility determinations or weigh evidence. See *Anderson*,
11 477 U.S. at 255. Rather, "[t]he evidence of the non-movant is to
12 be believed, and all justifiable inferences are to be drawn in
13 his favor." *Id.* Only admissible evidence may be considered in
14 deciding a motion for summary judgment. Fed. R. Civ. P. 56(e).
15 "Conclusory, speculative testimony in affidavits and moving
16 papers is insufficient to raise genuine issues of fact and defeat
17 summary judgment." *Soremekun*, 509 F.3d at 984.
18

19 IV. ANALYSIS

20 A. First Cause of Action: Excessive Force (42 U.S.C. § 21 1983, Fourth Amendment) (Against Officers Hart, Dalia, 22 Arellano, and Does 1-10)

23 1. 42 U.S.C. § 1983

24 Section 1983 provides in pertinent part:

25 Every person who, under color of any statute, ordinance,
26 regulation, custom, or usage, of any State or Territory or
27 the District of Columbia, subjects, or causes to be
28 subjected, any citizen of the United States or other person
within the jurisdiction thereof to the deprivation of any
rights, privileges, or immunities secured by the
Constitution and laws, shall be liable to the party injured

1 in an action at law, suit in equity, or other proper
2 proceeding for redress

3 42 U.S.C. § 1983. "Section 1983 does not create any substantive
4 rights, but is instead a vehicle by which plaintiffs can bring
5 federal constitutional and statutory challenges to actions by
6 state and local officials." *Anderson v. Warner*, 451 F.3d 1063,
7 1067 (9th Cir. 2006). To state a claim under 42 U.S.C. § 1983, a
8 plaintiff must show (1) the violation of a right secured by the
9 Constitution or a federal law, and (2) that the alleged
10 deprivation was committed by a person acting under color of state
11 law. *West v. Atkins*, 487 U.S. 42, 48, 108 S.Ct. 2250 (1988).
12 Here, Plaintiffs assert claims against Officers Hart, Dalia, and
13 Arellano ("Officer Defendants") for violation of the Fourth and
14 Fourteenth Amendments.
15

16 2. Fourth Amendment Claim

17 Plaintiffs assert a claim of excessive force, which is
18 examined under the Fourth Amendment's prohibition against
19 unreasonable seizures. *Graham v. Connor*, 490 U.S. 386, 394, 109
20 S.Ct. 1865 (1989). Fourth Amendment analysis requires balancing
21 of the quality and nature of the intrusion on an individual's
22 interests against the countervailing governmental interests at
23 stake. *Id.* at 396. Use of force violates an individual's
24 constitutional rights under the Fourth Amendment where the force
25 used was objectively unreasonable in light of the facts and
26 circumstances confronting them. *Id.* at 397. Excessive force
27
28

1 inquiries require balancing of the amount of force applied
2 against the need for that force under the circumstances. *Meredith*
3 *v. Erath*, 342 F.3d 1057, 1061 (9th Cir. 2003). "Because such
4 balancing nearly always requires a jury to sift through disputed
5 factual contentions, and to draw inferences therefrom . . .
6 summary judgment or judgment as a matter of law . . . should be
7 granted sparingly" in cases involving claims of excessive force.
8 *Gregory v. Cnty. of Maui*, 523 F.3d 1103, 1106 (9th Cir. 2008)
9 (quoting *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d
10 1052, 1056 (9th Cir. 2003)); see also *Smith v. City of Hemet*, 394
11 F.3d 689, 701 (9th Cir. 2005) ("We have held repeatedly that the
12 reasonableness of force used is ordinarily a question of fact for
13 the jury.") (quoting *Liston v. Cnty. of Riverside*, 120 F.3d 965,
14 976 n.10 (9th Cir. 1997)).

17 a) Constitutional Violation

18 (1) Quantum of Force

19 Officer Hart tased Decedent in dart mode four times. When
20 Officer Hart tased Decedent the first time, Decedent was running
21 away from Officer Defendants. Officer Hart deployed the taser
22 from eight to twenty feet away, and the darts struck Decedent in
23 the upper and lower back. Decedent immediately fell on his face
24 onto the concrete; Mr. Spivey's video shows Decedent's face
25 covered in blood. Officer Hart tased Decedent three more times
26 after Decedent had already fallen and was laying face down on the
27 ground with the officers over Decedent.

1 The Ninth Circuit has characterized the use of tasers in
2 dart mode as an "intermediate or medium, though not
3 insignificant, quantum of force." *Bryan v. MacPherson*, 630 F.3d
4 805, 826 (9th Cir. 2010). "The pain is intense, is felt throughout
5 the body, and is administered by effectively commandeering the
6 victim's muscles and nerves. Beyond the experience of pain,
7 tasers result in 'immobilization, disorientation, loss of
8 balance, and weakness,' even after the electrical current has
9 ended." *Id.* at 825. Defendants acknowledge the seriousness of the
10 intrusion on Decedent's Fourth Amendment interests resulting from
11 the use of the Taser in dart mode.

12
13 The amount of force Officer Defendants used to remove
14 Decedent from the top of the tractor trailer is in dispute.
15 Pointing to Officer Kensey's deposition, Defendants contend that
16 the officers either pulled Decedent or he slipped down to the
17 hood of the cab, then to the ground. Plaintiffs point to Officer
18 Arellano's deposition, where she testified that the Officers
19 simply let go of Decedent and let him fall the high distance to
20 the ground. Doc. 53, Ex. D, 29. Mr. Spivey's video shows the
21 officers holding onto Decedent's waist on top of the truck with
22 Decedent bent over, and Decedent falling from the truck to the
23 concrete ground.

24
25
26 Officer Defendants collectively used their hands and weight
27 of their bodies to restrain Decedent on the ground. There is no
28

1 allegation that Officer Defendants struck or hit Decedent once he
2 was on the ground; however, the collective force of numerous
3 officers applying force on Decedent as he lay on his stomach was
4 potentially severe. Mr. Spivey's video shows that Officer
5 Defendants, Officer Kensey, and then later CHP officers and the
6 paramedic, pressed their body weight onto Decedent's prone back
7 and body for over three minutes. In *Drummond ex rel. Drummond v.*
8 *City of Anaheim*, 343 F.3d 1052, 1056 (9th Cir. 2003), the Ninth
9 Circuit concluded that although the officers did not shoot or
10 beat the plaintiff, the alleged force was "severe and, under the
11 circumstances, capable of causing death or serious injury" where
12 the officers continued to press their weight on his neck and
13 torso as he lay handcuffed on the ground.
14

15
16 The quantum of force Officer Defendants used must be
17 balanced against the need for that force. *Meredith v. Erath*, 342
18 F.3d at 1061.

19 (2) Government's Interest in Use of Force

20 The government's interest in the use of force is evaluated
21 by examining the three core factors of *Graham v. Connor*, 490 U.S.
22 386, 109 S.Ct. 1865 (1989): (1) the severity of the crime at
23 issue; (2) whether the suspect poses an immediate threat to the
24 safety of the officers or others; and (3) whether the suspect is
25 actively resisting arrest or attempting to evade arrest by
26 flight. *Bryan v. MacPherson*, 630 F.3d at 818 (quoting *Graham*, 490
27
28

1 U.S. at 396). The three *Graham* factors are not exclusive; courts
2 examine the totality of the circumstances and consider "whatever
3 specific factors may be appropriate in a particular case, whether
4 or not listed in *Graham*." *Bryan v. MacPherson*, 630 F.3d at 826
5 (quoting *Franklin v. Foxworth*, 31 F.3d 873, 876 (9th Cir. 1994)).
6 The Ninth Circuit has also considered the availability of
7 alternative methods of capturing or detaining the suspect,
8 *Luchtel v. Hagemann*, 623 F.3d 975, 980 (9th Cir. 2010), the
9 suspect's mental and emotional state, *id.*, and whether the police
10 officers gave the suspect any warnings where feasible, *Bryan v.*
11 *MacPherson*, 630 F.3d at 831. An officer's actions must be
12 examined "from the perspective of a reasonable officer on the
13 scene, rather than with the 20/20 vision of hindsight." *Graham*,
14 490 U.S. at 396.
15

16
17 Many factors weigh in favor of finding excessive force.
18 First, Decedent's alleged crimes, driving down the wrong side of
19 the highway and being under the influence of a controlled
20 substance, were neither violent nor severe. See *Bryan v.*
21 *MacPherson*, 630 F.3d at 828 ("Traffic violations generally will
22 not support the use of a significant level of force."); *Tatum v.*
23 *City & Cnty. of S.F.*, 441 F.3d 1090, 1096 (9th Cir. 2006) (being
24 under the influence of a controlled substance is not a severe
25 crime).
26

27 Second, the most significant factor under *Graham* is whether
28

1 the suspect poses an immediate threat to the safety of the
2 officers or others. *Chew v. Gates*, 27 F.3d 1432, 1441 (9th Cir.
3 1994). It is undisputed that Decedent was unarmed, and there is
4 no evidence that Officer Defendants thought Decedent was armed or
5 posed a danger to their safety.

6
7 Third, Decedent was exhibiting unusual behavior, sweating
8 profusely, and yelling something incomprehensible about his son
9 being in a hotel and not able to breathe, and Officer Defendants
10 suspected that Decedent may have been under the influence of
11 methamphetamine. Citing *Luchtel*, 623 F.3d at 980, Defendants
12 contend that Decedent's mental illness or intoxication only
13 increased the violence of his resistance and did not require a
14 lesser degree of force. However, "[e]ven when an emotionally
15 disturbed individual is 'acting out' and inviting officers to use
16 deadly force to subdue him, the governmental interest in using
17 such force is diminished by the fact that the officers are
18 confronted, not with a person who has committed a serious crime
19 against others, but with a mentally ill individual." *Deorle v.*
20 *Rutherford*, 272 F.3d 1272, 1283 (9th Cir. 2001).

21
22 Fourth, when Officer Hart tased Decedent the second through
23 fourth times and when Officer Defendants applied their body
24 weight to restrain Decedent, Decedent was on the ground, no
25 longer running, within the officers' control, with numerous other
26 officers standing nearby and above Decedent; the need for
27
28

1 significant force was decreased.

2 Other factors weigh against a finding of excessive force.
3 First, it is undisputed that Decedent was actively resisting
4 arrest and running away from Officer Defendants. *See Luchtel*, 623
5 F.3d at 981 ("[A] person does not have the right to resist arrest
6 even if the charges are false or the arrest unlawful.") (quoting
7 *United States v. Willifong*, 274 F.3d 1297, 1301 (9th Cir. 2001)).
8 Decedent violently resisted Officer Defendants, kicked Officers
9 Dalia and Arellano, and kicked Officer Hart hard in the right
10 shoulder, tearing his rotator cuff, which later required surgery.

11
12 Second, although Decedent was on the median of Freeway 99
13 and traffic had been stopped on the northbound lanes of Freeway
14 99, the southbound lanes were still open, and there was a risk
15 that Decedent would run into the open southbound lanes of the
16 freeway or that the incident might cause a traffic accident.
17 These conditions created the risk of harm to others.

18
19 Third, the officers repeatedly identified themselves to
20 Decedent, ordered Decedent to stop, and Officer Hart gave
21 Decedent a warning before tasing him at least the first three
22 times. *Deorle v. Rutherford*, 272 F.3d 1272, 1284 (9th Cir. 2001)
23 ("[W]arnings should be given, when feasible, if the use of force
24 may result in serious injury, and that the giving of a warning or
25 the failure to do so is a factor to be considered in applying the
26 *Graham* balancing test.").
27

1 Fourth, before Officer Hart tased Decedent and the Officer
2 Defendants used their body weight to restrain Decedent, Officer
3 Kensey had already used other alternative tactics: baton strikes
4 and pepper spray. *See Bryan v. MacPherson*, 630 F.3d at 831
5 (requiring police officers to consider whether alternative
6 tactics are available to affect an arrest).
7

8 There is a genuine issue of material fact whether the
9 officers saw Decedent's 9-inch scar on his chest from Decedent's
10 open heart surgery and pacemaker. Defendants contend that Officer
11 Hart and Officer Kensey did not notice a scar on Decedent's chest
12 when he was shirtless on the hood of the truck. Plaintiffs assert
13 that Officer Kensey testified during his police interview that
14 Officer Arellano told the officers that Decedent had a large scar
15 on his chest and told them not to use a Taser on him. Doc. 53,
16 Ex. E, ¶ 9. Officer Arellano testified that she did not recall
17 giving this warning or ever seeing a scar on Decedent's chest.
18 Doc. 53, Ex. D, 24-25. Officer Hart testified that he did not
19 hear anyone say that Decedent had a scar on his chest. DUF ¶ 39.
20 This fact is in dispute.
21

22 The amount of force Officer Defendants used to get Decedent
23 down from the tractor trailer is also in dispute. Defendants
24 assert that Officers Hart and Arellano merely grasped, or
25 attempted to grasp, Decedent with their hands to bring Decedent
26 down to the ground to safety. Pointing to Officer Kensey's
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28

1 deposition, Defendants contend that Officers Hart and Arellano
2 either pulled Decedent or he slipped down to the hood of the cab,
3 then to the ground. Plaintiffs point to Officer Arellano's
4 deposition, where she testified that the Officers simply let go
5 of Decedent and let him fall a substantial distance to the
6 ground. Doc. 53, Ex. D, 29.

7
8 Whether Officer Defendants' use of force was excessive under
9 the totality of the circumstances is a difficult question. There
10 are material factual disputes regarding (1) the amount of force
11 used and (2) whether Officer Hart tased Decedent and Officer
12 Defendants restrained Decedent with their bodies despite being
13 cognizant of his 9-inch chest scar and heart condition. Where
14 facts are disputed, their resolution and determinations of
15 credibility are "manifestly in the province of a jury." *Wall v.*
16 *Cnty. of Orange*, 364 F.3d 1107, 1110 (9th Cir. 2004) (quoting
17 *Santos v. Gates*, 287 F.3d 846, 852 (9th Cir. 2002)). Viewing the
18 facts in the light most favorable to, and drawing all inferences
19 in favor of, Plaintiff, without making credibility
20 determinations, a reasonable fact finder could find that Officer
21 Defendants' use of intermediate, and ultimately deadly, force was
22 objectively unreasonable.
23

24
25 b) Qualified Immunity

26 Qualified immunity shields government officials "from
27 liability for civil damages insofar as their conduct does not
28

1 violate clearly established statutory or constitutional rights of
2 which a reasonable person would have known." *Harlow v.*
3 *Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727 (1982). The
4 protection of qualified immunity applies regardless of whether
5 the government official makes an error that is "a mistake of law,
6 a mistake of fact, or a mistake based on mixed questions of law
7 and fact." *Pearson v. Callahan*, 555 U.S. 223, 129 S.Ct. 808, 818,
8 172 L.Ed.2d 565 (2009) (quoting *Groh v. Ramirez*, 540 U.S. 551,
9 567, 124 S.Ct. 1284 (2004) (KENNEDY, J., dissenting)). The
10 doctrine of qualified immunity protects "all but the plainly
11 incompetent or those who knowingly violate the law" *Malley*
12 *v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092 (1986). Because
13 qualified immunity is "an immunity from suit rather than a mere
14 defense to liability ... it is effectively lost if a case is
15 erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472
16 U.S. 511, 526, 105 S.Ct. 2806 (1985) (emphasis deleted).

17
18
19 The qualified immunity inquiry has two prongs: (1) "whether
20 the facts that a plaintiff has alleged ... or shown ... make out
21 a violation of a constitutional right," and (2) "whether the
22 right at issue was 'clearly established' at the time of
23 defendant's alleged misconduct." *Wilkinson v. Torres*, 610 F.3d
24 546, 550 (9th Cir. 2010) (quoting *Pearson v. Callahan*, 129 S.Ct.
25 at 815-816). "The relevant, dispositive inquiry in determining
26 whether a right is clearly established is whether it would be
27
28

1 clear to a reasonable officer that his conduct was unlawful in
2 the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202,
3 121 S.Ct. 2151 (2001). This inquiry is wholly objective and is
4 undertaken in light of the specific factual circumstances of the
5 case. *Id.* at 201. "The principles of qualified immunity shield an
6 officer from personal liability when an officer reasonably
7 believes that his or her conduct complies with the law." *Pearson*
8 *v. Callahan*, 129 S.Ct. at 823.

10 In *Bryan v. MacPherson*, 630 F.3d at 826, the Ninth Circuit
11 held that the use of a taser and similar devices in dart mode
12 constitutes an "intermediate, significant level of force that
13 must be justified by the governmental interest involved" and that
14 such law is clearly established. The Ninth Circuit, however, held
15 that the law regarding tasers was not clearly established in 2005
16 when the incident in question occurred. *Id.* at 833. The Ninth
17 Circuit also noted that two recent Ninth Circuit panels concluded
18 that the law regarding tasers is not sufficiently clearly
19 established to warrant denying officers qualified immunity. *Id.*
20 (citing *Mattos v. Agarano*, 590 F.3d 1082, 1089-90 (9th Cir. 2010),
21 *reh'g en banc granted*, 625 F.3d 1132 (9th Cir. 2010), and *Brooks*
22 *v. City of Seattle*, 599 F.3d 1018, 1031 n.18 (9th Cir. 2010)),
23 *reh'g en banc granted*, 623 F.3d 911 (9th Cir. 2010)). Under *Bryan*
24 *v. MacPherson*, Officer Hart would be entitled to qualified
25 immunity for applying the taser to Decedent.
26
27
28

1 This case, however, is about more force than tasing alone.
2 Officer Defendants, along with Officer Kensey, CHP officers, and
3 the paramedic, applied pressure to Decedent's back, with
4 Decedent's stomach pressed into the ground. At the point when
5 Officer Hart applied the second, third, and fourth taser
6 applications, Decedent was already on the ground, on his stomach,
7 bleeding from his face, with the Officer Defendants standing over
8 Decedent. According to the report of forensic pathologist Dr.

9
10 Werner Spitz:

11 The process of dying in Richard Abston was initiated by the
12 fact that lack of adequate amounts of oxygen from inability
13 to breathe caused arrhythmia of the heart beat, followed by
14 cardiac arrest. The records clearly indicate that Abston's
15 death was progressive, not instantaneous by any means. This
16 was a death by asphyxiation, due to lack of oxygen
17 availability.

18 Doc. 53, Ex. I, 5.

19 In consideration of the circumstances surrounding the death
20 of Richard Abston and the timely relationship between the
21 restraint and the absence of vital signs, the type of
22 restraint and the absence of significant findings at the
23 autopsy, it is my opinion that Richard Abston died of
24 asphyxia due to inability to breathe, as a result of air
25 hunger due to compression and being pinned to the ground.
26 This type of death is often referred to as positional
27 asphyxia. Exposure to ECD/MCD deployments and fear of
28 impending doom constituted a significant factor in causing
the death.

Id. at 8. A reasonable officer should have known that all the
Officer Defendants exerting pressure on Decedent while he was
pinned on his stomach posed a danger of compression or restraint
asphyxia.

1 Defendants cite *Luchtel*, 623 F.3d at 977-978, a case where
2 two officers pinned a woman who was under the influence of crack
3 cocaine to the floor and handcuffed her against her continued
4 resistance. The plaintiff in *Luchtel* suffered a dislocated
5 shoulder and torn shoulder ligaments, bruises, swelling, and
6 abrasions from being pinned to the floor. Decedent in this case,
7 however, suffered not only bruises and abrasions, but died from
8 continued body weight on his back and body. In *Drummond ex rel.*
9 *Drummond v. City of Anaheim*, 343 F.3d at 1056, the Ninth Circuit
10 held that two officers who "continued to press their weight into
11 [an individual's] neck and torso as he lay handcuffed on the
12 ground and begged for air" was excessive force. "Under similar
13 circumstances, in what has come to be known as 'compression
14 asphyxia,' prone and handcuffed individuals in an agitated state
15 have suffocated under the weight of restraining officers." *Id.*
16 The Ninth Circuit concluded that the officers were not entitled
17 to qualified immunity, as any reasonable officer would have known
18 that such conduct constituted excessive force. *Id.* at 1061-1062.
19 *Drummond* is from 2003; the Ninth Circuit's view on compression
20 asphyxia was therefore clearly established in 2008, when the
21 incident occurred.
22
23
24

25 Defendants' motion for summary judgment on the Fourth
26 Amendment claim in the First Claim for Relief on the grounds of
27 qualified immunity is DENIED.
28

1 B. First Cause of Action: Substantive Due Process (42
2 U.S.C. § 1983, Fourteenth Amendment) (Against Officer
3 Defendants and Does 1-10)

4 1. Constitutional Violation

5 The Ninth Circuit recognizes that a "child's interest in her
6 relationship with a parent is sufficiently weighty by itself to
7 constitute a cognizable liberty interest." *Curnow By & Through*
8 *Curnow v. Ridgecrest Police*, 952 F.2d 321, 325 (9th Cir. 1991).
9 Ninth Circuit precedent suggests that Decedent's wife may also
10 assert such interest. *See Crumpton v. Gates*, 947 F.2d 1418, 1421
11 (9th Cir. 1991).

12 Official conduct that "shocks the conscience" in depriving
13 someone of their familial interest is cognizable as a due process
14 violation. *Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir. 2008).
15 In determining whether excessive force shocks the conscience, the
16 first inquiry is "whether the circumstances are such that actual
17 deliberation by the officer is practical." *Wilkinson v. Torres*,
18 610 F.3d 546, 554 (9th Cir. 2010) (quoting *Porter v. Osborn*, 546
19 F.3d at 1137) (internal brackets omitted). Where actual
20 deliberation is practical, an officer's "deliberate indifference"
21 may suffice to shock the conscience. *Id.* If an officer "makes a
22 snap judgment because of an escalating situation, his conduct may
23 only be found to shock the conscience if he acts with a purpose
24 to harm unrelated to legitimate law enforcement objectives." *Id.*
25 In *Porter*, 546 F.3d at 1137, the Ninth Circuit found that actual
26 deliberation was not practical for an officer faced with an
27 deliberation was not practical for an officer faced with an
28

1 evolving set of circumstances over five minutes necessitating
2 "fast action" and "repeated split-second decisions." *Id.* at 1139.

3 Plaintiffs contend that Officer Defendants had ample time to
4 deliberate and reflect on their actions and were not faced with a
5 rapidly escalating, evolving set of circumstances. The entire
6 incident, however, only lasted a few minutes, and occurred on and
7 alongside a freeway. Officer Defendants made snap judgments
8 without time for deliberation, and their conduct will only shock
9 the conscience if they acted "with a purpose to harm unrelated to
10 legitimate law enforcement objectives." *Id.* at 1137.

11
12 Plaintiffs argue that Officer Defendants acted with a
13 purpose to harm unrelated to legitimate law enforcement
14 objectives because Officer Kensey asked Officer Hart if he had a
15 less lethal weapon other than a taser, Officer Arelano observed
16 Decedent's chest scar and admonished the other officers not to
17 tase Decedent, and the Officer Defendants piled on top of
18 Decedent until he was non-responsive and died. This evidence does
19 not show, and no other evidence shows, that Officer Defendants
20 had any purpose to harm Decedent apart from law enforcement
21 objectives to take Decedent into custody. Plaintiffs' Fourteenth
22 Amendment claim is unsupported.

23
24
25 **2. Qualified Immunity**

26 There is no evidence that Officer Defendants violated
27 Plaintiffs' Fourteenth Amendment rights. Officer Defendants are
28

1 entitled to qualified immunity. Defendants' motion for summary
2 judgment on the Fourteenth Amendment claim in the First Cause of
3 Action is GRANTED.

4 C. Second and Third Causes of Action: Unconstitutional
5 Custom or Policy (Against City of Merced, Sheriff
6 Thomas, and Does 11-25)

7 A municipality may be held liable under Section 1983 "when
8 execution of a government's policy or custom, whether made by its
9 lawmakers or by those whose edicts or acts may fairly be said to
10 represent official policy, inflicts the injury." *Monell v. Dep't*
11 *of Soc. Servs.*, 463 U.S. 658, 694, 98 S.Ct. 2018 (1978). To
12 prevail under a Section 1983 claim against a local government, a
13 plaintiff must show: (1) he or she was deprived of a
14 constitutional right; (2) the local government had a policy; (3)
15 the policy amounted to a deliberate indifference to his or her
16 constitutional right; and (4) the policy was the moving force
17 behind the constitutional violation. *Burke v. Cnty. of Alameda*,
18 586 F.3d 725, 734 (9th Cir. 2009). There are three ways to show a
19 municipality's policy or custom:
20

21 (1) by showing "a longstanding practice or custom which
22 constitutes the 'standard operating procedure' of the local
23 government entity;" (2) "by showing that the decision-making
24 official was, as a matter of state law, a final policymaking
25 authority whose edicts or acts may fairly be said to
26 represent official policy in the area of decision;" or (3)
"by showing that an official with final policymaking
authority either delegated that authority to, or ratified
the decision of, a subordinate."

27 *Menotti v. Seattle*, 409 F.3d 1113, 1147 (9th Cir. 2005) (quoting
28 *Ulrich v. San Francisco*, 308 F.3d 968, 984-85 (9th Cir. 2002)).

1 Here, Plaintiffs assert two *Monell* claims: (1) failure to train
2 and (2) ratification.

3 1. Failure to Train

4 Failure to train may serve as a basis for Section 1983
5 liability where the failure to train amounts to "deliberate
6 indifference to the rights of persons with whom the police come
7 into contact." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388,
8 109 S.Ct. 1197 (1989). *Monell* is not satisfied by only alleging
9 that the existing training program represents a policy for which
10 the city is responsible. *Id.* at 389. Rather, the focus must be on
11 whether the training program is adequate in relation to the tasks
12 the particular officers must perform, and if it is not, on
13 whether such inadequate police training can justifiably be said
14 to represent "city policy." *Id.* at 390. Only where the failure to
15 train reflects a municipality's "deliberate" or "conscious"
16 choice can the failure be an actionable city "policy or custom."
17 *Id.* at 389. Moreover, the identified deficiencies in a city's
18 training program must be closely related to the ultimate injury.
19 *Id.* at 391. A plaintiff alleging a failure to train must show:
20 (1) he was deprived of a constitutional right, (2) the
21 municipality had a training policy that "amounts to deliberate
22 indifference to the constitutional rights of the persons with
23 whom its police officers are likely to come into contact;" and
24 (3) his constitutional injury would have been avoided had the
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1 municipality properly trained those officers. *Blankenhorn v. City*
2 *of Orange*, 485 F.3d 463, 484 (9th Cir. 2007) (quotation marks and
3 brackets omitted).

4 Plaintiffs' police procedures expert, Roger Clark, states
5 that Taser International has issued at least two published legal
6 warnings specifically notifying Taser users to avoid targeting
7 the chest area of person with a known history of heart attacks.
8 Doc. 53, Ex. G, 9. Here, it is undisputed that each Officer
9 Defendant received basic Taser training once from the Merced
10 Police Department; however, Officer Arellano testified that she
11 did not recall subsequent training through the Merced Police
12 Department or updated materials or bulletins regarding Taser use.
13 Officer Hart was trained to avoid deploying a Taser to the head,
14 neck or groin areas, as well as to preexisting injuries if
15 possible. DUF ¶ 89. Officer Arellano was not trained to avoid
16 using a Taser on preexisting injuries.

17 Mr. Clark also states that Taser International's August 28,
18 2006 Product Warning - Law Enforcement Taser publication
19 specifically warned Taser users against repeated, prolonged
20 exposure of the Taser discharge against subjects. The publication
21 specifically identified people who exhibit symptoms of "Excited
22 Delirium" (i.e. "sweating profusely"), such as Decedent was
23 exhibiting, as being susceptible to "Sudden In-Custody Death
24 Syndrome." Doc. 53, Ex. G, 9-10. Officer Hart testified that he
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1 was not trained on the limits of how many times a person can be
2 tased, how long a person can be tased, and using the taser
3 against persons who exhibit symptoms of mental impairment.
4 Officer Arellano testified that she was not trained to avoid
5 prolonged or extended Taser use, use on suspects showing symptoms
6 of excited delirium, or encounters with suspects with excited
7 delirium syndrome. *Id.* at 16-18.

9 Mr. Clark opines that the Merced Police Department did not
10 have a reasonable Departmental written policy, training and
11 guidance regarding the proper methods to deal with delusional and
12 impaired persons. Doc. 53, Ex. G, 3. Officer Hart testified that
13 while he has been trained generally on responding to suspects who
14 appear to be under the influence, he has not had any direct
15 training on the use of force against subjects who appear mentally
16 impaired. Doc. 53, Ex. C, 22-23. Officers Hart and Arellano
17 testified that they were not trained on responding to suspects
18 with excited delirium symptoms.

20 Mr. Clark further opines that police officers should be
21 trained on the risk of positional or restraint asphyxia and
22 proper restraint techniques to minimize this risk. Plaintiffs do
23 not provide any evidence of the City of Merced's training
24 policies on positional or restraint asphyxia or that Officer
25 Defendants were not adequately trained on the risk of positional
26 or restraint asphyxia.

1 Plaintiffs' inadequate training claim is tenuous; they have
2 not provided any records, documentation, or explanation of the
3 City of Merced's training and policies. Mr. Clark's expert report
4 and Officer Defendants' deposition testimony, however, raise
5 questions whether the identified deficiencies in the City of
6 Merced's training with respect to Taser use, excited delirium,
7 and use of force on suspects who are mentally impaired or under
8 the influence also included restraint asphyxia. Drawing all
9 inferences in Plaintiffs' favor, this evidence is sufficient to
10 withstand a motion for summary judgment on failure to train.
11 Defendants' motion for summary judgment as to the Second and
12 Third Causes of Action on Plaintiffs' failure to train claim is
13 DENIED.
14
15

16 2. Ratification

17 "A policy or custom may be found . . . in the failure of an
18 official 'to take any remedial steps after the violations.'" *Gomez v. Vernon*, 255 F.3d 1118, 1126-27 (9th Cir. 2001) (quoting
19 *Larez v. City of Los Angeles*, 946 F.2d 630, 647 (9th Cir. 1991)).
20 A municipal policy "may be inferred from widespread practices or
21 evidence of repeated constitutional violations for which the
22 errant municipal officers were not discharged or reprimanded."
23 *Menotti*, 409 F.3d at 1147 (quoting *Nadell v. Las Vegas Metro.*
24 *Police Dep't*, 268 F.3d 924, 929 (9th Cir. 2001)). To prove
25 ratification, a plaintiff must show that the "authorized
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1 policymakers approve a subordinate's decision and the basis for
2 it." *Christie v. Iopa*, 176 F.3d 1231, 1239 (9th Cir. 1999)
3 (quoting *St. Louis v. Prapotnik*, 485 U.S. 112, 127, 108 S.Ct. 915
4 (1988)). "Ordinarily, ratification is a question for the jury."
5 *Iopa*, 176 F.3d at 1238-1239.

6
7 Plaintiffs assert that Officer Defendants defied City of
8 Merced policy without impunity and Officer Defendants' decision
9 making was apparently and/or tacitly endorsed by Sheriff Thomas
10 and City of Merced. Defendants contend that Plaintiffs'
11 ratification claim fails because it is based solely on the
12 subject incident. Plaintiffs have not offered evidence of any
13 other incident of alleged ratification. The Ninth Circuit,
14 however, has found a municipality liable for an isolated
15 constitutional violation where the final policymaker ratified a
16 subordinate's actions. *Id.* at 1238.

17
18 Although a ratification claim can be based on a single
19 incident where a final policymaker ratified a subordinate's
20 actions, Plaintiffs have not established a genuine issue of
21 material fact that a final policymaker ratified Officer
22 Defendants' actions. Plaintiffs have not provided evidence that
23 any final policymaker even had knowledge of Officer Defendants'
24 alleged unconstitutional acts, or that he or she approved such
25 acts. *See id.* at 1239 ("A policymaker's knowledge of an
26 unconstitutional act does not, by itself, constitute
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1 ratification. Instead, a plaintiff must prove that the
2 policymaker approved of the subordinate's act."). Defendants'
3 motion for summary judgment as to the Second and Third Causes of
4 Action on Plaintiffs' ratification claim is GRANTED.

5 D. Fourth Cause of Action: Assault and Battery (Against
6 Officer Defendants and Does 1-10);

7 Plaintiffs' claim for assault and battery flows from the
8 same facts as the alleged Fourth Amendment violation for
9 excessive force and are measured by the same reasonableness
10 standard of the Fourth Amendment. See *Edson v. City of Anaheim*,
11 63 Cal.App.4th 1269, 1272-73, 74, Cal.Rptr.2d 614 (1998); *Munoz v.*
12 *City of Union City*, 120 Cal.App.4th 1077, 1102 n.6, 16 Cal.Rptr.3d
13 521 (2004). As discussed above, there are genuine issues of
14 material fact precluding summary judgment and a reasonable fact
15 finder could conclude that Officer Defendants' use of force was
16 unreasonable. Defendants' motion for summary judgment on the
17 Fourth Cause of Action is DENIED.

18 E. Seventh Cause of Action: Negligence - Wrongful Death
19 (Against Officer Defendants, City of Merced, and Does
20 1-10)

21 1. Officer Defendants

22 Defendants argue that they are entitled to summary judgment
23 because they did not breach a duty owed to Decedent or to
24 Plaintiffs. Plaintiffs' claim for negligence-wrongful death flow
25 from the same facts as the alleged Fourth Amendment violation for
26 excessive force and are measured by the same reasonableness
27

1 standard of the Fourth Amendment. See *Munoz v. City of Union*
2 *City*, 120 Cal.App.4th 1077, 1102 n.6, 16 Cal.Rptr.3d 521 (2004)
3 ("Federal civil rights claims of excessive force are the federal
4 counterpart to state battery and wrongful death claims; in both,
5 the plaintiff must prove the unreasonableness of the officer's
6 conduct"). For the reasons above, Defendants' motion for summary
7 judgment on the Seventh Cause of Action as to Officer Defendants
8 is DENIED.

9
10 2. City of Merced

11 California has not adopted *Monell* and imposes liability on
12 government entities under the doctrine of respondeat superior for
13 acts of government employees. *Robinson v. Solano*, 278 F.3d 1007,
14 1016 (9th Cir. 2002). California Government Code § 815.2(a)
15 provides:
16

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

21 Cal. Gov't Code § 815.2(a). As discussed above, a reasonable fact
22 finder could conclude that Officer Defendants' use of force was
23 unreasonable. Defendants' motion for summary judgment on the
24 Seventh Cause of Action as to the City of Merced is DENIED.

25 F. Eighth Cause of Action: Negligent Hiring, Retention,
26 Training, Supervision and Discipline (Against City of
Merced, Sheriff Thomas, and Does 11-25)

27 Citing *de Villers v. Cnty. of San Diego*, 156 Cal.App.4th 238,
28

1 67 Cal.Rptr.3d 253 (2007), Defendants contend that under
2 California law, a governmental entity is not liable for negligent
3 hiring and supervision absent a mandatory duty. Defendants assert
4 that California's general negligence statute, California Civil
5 Code § 1714, may not supply a statutory basis for negligence.
6 Citing *Price v. Cnty. of San Diego*, 990 F.Supp. 1230, 1245 (S.D.
7 Cal. 1998), Plaintiffs assert that to prevail on their negligence
8 claim, they must show that Officer Defendants acted unreasonably
9 and that the unreasonable behavior harmed Decedent.
10

11 Plaintiffs fail to recognize the difference between direct
12 and vicarious liability. Plaintiffs' Eighth Cause of Action for
13 negligent hiring, retention, training, supervision and discipline
14 is a claim of direct liability against City of Merced and Sheriff
15 Thomas in his official capacity, not for vicarious liability
16 based on Officer Defendants' acts within the course and scope of
17 their employment. *See de Villers*, 156 Cal.App.4th at 251. Under
18 California Government Code § 815, public entities cannot be held
19 liable in tort except as specifically provided by statute. Cal.
20 Gov't Code § 815. A public entity's direct liability for a tort
21 must be founded on a specific statute apart from the general tort
22 principles in California Civil Code § 1714. *de Villers*, 156
23 Cal.App.4th at 251 (discussing *Zelig v. Cnty. of Los Angeles*, 27
24 Cal.4th 1112, 119 Cal.Rptr.2d 709 (2002), and *Eastburn v. Reg'l*
25 *Fire Prot. Auth.*, 31 Cal.4th 1175, 80 P.3d 656 (2003)). Plaintiffs
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1 have not identified a statutory basis for supporting their claim
2 of direct liability against City of Merced and Sheriff Thomas.
3 California courts of appeals have concluded that no statutory
4 basis exists for supporting a claim of direct liability against a
5 government entity based on its allegedly negligent hiring and
6 supervision practices. *de Villers*, 156 Cal.App.4th at 251; see
7 also *Munoz v. City of Union City*, 120 Cal.App.4th 1077, 1110-1115,
8 16 Cal.Rptr.3d 521 (2004). Plaintiffs' Eighth Cause of Action
9 fails as a matter of law. Defendants' motion for summary judgment
10 on the Eighth Cause of Action is GRANTED.
11

12 G. Claim for Punitive Damages

13 Punitive damages are recoverable in an action under 42
14 U.S.C. § 1983 "when the defendant's conduct is shown to be
15 motivated by evil motive or intent, or when it involves reckless
16 or callous indifference to the federally protected rights of
17 others." *Smith v. Wade*, 461 U.S. 30, 56, 103 S.Ct. 1625 (1983).
18 Under California law, punitive damages are authorized if a
19 plaintiff can show by clear and convincing evidence that a
20 defendant acted with oppression, fraud, or malice. Cal. Civ. Code
21 § 3294(a).
22

23 Defendants assert that Plaintiffs have produced no evidence
24 that Officer Defendants' conduct evinced evil intent, malice,
25 fraud, oppression, or callous indifference to Decedent's or
26 Plaintiffs' rights. Plaintiffs rejoin that there is a material
27
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1 question of fact whether Officer Arellano warned the other
2 officers that Decedent had a scar on his chest indicating a
3 preexisting heart condition and whether she told the other
4 officers not to use a Taser on him. Construing the evidence in
5 the light favorable to Plaintiffs, Plaintiffs contend that a
6 reasonable jury could find that Decedent's scar was obvious and
7 openly viewed by Officer Defendants, Officer Arellano warned them
8 not to tase Decedent because of his visible scar, and Officer
9 Hart used the Taser on Decedent multiple times, even after he was
10 prone on his stomach and tased, in bad faith. There is sufficient
11 evidence to create a factual dispute regarding Officer
12 Defendants' intent. Whether Plaintiffs are entitled to punitive
13 damages against Officer Defendants is a question for the jury.
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16 Defendants' motion for summary judgment on the punitive
17 damages claim as to Officer Defendants is DENIED.

18 V. CONCLUSION

19 For the reasons stated:

20 1. Defendants' motion for summary judgment, or in the
21 alternative, summary adjudication is GRANTED in part and
22 DENIED in part, as follows:

23 a. Defendants' motion for summary judgment as to the First
24 Cause of Action is DENIED as to the Fourth Amendment
25 Claim and GRANTED as to the Fourteenth Amendment Claim.

26 b. Defendants' motion for summary judgment as to the
27
28

1 Second and Third Causes of Action is DENIED as to the
2 failure to train claim and GRANTED as to the
3 ratification claim.

4 c. Defendants' motion for summary judgment as to the
5 Fourth Cause of Action is DENIED.

6 d. Defendants' motion for summary judgment as to the
7 Seventh Cause of Action is DENIED.

8 e. Defendants' motion for summary judgment as to the
9 Eighth Cause of Action is GRANTED.

10 f. Defendants' motion for summary judgment as to the claim
11 for punitive damages is DENIED.

12
13 2. Defendants shall submit a proposed form of order consistent
14 with this memorandum decision within five (5) days of
15 electronic service of this memorandum decision.
16

17 SO ORDERED.

18 DATED: May 24, 2011.

19 /s/ Oliver W. Wanger
20 Oliver W. Wanger
21 United States District Judge
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