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**IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF CALIFORNIA**

**MANUELA CANCINO CONTRERAS  
MORALES and R.A.M., a minor,**

**Plaintiff,**

**v.**

**CITY OF DELANO; MARK P.  
DEROSIA; JOSE MEJIA; SHAUN  
MANUELE; and DOES 1 through 50,  
inclusive,**

**Defendants.**

**1:10-CV-1203 AWI JLT**

**MEMORANDUM OPINION  
AND ORDER GRANTING IN  
PART AND DENYING IN  
PART THE PARTIES' CROSS-  
MOTIONS FOR SUMMARY  
JUDGMENT OR SUMMARY  
ADJUDICATION**

Doc. No's. 42 and 46

This is an action for damages arising out of the death of Ruben Mesa Morales (“Decedent”) as a result of a gunshot wound inflicted by Jose Mejia (“Mejia”), a reserve officer of the City of Delano Police Department, acting in the course and scope of his employment. The action is brought by Manuela Cancino Contreras Morales individually and as successor in interest of Decedent and by R.A.M., a minor child of Decedent by and through his Guardian ad Litem, Manuela Morales (collectively, “Plaintiffs”). In the currently-operative Second Amended Complaint (“SAC”), Plaintiffs allege a total of seven claims for relief against defendants City of Delano, Mark P. Derosia (“Derosa”), Delano Chief of Police, Mejia and Shaun Manuele (“Manuele”), a City of Delano police officer. Defendants Derosa, Mejia and Manuele (the “individual Defendants”) are each sued in both their individual and official capacities. Currently before the court is Plaintiffs’ motion for partial summary judgment on a portion of their first claim for relief. Document # 46. Also currently before the

1 court is Defendants' motion for summary judgment as all claims against all Defendants.  
2 Document # 42. Federal question jurisdiction exists pursuant to 28 U.S.C. § 1331. Venue is  
3 proper in this court.

#### 4 **FACTUAL BACKGROUND**

5 Although most of the facts alleged in the parties' cross-motions for summary judgment  
6 are sharply disputed, a short list of stipulated facts has been submitted from which a general  
7 picture of the events giving rise to this action can be drawn. Decedent married Plaintiff  
8 Morales in Zacatecas, Mexico in 2000. They had one child together, R.A.M., who was born in  
9 the United States in Georgia. Decedent is a veteran of the United States military and lived in a  
10 converted garage apartment (hereinafter, the "apartment") that was attached to a house owned  
11 by Maria and Gabriel Nunez in Delano, California. Except for the birth of R.A.M. in Georgia,  
12 Plaintiffs have continuously resided in Zacates, Mexico. Decedent was paying a monthly rent  
13 of \$500.00 per month to Maria and Gabriel Nunez at the time of his death.

14 Shortly after midnight on July 7, 2009, Mrs. Nunez returned home with her three  
15 children and noted that the front door was open and lights were flickering inside her home.  
16 After calling her husband at work, she called 9-1-1. Police officers arrived shortly thereafter.  
17 Mrs. Nunez was approached by Officer Felix, a non-party to this action, as Mrs. Nunez stood  
18 on the sidewalk in front of the residence. Mrs. Nunez, who spoke only Spanish, told Officer  
19 Felix that she rented a portion of her home to a person. Officer Felix was not certified as  
20 Spanish speaking by the Delano Police Department. Although there is some dispute over the  
21 details, it is generally not disputed that officers Mejia and Manuele were deployed to the back  
22 yard of the residence after which other officers entered the house by the front entrance. While  
23 the parties do not disputed that one of the responding non-party officers, Officer Felix, was  
24 told there was a renter who lived on the property in the apartment, it is sharply disputed  
25 whether Mejia or Manuele knew, or should have known, of the presence of Decedent in the  
26 apartment.

1           Although it is not entirely clear to the court whether the apartment can be accessed  
2 from the front of the house, there is no dispute that the apartment cannot be accessed from the  
3 inside of the main part of the house. It is not disputed that Mejia and Manuele entered through  
4 an unlocked doorway in the backyard leading into Decedent's apartment. It is not disputed  
5 that Mejia fired a single shot from his service pistol that struck Decedent and that the gunshot  
6 would ultimately result in Decedent's death. It is not disputed that Decedent was unarmed  
7 at the time of his shooting.

### 8           **PROCEDURAL HISTORY**

9           The original complaint in this action was filed on June 30, 2010. The currently  
10 operative SAC was filed on August 6, 2010. Plaintiffs' SAC alleges a total of seven claims  
11 for relief; four claims are alleged pursuant to 42 U.S.C. § 1983 and the remaining three are  
12 alleged pursuant to California common law for wrongful death, battery and negligence,  
13 respectively. Although Plaintiffs' first claim for relief is set forth as a single claim against  
14 officers Mejia and Manuele, it actually alleges violation of Decedent's rights under the Fourth  
15 and Fourteenth Amendments on four separate legal theories; unlawful warrantless search,  
16 unlawful use of force, unlawful denial of Decedent to access to medical care necessitated by  
17 Defendants' actions, and falsification of evidence in furtherance of a conspiracy to deprive  
18 Decedent to access to courts. Plaintiffs' second claim for relief alleges the violation of  
19 Plaintiffs' Fourteenth Amendment right to the companionship and support of Decedent.  
20 Plaintiffs' first and second claims for relief are alleged against Mejia and Manuele.

21           Plaintiffs' third claim for relief is alleged against City of Delano pursuant to Monell v.  
22 Dep't of Soc. Services, 436 U.S. 658, 694 (1978). Plaintiffs' fourth claim for relief is alleged  
23 against Police Chief DeRosa in his individual capacity and the City of Delano for supervisory  
24 liability pursuant to 42 U.S.C. § 1983. Plaintiffs' fifth claim for relief for wrongful death  
25 under California common law is alleged against all defendants; the sixth claim for relief  
26 alleges common law battery against Mejia only, and the seventh claim for relief alleges  
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1 negligence against Mejia and Manuele.

2 The parties' cross-motions for summary judgment or summary adjudication were filed  
3 on September 23, 2011. Each party filed an opposition to the motion of the other party on  
4 October 24, 2011. The parties filed their respective replies on October 31, 2011. The hearing  
5 on the cross motions was vacated and the matter was taken under submission as of November  
6 7, 2011.

### 7 LEGAL STANDARD

8 Summary judgment is appropriate when it is demonstrated that there exists no genuine  
9 issue as to any material fact, and that the moving party is entitled to judgment as a matter of  
10 law. Fed. R. Civ. P. 56(c); Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); Poller v.  
11 Columbia Broadcast System, 368 U.S. 464, 467 (1962); Jung v. FMC Corp., 755 F.2d 708,  
12 710 (9th Cir. 1985); Loehr v. Ventura County Community College Dist., 743 F.2d 1310, 1313  
13 (9th Cir. 1984).

14 Under summary judgment practice, the moving party always bears the initial responsibility of informing  
15 and identifying those portions of "the pleadings, depositions, answers to interrogatories, and  
admissions on file, together with the affidavits, if any," which it believes demonstrate the  
16 absence of a genuine issue of material fact.

17 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Although the party moving for summary  
18 judgment always has the initial responsibility of informing the court, the nature of the  
19 responsibility varies "depending on whether the legal issues are ones on which the movant or  
20 the non-movant would bear the burden of proof at trial." Cecala v. Newman, 532 F.Supp.2d  
21 1118, 1132-1133 (D. Ariz. 2007). When the moving party has the burden of proof at trial, that  
22 party must carry its initial burden at summary judgment by presenting evidence affirmatively  
23 showing, for all essential elements of its case, that no reasonable jury could find for the  
24 non-moving party. United States v. Four Parcels of Real Property, 941 F.2d 1428, 1438 (11th  
25 Cir.1991) (en banc); Calderone v. United States, 799 F.2d 254, 259 (6th Cir. 1986); see also  
26 E.E.O.C. v. Union Independiente De La Autoridad De Acueductos Y Alcantarillados De  
27 Puerto Rico, 279 F.3d 49, 55 (1st Cir. 2002) (stating that if "party moving for summary

1 judgment bears the burden of proof on an issue, he cannot prevail unless the evidence that he  
2 provides on that issue is conclusive.”)

3 If the moving party meets its initial responsibility, the burden then shifts to the  
4 opposing party to establish that a genuine issue as to any material fact actually does exist.  
5 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); First Nat'l Bank  
6 of Arizona v. Cities Serv. Co., 391 U.S. 253, 288-89 (1968); Ruffin v. County of Los Angeles,  
7 607 F.2d 1276, 1280 (9th Cir. 1979). In attempting to establish the existence of this factual  
8 dispute, the opposing party may not rely upon the mere allegations or denials of its pleadings,  
9 but is required to tender evidence of specific facts in the form of affidavits, and/or admissible  
10 discovery material, in support of its contention that the dispute exists. Rule 56(e); Matsushita,  
11 475 U.S. at 586 n.11; First Nat'l Bank, 391 U.S. at 289; Strong v. France, 474 F.2d 747, 749  
12 (9th Cir. 1973). The opposing party must demonstrate that the fact in contention is material,  
13 i.e., a fact that might affect the outcome of the suit under the governing law, Anderson v.  
14 Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); T.W. Elec. Serv., Inc. v. Pacific Elec.  
15 Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., the  
16 evidence is such that a reasonable jury could return a verdict for the nonmoving party,  
17 Anderson, 477 U.S. 248-49; Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436 (9th Cir.  
18 1987).

19 In the endeavor to establish the existence of a factual dispute, the opposing party need  
20 not establish a material issue of fact conclusively in its favor. It is sufficient that “the claimed  
21 factual dispute be shown to require a jury or judge to resolve the parties' differing versions of  
22 the truth at trial.” First Nat'l Bank, 391 U.S. at 290; T.W. Elec. Serv., 809 F.2d at 631. Thus,  
23 the “purpose of summary judgment is to ‘pierce the pleadings and to assess the proof in order  
24 to see whether there is a genuine need for trial.’” Matsushita, 475 U.S. at 587 (quoting Fed. R.  
25 Civ. P. 56(e) advisory committee's note on 1963 amendments); International Union of  
26 Bricklayers v. Martin Jaska, Inc., 752 F.2d 1401, 1405 (9th Cir. 1985).

1 In resolving the summary judgment motion, the court examines the pleadings,  
2 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if  
3 any. Rule 56(c); Poller, 368 U.S. at 468; SEC v. Seaboard Corp., 677 F.2d 1301, 1305-06  
4 (9th Cir. 1982). The evidence of the opposing party is to be believed, Anderson, 477 U.S. at  
5 255, and all reasonable inferences that may be drawn from the facts placed before the court  
6 must be drawn in favor of the opposing party, Matsushita, 475 U.S. at 587 (citing United  
7 States v. Diebold, Inc., 369 U.S. 654, 655 (1962)(per curiam); Abramson v. University of  
8 Hawaii, 594 F.2d 202, 208 (9th Cir. 1979). Nevertheless, inferences are not drawn out of the  
9 air, and it is the opposing party's obligation to produce a factual predicate from which the  
10 inference may be drawn. Richards v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D.  
11 Cal. 1985), aff'd, 810 F.2d 898, 902 (9th Cir. 1987).

12 **MEMORANDUM OPINION AND ORDER ON PLAINTIFF'S**  
13 **MOTION FOR SUMMARY ADJUDICATION**

14 Plaintiffs seek summary adjudication only as to the portion of their first claim for relief  
15 that alleges the warrantless, no-knock entry into Decedent's apartment was in violation of his  
16 rights under the Fourth Amendment.

17 **A. Factual Issues**

18 In making the determination of Plaintiffs' entitlement to summary judgment on this  
19 issue, the first issue presented by Defendants' opposition is how the court is to address the  
20 factual context of Plaintiffs' claim. Defendants' primary contention is that the actions of  
21 Mejia and Manuele were objectively reasonable in light of the facts known to them.  
22 Prominent among Defendants' objections to Plaintiffs' proffer of undisputed material facts is  
23 their objection under Graham v. Connor, 490 U.S. 386 (1989) to any fact that was not known  
24 to either Mejia or Manuele at the time of the entry into Decedent's apartment.

25 The Supreme Court's decision in Graham establishes three general rules of Fourth  
26 Amendment jurisprudence. First, Graham establishes that Fourth Amendment claims,

1 whether based on unlawful search or unlawfull application of force, are determined under the  
2 standard of objective reasonableness, not under the Fourteenth Amendment substantive due  
3 process standard. Id. at 394-395. Second, Graham establishes that the determination of  
4 reasonableness is to be “judged from the perspective of a reasonable officer on the scene,  
5 rather than with the 20/20 vision of hindsight. Id. at 396. Third, Graham, establishes that the  
6 reasonableness inquiry is objective, that is, without reference to the officer’s underlying intent  
7 and motivations. Id. at 397.

8 Plaintiffs’ undisputed material facts are contested in almost every particular. In a  
9 disputed summary judgment motion under Fed.R.Civ.P. 56, the trial court is obligated to draw  
10 all reasonable inferences in favor of the non-moving party and resolve all factual conflicts in  
11 favor of the non-moving party. Murphy v. Schneider National, Inc., 362 F.3d 1133, 1138 (9th  
12 Cir. 2004).

13 Unfortunately it is frequently the case, and is so here, that where parties seek to “cover  
14 all the bases” factually, the facts the court finds critical to its decision suffer from  
15 underdevelopment. With regard to Plaintiff’s proffer of undisputed material facts, the court  
16 agrees with Defendants that the majority of these are irrelevant. With regard to Defendants, so  
17 much effort has gone into establishing what officers Mejia and Manuele did not know that the  
18 court is left with the conclusion that these officers were dispatched to “cover the back” in a  
19 state of near-perfect ignorance. The court notes that certain aspects of Defendants’ version of  
20 the facts are sharply disputed; principal among these is Defendants’ allegation that Mejia and  
21 Manuele had neither actual or constructive knowledge of Decedent’s presence in the  
22 apartment or of his status as a renter. Were the court considering here Defendants’ motion for  
23 summary adjudication of this issue, that factual dispute alone would be sufficient to defeat  
24 Defendants’ motion. However, Plaintiffs’ motion is currently under consideration and the  
25 court must accept Defendants’ version of the facts to the extent the facts are disputed.

26 Accepting Defendants’ representation of the facts as true, officers Mejia and Manuele  
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1 arrived at the scene at about the same time as the other officers and were told to “cover the  
2 back” knowing only that there had been a call reporting that the front door was found to be  
3 ajar/open when it should not have been, and that there was a light on inside when there should  
4 not have been. Nothing else. Officers Mejia and Manuele had no knowledge of whether  
5 anyone had tried to make contact with anyone inside the apartment or Mrs. Nunez’s  
6 (hereinafter, the “residence”) and did not attempt to do so themselves. See Plaintiff’s UMF #  
7 46 (none of the responding officers knocked on the apartment front door or windows). As  
8 noted above, Mejia and Manuele had no knowledge of any conversation between Mrs. Nunez  
9 and the other officers or of the search of the Nunez residence or of the status of the other  
10 officers following their search. By combining together Plaintiff’s UMF’s numbered 46 (no  
11 attempt to call out to anyone on the inside or announce police presence) and 51 (no knock  
12 upon entry by Mejia and Manuel) the court concludes that Mejia and Manuele entered the  
13 space rented by Decedent through an unlocked door without knocking or announcing.

14 The court notes that Defendants invite the court to speculate that Mejia and Manuele  
15 were caught up in rapidly evolving facts requiring split-second decision making. There are  
16 absolutely no facts to indicate this was the case. At most, the facts permit the conclusion that  
17 Mejia and Manuele were deployed to “cover the back,” which they did, and where nothing  
18 much appears to have happened. There were no fleeing suspects, no shots fired, no voices  
19 indicating urgency, and no radio transmissions indicating an escalating situation. Neither  
20 party has developed the facts surrounding the entry with a great deal of precision so the court  
21 is left with the understanding that Mejia and Manuele “covered the back” for some period of  
22 time not knowing what the other officers were doing. At some point, and for no stated reason,  
23 Mejia and Manuele decided to enter an open door without knocking or announcing and  
24 without any knowledge where the door would lead.

25 Defendants allege, and the court accepts as true for purposes of this discussion, that  
26 Mejia and Manuele did not know if, or when, the other officer commenced a search of the  
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1 residence from the front; did not know that the search of the residence concluded without  
2 finding anything amiss; and did not know that Mrs. Nunez had communicated to officers Felix  
3 and Ward that the area comprising the garage had been converted into an apartment and was  
4 occupied by Decedent. The court also accepts as true that sometime after the radio broadcast  
5 of the “code 4” message, Mejia and Manuele entered without knocking or announcing through  
6 a partially-opened door in the back yard that they did not know entered into the space that was  
7 being rented by Decedent. There is, of course, no dispute that Mejia and Manuele entered  
8 without a warrant.

9 The question posed by Plaintiffs’ motion for summary adjudication is whether the  
10 warrantless, no-knock entry by Mejia and Manuele was lawful.

## 11 **B. Fourth Amendment Violation**

12 “It is a ‘basic principle of Fourth Amendment law’ that searches and seizures  
13 inside a home without a warrant are presumptively unreasonable.” Payton v.  
14 New York, 445 U.S. 573, 586 (1980) (footnote omitted). The presumption of  
15 unconstitutionality that accompanies “the [warrantless] entry into a home to  
conduct a search or make an arrest” may be overcome only by showing  
“consent or exigent circumstances.” Steagald v. United States, 451 U.S. 204,  
211 (1981).

16 Lopez-Rodriguez v. Mukasey, 536 F.3d 1012, 1016 (9th Cir. 2008). To these two  
17 fundamental exceptions to the general warrant requirement, Defendants add the “emergency  
18 exception.” Defendants claim all three apply with respect to the entry by Mejia and Manuele.

### 19 ***1. Emergency Exception***

20 As Defendants correctly point out, the emergency exception derives from the care-  
21 taking function and requires that there be reasonable grounds to believe there was an  
22 emergency that required immediate assistance to preserve life or property. See Defendants’  
23 Opposition, Doc. # 52 at 17:1-8 (citing Espinosa v. City & County of San Francisco, 598 F.3d  
24 528, 534 (9th Cir. 2010); Hopkins v. Bonvicino, 573 F.#d 752, 763-764 (9th Cir. 2005)). The  
25 factual allegations presented in this case give no hint of the existence of a situation that would  
26 invoke the care-taking function of the police. The only information available to the officers  
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1 was that there was a house with the front door open and a light on where there should have  
2 been no one home. No reasonable officer could make a determination that an emergency  
3 existed from those facts. The court finds Defendants' version of the facts does not support the  
4 proposition that the entry was justified on the basis of an emergency.

## 5 *2. Exigent Circumstances*

6 Next, Defendants contend that the entry by Mejia and Manuele into the space rented by  
7 Decedent was justified by exigent circumstances. "There are exigent circumstances to justify  
8 a warrantless entry by police officers into a home if the officers have a reasonable belief that  
9 their entry is 'necessary to prevent physical harm to the officers or other persons, the  
10 destruction of relevant evidence, the escape of the suspect, or some other consequence  
11 improperly frustrating legitimate law enforcement efforts.' [Citation.]" Huff v. City of  
12 Burbank, 632 F.3d 539, 544-545 (9th Cir. 2011) (quoting Fisher v. City of San Jose, 558 F.3d  
13 1069, 1075 (9th Cir. 2009)). Reliance on the exigent circumstances exception requires that  
14 governmental defendants offer facts to prove: (1) that the officer had probable cause to search  
15 the house; and (2) that "exigent circumstances justified the warrantless intrusion." United  
16 States v. Johnson, 256 F.3d 895, 205 (9th Cir. 2009). The parties do not seem to dispute that  
17 Mrs. Nunez's 9-1-1 call was sufficient to establish probable cause for entry into the residence.  
18 There remains, then, the issue of whether there existed an exigent circumstance with regard to  
19 the entry of Mejia and Manuele into the apartment.

20 To make the case that exigent circumstances existed with regard to the warrantless, no-  
21 knock entry by Mejia and Manuele, Defendants rely principally on Murdock v. Stout, 54 F.3d  
22 1437 (9th Cir. 1995). In Murdock, the initial evidence that police encountered that indicated  
23 exigent circumstances consisted of a neighbor's report of suspicious activity and the  
24 observation of an open door at the rear of the house. The Murdock court noted that, had the  
25 responding officers known only those facts, in the absence of any other physical evidence of  
26 burglary, there would have been little doubt that exigency would not have been demonstrated.

1 Id. at 1441-1442. However, the Murdock court noted that facts subsequently determined by  
2 the police officers, facts not in evidence here, tipped the scales in the officers' favor.  
3 Specifically, the Murdock court noted that the officers observed that lights and a television  
4 were on and then "prudently attempted to make contact with the resident," including shouting  
5 twice into the home and calling the telephone number for the house. Id. at 1442. Defendants'  
6 reliance on Murdock is unavailing specifically for the reason that there is no evidence that  
7 Mejia or Manuele had any additional information to tip the scales in favor of determining  
8 there was an exigent circumstance. So far as the court can determine from Defendants'  
9 version of the facts, Mejia and Manuele deployed to the back yard knowing only that the  
10 homeowner had observed a door ajar and lights on. The officers made no attempt to make  
11 contact with anyone on the inside and had no knowledge whether any other officers had done  
12 so.

13 In addition, and probably most critically, the Murdock court held that, where entry  
14 could be accomplished with no damage to property, "only mild exigency need be shown." Id.  
15 This proposition was rejected in LaLonde v. County of Riverside, 204 F.3d 947, 956 - 957  
16 (9th Cir. 2000). Thus, to the extent there is any suggestion derived from Murdock that Mejia  
17 and Manuele could perform a warrantless, no-knock entry into the apartment on a theory of  
18 exigent circumstances because the door was not locked, that suggestion is rejected. What  
19 Murdock makes clear to this court is that what distinguishes an exigent circumstance from one  
20 that is not exigent is some fact or facts *in addition* to the observation that the door is open and  
21 the lights are on when they should not be. The absence of any other physical evidence of  
22 exigency, coupled with the lack of any effort by the officers, including Mejia and Manuele, to  
23 announce themselves or to make any effort to establish that no one was lawfully present  
24 convinces the court that the facts of this case, as presented by the parties and construed in a  
25 light most favorable to Defendants, lies firmly outside the realm of circumstances that are  
26 known and accepted to constitute exigent circumstances.



1 by, or was expressed when the officers entered the front of the residence at the direction or  
2 request of Mrs. Nunez, that fact was not known to the officers in the back yard and could not  
3 have been reasonably surmised by them given their asserted extensive ignorance of what was  
4 going on during the search.

5 Defendants' arguments to the contrary appear to be predicated on two lines of  
6 argument the court finds unpersuasive. The first is that Defendants Mejia and Manuele  
7 reasonably believed they were in a rapidly-evolving situation involving a burglary suspect and  
8 split-second decision making. The court finds that what Manuele and Mejia were confronted  
9 with is an open door and a light left on inside of the residence. The rest is surmise that fails to  
10 establish exigency. See LaLonde, 204 F.3d at 957 (burden to show evidence of exigent  
11 circumstance not satisfied by speculation on what the conditions might have been).

12 Second, Defendants argue that the reasonability of Defendants' actions must be judged  
13 based on what they were actually, subjectively aware of. As previously discussed, this is not  
14 the case. Defendants' actions are judged under the totality of the circumstances that a  
15 reasonable police officer would have known at the time under the existing circumstances. An  
16 officer may not take refuge in ignorance of facts that a reasonable officer would have known  
17 or felt compelled to find out. The court has considerable difficulty with the proposition that a  
18 reasonable officer, having as little actual knowledge of the situation as was apparently the case  
19 here, would have felt justified in making a no-knock entrance without bothering to  
20 communicate with others to obtain more information. It makes no difference that the officers  
21 subjectively believed that the door they were entering was part of Nunez's residence. Given  
22 that the Mejia and Manuele did not know if Nunez had given consent to search, did not know  
23 whether the officers had entered the residence or that they were going to do so, and did not  
24 know whether anyone had attempted to determine whether there was an innocent person inside  
25 of the residence or apartment, Mejia and Manuele had no objectively reasonable basis to  
26 presume consent to make the no-knock entry into the apartment.

1           It bears emphasizing what the court considers critical to its determination of the  
2 question of whether Decedent’s Fourth Amendment Rights were infringed by the entry of  
3 Decedent’s apartment by Mejia and Manuele. The crucial facts are: (1) Mejia and Manuele  
4 were deployed to “cover the back” and did so having no knowledge of the status of the other  
5 officers actions or of any other facts other than the front door being ajar and one or more  
6 interior lights being on in the residence; (2) during what the court presumes to be a not-  
7 negligible length of time, nothing happened that would have indicated to Mejia and Manuele  
8 any change in circumstance; (3) Mejia and Manuele undertook the entry without first  
9 obtaining any more than the very minimum information they had when they were deployed to  
10 the back yard; and (4) the entry was, for no apparent reason, undertaken without knocking or  
11 announcing. The court is mindful that, in taking all the disputed facts in the light most  
12 favorable to Defendants, it has been required to make some assumptions as to the totality of  
13 the facts that Mejia and Manuele encountered.

14           **C. Qualified Immunity**

15           Defendants contend that, even if Decedent’s Fourth Amendment rights were violated  
16 with regard to warrantless, no-knock entry of his apartment by Mejia and Manuele, those  
17 Defendants are nonetheless shielded from liability by qualified immunity. “Qualified  
18 immunity can shield government officials from individual civil liability where their conduct  
19 ‘does not violate clearly established statutory or constitutional rights of which a reasonable  
20 person would have known.’ [Citation.]” Huff v. City of Burbank, 632 F.3d 539, 547-548 (9th  
21 Cir. 2011) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). “We use a two-step  
22 analysis to determine whether the facts show that: (1) the conduct of the officers violated a  
23 constitutional right; and (2) the right that was violated was clearly established at the time of  
24 the violation.” Huff, 632 F.3d at 548. “While the constitutional violation prong concerns the  
25 reasonableness of the officers *mistake of fact*, the clearly established prong concerns the  
26 reasonableness of the officer’s *mistake of law*.” Torres v. City of Madera, 648 F.3d 1119,  
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1 1127 (9th Cir. 2011) (italics in original).

2 Qualified immunity is “an entitlement not to stand trial or face the other  
3 burdens of litigation.” Mitchell v. Forsyth, 472 U.S. 511, 526 (1985). The  
4 privilege is an immunity from suit rather than a mere defense to liability. Id.  
5 Accordingly, courts have repeatedly stressed “the importance of resolving  
6 immunity questions at the earliest possible stage in litigation.” Hunter v.  
7 Bryant, 502 U.S. 224, 227 (1991) ( per curiam ). Because qualified immunity is  
8 an affirmative defense, the burden of proof initially lies with the official  
9 asserting the defense. Harlow, 457 U.S. at 812.

10 Padilla v. Yoo, 633 F.Supp.2d 1005, 1031 (N.D. Cal. 2009).

11 The court begins by noting that the procedural context of the question of qualified  
12 immunity is presented somewhat non-typically here where the motion for summary  
13 adjudication is by a *plaintiff* whose claim is against a defendant who asserts the defense of  
14 qualified immunity. While an official sued in his individual capacity may prevail on a  
15 defensive summary judgment motion by showing *either* the absence of a constitutional  
16 violation *or* that the right in question was not clearly defined at the time of the violation; a  
17 *plaintiff* seeking summary judgment on the same claim must prove *both* the constitutional  
18 violation *and* that the right was clearly defined. See Mueller v. Auker, 576 F.3d 979, 989 (9th  
19 Cir. 2009) (summary judgment in favor of plaintiff on substantive claim, coupled with denial  
20 of qualified immunity defense, is equivalent to final judgment on the merits).

21 To recap the court’s findings with regard to Plaintiffs’ claim for Fourth Amendment  
22 violation resulting from the entry by Mejia and Manuele, the court finds that the facts, as  
23 viewed in the light most favorable to Defendants tend strongly to support Plaintiffs’ unlawful  
24 entry claim. However, as noted above, both parties seem to have skipped over the factual and  
25 legal element the court finds most crucial to the determination of Plaintiff’s claim; that is,  
26 Defendants have not shown precisely how, or on what legal basis, Mejia and Manuele could  
27 reasonably have believed they had consent to enter through the partially-opened door (whether  
28 or not they subjectively believed it was part of the residence) without knocking or announcing.  
Likewise, Plaintiffs have not been clear on whether any of the responding officers had actual  
or implied consent and how that consent, if any, was communicated. The court again points

1 out that it has performed at least a cursory search for case authority for the proposition that a  
2 9-1-1 call confers some form of consent to search with negative results. That, coupled with  
3 the scarcity of facts pertaining to the issue of actual or implied consent leaves the court in a  
4 position where it feels that further briefing is essential to complete the analysis of whether  
5 Defendants Mejia and Manuele are entitled to the defense of qualified immunity.

6 The court finds that the rights of the parties should not be decided on the basis of the  
7 court's decision on a sub-issue that neither party has briefed sufficiently. Therefore, the  
8 parties will be asked to submit further briefing on the issue of implied or actual consent for the  
9 search and to make such additional factual allegations as may be relevant to the court's  
10 decision and admissible under summary judgment rules. The court will stay determination of  
11 Plaintiff's motion for partial adjudication until the additional briefing is complete.

## 12 DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

### 13 I. Motion for Summary Judgment as to Defendant DeRosia as Proper Defendant

14 Defendants move for summary judgment as to all claims against Defendant DeRosia  
15 on the ground DeRosia was not the cause of any constitutional harm Decedent may have  
16 suffered. An examination of Plaintiffs' SAC indicates DeRosia is sued in both his individual  
17 and official capacities for inadequate training or supervision. The Ninth Circuit "has long  
18 permitted plaintiffs to hold supervisors individually liable in § 1983 cases when culpable  
19 action, or inaction, is directly attributed to them." Starr v. Baca, 652 F.3d 1202, 1205 (9th Cir.  
20 2011).

21 In *Larez v. City of Los Angeles*, 946 F.2d 630 (9th Cir. 1991), we explained  
22 that to be held liable the supervisor need not be directly and personally  
23 involved in the same way as are the individual officers who are on the scene  
24 inflicting constitutional injury.' *Id.* at 645. Rather, the supervisor's  
25 participation could include his "own culpable action or inaction in the training,  
supervision, or control of his subordinates," "his acquiescence in the  
26 constitutional deprivations of which the complaint is made," or "conduct that  
27 showed a reckless or callous indifference to the rights of others." *Id.* at 646  
(internal citations, quotation marks, and alterations omitted).

28 Starr, 652 F.3d at 1205-1206.



1 Defendants' argument in favor of summary judgment recognizes that Plaintiff's SAC  
2 asserts the supervisor claim against DeRosia in both his individual and official capacities.  
3 With regard to the suit against DeRosia in his individual capacity, Defendants argue only that  
4 DeRosia was not present at the time Decedent was injured and so could not have acted under  
5 color of law to cause any constitutional harm to Decedent. This assertion completely misses  
6 the point of supervisory liability which places liability on supervisors in their individual  
7 capacity where it can be shown that the supervisor's action were a substantial cause of the  
8 constitutional harm because the officials who actually performed the acts leading to the harm  
9 were inadequately trained, supervised or disciplined. Personal participation in the acts that  
10 directly lead to the constitutional harm are not a necessary element of supervisory liability.

11 The bulk of Defendants' argument in favor of summary judgment as to DeRosia is  
12 aimed at the proposition that a suit against an officer in his *official* capacity is the same as a  
13 suit against the entity and therefore the supervisory officer in his official capacity is an  
14 unnecessary party to the action. See Kentucky v. Graham, 473 U.S. 159, 165-166 (1985).  
15 Plaintiffs do not dispute Defendants' contentions with regard to an action against a  
16 supervisor in his official capacity. Rather, Plaintiffs point to evidence, primarily in the form  
17 of expert opinion testimony, tending to show that both the training that Defendant Mejia  
18 received prior to the shooting, and the review of cases of officer involved shootings, including  
19 Mejia's shooting in this case, are not adequately investigated and retraining or other corrective  
20 action is not taken. See Declaration of Roger A. Clark, Document # 61 at ¶ 12 (listing  
21 conclusions regarding insufficiency of police officer training and supervision and  
22 insufficiency of investigation of OIS instances).

23 The court construes Plaintiffs' Fourth Claim for Relief, as set forth in the SAC, as  
24 alleging a claim against DeRosia in his *individual* capacity for deficient supervision and  
25 training. The merits of Plaintiffs' supervisory claim against DeRosia will be discussed below.  
26 The court finds Defendants' argument that DeRosia is not a proper defendant because he did  
27  
28

1 not personally participate in the conduct giving rise to Decedent's harm to be without merit.

2 **II. Motion for Summary Judgment as to Individual Defendants Manuele and Mejia**

3 Plaintiff's first claim for relief alleges violation of Decedent's rights under the Fourth  
4 Amendment. Four separate theories of violation are alleged in the single claim for relief.  
5 They are; unlawful entry/search of the premises, unlawful application of force in performing a  
6 seizure, unlawful delay in securing aid for injuries caused by the officers' actions, and  
7 conspiracy to deny access to the courts by way of cover-up. Each of these sub-claims are  
8 alleged against both Mejia and Manuele.

9 ***A. Unlawful Entry - Manuele and Mejia***

10 With regard to the allegation of an unlawful entry into the apartment by Decedent,  
11 Defendants' arguments for summary judgment are close to, or the same as, those made in  
12 opposition to Plaintiffs' motion for summary adjudication on the same issue. As is evident  
13 from the discussion above relating to Plaintiffs' motion for summary adjudication on the issue  
14 of unlawful entry, the court concludes that Defendants have definitely not carried their burden  
15 to show there remains no issue of material fact as to the entry of Mejia and Manuele into the  
16 apartment rented by Decedent. There is no question that both officers entered. As discussed  
17 above, Defendants have failed to show that there were exigent circumstances requiring the  
18 entry of Mejia or Manuele through the unlocked door that was an entry way into the apartment  
19 rented by Decedent. Even if it could be established that the 9-1-1 call Mrs. Nunez made was  
20 sufficient to confer implied consent to search the residence, Defendants would still not be  
21 entitled to summary judgment because the facts, now taken in the light most favorable to  
22 Plaintiffs, establish that Mrs. Nunez informed all the police responders present that the  
23 apartment had a renter. If a jury could find that Manuele and Mejia knew or reasonably  
24 should have known that the apartment had a renter, they could not reasonably believe they had  
25 permission to enter that space. The court therefore finds that summary judgment is not  
26 appropriate as to the entry of both Manuele and Mejia into the apartment occupied by  
27

1 Decedent.

2 ***B. Unlawful Use of Force***

3 A seizure is a “governmental termination of freedom of movement through means  
4 intentionally applied,” Jensen v. City of Oxnard, 145 F.3d 1078, 1083 (9th Cir.1998) (internal  
5 quotation marks and citation omitted), and occurs “whenever [an officer] restrains the  
6 individual's freedom to walk away.” Robins v. Harum, 773 F.2d 1004, 1009 (9th Cir.1985).  
7 An intentional shooting by a police officer constitutes a seizure for purposes of the Fourth  
8 Amendment. Jensen, 145 F.3d at 1078. “To determine if a Fourth Amendment violation has  
9 occurred, we must balance the extent of the intrusion in the individual’s Fourth Amendment  
10 rights against the government’s interests to determine whether the officer’s conduct was  
11 objectively reasonable based on the totality of the circumstances. [Citation.]” Espinosa v. City  
12 and County of San Francisco, 598 F.3d 528, 537 (9th Cir. 2010) (citing Graham v. Connor,  
13 490 U.S. 386, 396-397 (1989). “An objectively unreasonable use of force is constitutionally  
14 excessive and violates the Fourth Amendment’s prohibition against unreasonable seizures.”  
15 Torres v. City of Madera, 648 F.3d 1119, 1123-1124 (9th Cir. 2011). “Law enforcement  
16 officers may not shoot to kill unless, at a minimum, the suspect presents an immediate threat  
17 to the officer or others, or is fleeing and his escape will result in a serious threat of injury to  
18 persons.” Harris v. Roderick, 126 F.3d 1189, 1201 (9th Cir. 1997).

19 A court analyzes the reasonableness of the force employed in police seizure according  
20 to the factors set forth by the Supreme Court in Graham. The Graham, Court employed “a  
21 non-exhaustive list of factors” which include “(1) the severity of the crime at issue; (2)  
22 whether the suspect poses an immediate threat to the safety of the officers or others; and (3)  
23 whether the suspect actively resists detention or attempts to escape.” Liston v. County of  
24 Riverside, 120 F.3d 965, 976 (9th Cir. 1997) (citing Graham, 490 U.S. at 388). The central  
25 issue in an action for unlawful use of force is whether the victim of the force used presented  
26 an immediate threat to the safety of the officers or bystanders. See Shannon v. City of Costa

1 Mesa, 46 F.3d 1145, 1995 WL 45723 (9th Cir. 1995) at \*4 (the most important element in an  
2 excessive force claim is whether the suspect poses an immediate threat to the safety of the  
3 officers or others).

4 ***1. Mejia***

5 Putting aside the issue of whether Mejia and Manuele were legally within the  
6 apartment space rented by Decedent, Defendants allege a set of facts that, if found true, would  
7 tend to establish that as Mejia and Manuele advanced down the narrow hallway after entering  
8 from the outside, they heard a sound they thought might be an intruder preparing to resist the  
9 police presence. Shortly thereafter they encountered Decedent who was advancing rapidly and  
10 menacingly and, while clad only in boxer shorts, was holding his hands in a way that made it  
11 impossible for Mejia to tell if he was holding a dangerous weapon. As Decedent advanced, he  
12 made a menacing noise and Mejia reasonably feared for his safety and fired his weapon only  
13 when he was prevented from retreating further because Manuele was in the way.

14 Almost every one of Defendants' proffered undisputed material facts that tend to  
15 establish the foregoing narrative are sharply disputed by Plaintiffs. Plaintiffs submit  
16 deposition testimony by Manuele that tends to contradict Defendants allegation that Decedent  
17 was advancing quickly on Mejia, or that Manuele was standing behind, and therefore blocking  
18 the retreat of, Mejia. Plaintiffs' proffer of deposition testimony tends to show that Manuele,  
19 who was standing next to Mejia, could tell that Decedent was unarmed and that his hands  
20 were raised and that there was no reason for Mejia to have reasonably believed that he was in  
21 imminent danger of death or injury. Since the court is considering Defendants' motion,  
22 Plaintiff's version of the facts is accepted so long as there is some evidence that tends to  
23 establish those facts. Here, the court concludes that Plaintiffs have made an adequate showing  
24 that there remains an issue of material facts as to whether Mejia's use of force was reasonable  
25 under all the circumstances. Summary Judgment as to Mejia is therefore not warranted on the  
26 excessive force claim.

1                                   **2. Manuele**

2                                   Defendants contend that Manuele cannot be held liable as to Plaintiffs’ claim for  
3 excessive use of force because Manuele’s conduct did not harm Decedent. Plaintiffs contend  
4 that Manuele used excessive force when he pointed his service weapon at Decedent and that  
5 Manuele was an “integral participant” in Mejia’s excessive use of force. Defendants correctly  
6 note that “pointing a loaded gun at a suspect, employing the threat of force, is use of a high  
7 level of force.” Espinosa v. City & County of San Francisco, 598 F.3d 528, 537-538 (9th Cir.  
8 2010". Thus, use of unreasonable force may be found whether or not there is an actual  
9 discharge of a weapon causing harm. Again, because the motion currently under  
10 consideration is Defendants’, the court must construe the hotly disputed material facts in favor  
11 of the non-moving party. At the very minimum, Plaintiffs’ version of the facts, believed by a  
12 jury, could support a finding that the officers who encountered Decedent observed that he was  
13 not armed, was not behaving in a hostile or threatening manner and was clad only in his  
14 underwear. By the same token, the court certainly cannot rule out the possibility that a jury  
15 would reject Defendants’ contention that it was reasonable for Manuele and Mejia to believe  
16 that Decedent was just another PCP ingesting burglar breaking into someone’s house in his  
17 underpants.

18                                   Given the facts currently in contention in this case, the court has no basis to find that  
19 there remains no issue of material fact whether Manuele *or* Mejia conducted themselves  
20 reasonably when they confronted Decedent with loaded weapons. Summary judgment is  
21 therefore not warranted as to either Mejia or Manuele on the issue of excessive use of force in  
22 violation of Decedent’s Fourth Amendment Rights.

23                                   **C. Conspiracy to Restrict Access To The Court**

24                                   At paragraph 39(3) of Plaintiffs’ SAC, Plaintiffs alleged that Decedent’s right to  
25 access to the courts was infringed by the falsification of evidence by the reporting officers.  
26 Plaintiff alleges that the falsification “was part of the custom of the code of silence by the  
27  
28

1 [D]efendants to delay, hinder and obstruct [Decedent's] constitutional right to access to courts  
2 and justice.” Id. In their motion for summary judgment, Defendants attack the sufficiency of  
3 Plaintiffs’ SAC by pointing out that Plaintiffs failed to allege what, specifically, was falsified  
4 and how such falsification, if any, prevented Plaintiffs’ access to the courts. See Doc. # 42 at  
5 38:13-39:20. So far as the court can determine, Plaintiffs have not opposed Defendants’  
6 motion for summary judgment on the issue of conspiracy to prevent access to the courts.  
7 Where a defendant moves for summary judgment and the plaintiff does not oppose or raise the  
8 claim in opposition, the claim is deemed abandoned. Jenkins v. County of Riverside, 398F.3d  
9 1093, 1095 n.4 (9th Cir. 2005). Summary judgment will be granted in favor of Defendants on  
10 the issue of conspiracy to deprive Decedent of access to the courts.

### 11 **III. Fourteenth Amendment Claims**

12 Plaintiffs’ SAC alleges two claims pursuant to the substantive due process clause of  
13 the Fourteenth Amendment. The first claim, improvidently set forth in Plaintiffs’ first claim  
14 for relief, alleges Mejia and Manuele were deliberately indifferent to Decedent’s condition and  
15 failed to render aid to ameliorate a condition they had caused. The second claim is a claim by  
16 Plaintiff and her son, R.G. for loss of companionship and support of Decedent. The court will  
17 consider Defendants’ motion for summary judgment as to each claim in turn.

#### 18 ***A. Failure to Provide Aid***

19 In a prior memorandum opinion and order, the court dismissed Plaintiffs’ failure to aid  
20 claim against then-defendant County of Kern, which was alleged on the basis of a 20-minute  
21 response between the time of the call for medical assistance and the arrival of the ambulance.  
22 In Plaintiffs’ SAC, the claim for constitutional harm arising from failure to aid is aimed at  
23 officers Mejia and Manuele. The SAC alleges that Mejia and Manuele delayed (for an  
24 undisclosed period of time) in calling for medical assistance and that neither rendered any aid  
25 at the scene.

26 Although the [Fourteenth] Amendment does not generally require police  
27 officers to provide medical assistance to private citizens, DeShaney v.

1 [Winnebago County Dept. Soc. Svcs., 489 U.S. 189, 197 (1989)] (holding that  
2 the due process clause does not generally confer affirmative rights to  
3 governmental aid, even where such aid may be necessary to secure life), when a  
4 state officer's conduct places a person in peril in deliberate indifference to their  
5 safety, that conduct creates a constitutional claim. See L.W. v. Grubbs, 974  
6 F.2d 119 (9th Cir. 1992) [ . . . ] (concluding a valid section 1983 claim existed  
7 against a supervisor at a state facility who placed plaintiff in danger by  
8 assigning her to work with an inmate sex offender who had a history of violent  
9 assaults on women; he subsequently raped and kidnaped her); Wood v.  
10 Ostrander, 879 F.2d 583 (9th Cir. 1989) [ . . . ] (concluding that a valid section  
11 1983 claim existed against a state police officer who caused a woman to be  
12 stranded in a high-crime area at night where she was subsequently raped).

13 Penilla v. City of Huntington Park, 115 F.3d 707, 709 (9th Cir. 1997).

14 "Deliberate indifference is 'a stringent standard of fault; requiring proof that a  
15 municipal actor disregarded a known or obvious consequence of his action.' [Citation.]" Id.  
16 (quoting Bryan Cnty. Brown, 520 U.S. 397, 410 (1997). Pursuant to L.W. v. Grubbs, 92 F.3d  
17 894 (9th Cir 1996).

18 We define the contours of deliberate indifference in [L.W. v. Grubbs, 92 F.3d  
19 894, 898-900 (9th Cir. 1996)]. Under Grubbs, the standard we apply is even  
20 higher than gross negligence – deliberate indifference requires a culpable  
21 mental state. Id. The state actor must "recognize[ ] [an] unreasonable risk and  
22 actually intend[ ] to expose the plaintiff to such risks without regard to the  
23 consequences to the plaintiff." Id. at 899 (internal quotation omitted). In other  
24 words, the defendant "knows that something *is* going to happen but ignores the  
25 risk and exposes [the plaintiff] to it." Id. at 900. The deliberate-indifference  
26 inquiry should go to the jury if any rational factfinder could find this requisite  
27 mental state. [Citation].

28 Patel v. Kent School Dist., 648 F.3d 965, 974 (9th Cir. 2011).

Plaintiffs' primary contention is that Mejia and Manuele acted with deliberate  
indifference when they failed to render *any* aid themselves prior to the arrival of paramedics.  
In addition, there is an inference, if not outright allegation, that there was an unwarranted  
delay between the time Decedent was shot and the time Manuele radioed for a medical  
response unit. The court presumes the delay in requesting an ambulance corresponds to the  
time Mejia and Manuele spent "clearing" the remainder of Decedent's apartment area.

There is no question that the shooting of Decedent by Mejia placed Decedent in a  
perilous situation. Whether the officers' conduct can be said to amount to deliberate

1 indifference depends on whether either the delay (if any) in radioing for an ambulance *or* the  
2 non-performance of first aid by the officers can be said to amount to a conscious disregard of  
3 Decedent's condition. With regard to the delay, if any, in making the call for ambulance  
4 assistance, Defendants allege, and Plaintiffs do not dispute, that Mejia and Manuele proceeded  
5 to examine the rest of the apartment area for intruders because they held the subjective belief  
6 they could encounter another, potentially dangerous person lurking elsewhere in the  
7 apartment. Whether or not this belief was reasonable, there is no doubt that any delay in  
8 making the radio request for ambulance assistance was due to the perceived need to complete  
9 the search, not because of a conscious neglect of Decedent and his condition.

10 With regard to the failure to provide first aid during the time between the radio request  
11 for medical assistance and the time the ambulance arrived, the court regards the failure to  
12 provide first aid as the risk to which Decedent was exposed. From that point of view,  
13 deliberate indifference requires a showing that Mejia and Manuele *knew* that by not  
14 performing any hands-on first aid, they were subjecting Decedent to a substantially greater risk  
15 that if they had applied first aid. Plaintiffs have alleged no facts that would allow the court to  
16 make that presumption. Pursuant to Panilla and other cases that illustrate deliberate  
17 indifference, the court must have some basis, whether it be common experience or a  
18 demonstration of what the officers actually knew, to make the determination that it was clear  
19 under the circumstances that a reasonable officer would have perceived a substantially greater  
20 risk of harm arising from the non-performance of the first aid measures that Plaintiffs suggest  
21 should have been taken. The court cannot make this determination. It is not at all clear to the  
22 court that the officers knew or should have known that their failure to do anything to or for  
23 Decedent would substantially increasing the risk to decedent. What steps should be taken in  
24 the event of a bullet wound to the chest is not self-evident. In the absence of a showing that  
25 there is a piece of knowledge that would be possessed by any reasonable police officer  
26 indicating that some particular first aid should be rendered, the court cannot find that the



1 failure to provide hands-on first aid is evidence of deliberate indifference.

2 Defendants' motion for summary judgment as to Plaintiffs' Fourteenth Amendment  
3 claim for deliberate indifference will therefore be granted.

4 ***B. Loss of Companionship and Support***

5 Plaintiffs Manuela Morales and R.A.M each allege a separate claim under the  
6 substantive due process clause against Mejia and Manuele for the loss of companionship and  
7 support of their husband and father, respectively. Somewhat strangely, Defendants' motion  
8 for summary judgment as to Plaintiffs' loss of companionship claims only addresses R.A.M.'s  
9 claim and Defendants' reply memorandum only gives a very cursory argument that Manuela  
10 Morales is not entitled to compensation under the Fourteenth Amendment because she had  
11 limited contact with Decedent and because Defendants caused no constitutional harm to  
12 Decedent. The court presumes it is Defendants' intent to oppose both claims on the grounds  
13 of a lack of a close relationship between the Plaintiffs and Decedent.

14 There is no actual dispute between the parties as to the legal standard for determining  
15 whether there is a violation of Fourteenth Amendment substantive due process rights. There  
16 is a constitutional interest in familial companionship and society that extends to children to the  
17 companionship and support of their parents just as the same constitutional interest exists in the  
18 relationship of parents to their children. Smith v. City of Fontana, 818 F.2d 1411, 1488 (9th  
19 Cir. 1983). The same principles establish a constitutional basis for the right of spouses to the  
20 support and companionship of each other. See Cosby v. City of Oakland, 1997 WL 703776  
21 (N.D. Cal. 1997) at \*5 n.6. A claim for loss of companionship implicates substantive due  
22 process rights under the Fourteenth Amendment. See Smith, 818 F.2d at 1419-1420 (because  
23 the state has no legitimate interest in interfering with liberty interests arising from familial ties  
24 by using excessive force, the protections offered by the substantive due process clause are  
25 appropriate). In the context of claims for loss of companionship, such claims are judged under  
26 the standards of "deliberate indifference or reckless disregard." See Smoot v. City of

1 Placentia, 950 F.Supp. 282, 283-284 (C.D. Cal. 1997) (citing Lewis v. Sacramento County, 98  
2 F.3d 434, 441 (9th Cir. 1996).

3           The facts alleged by Plaintiffs establish that, while Plaintiffs reside in Mexico and  
4 Decedent resided in Delano, California, the purpose of Decedent's residence in California was  
5 to earn and save money for the purpose of buying property in Mexico. Plaintiffs allege that  
6 Decedent sent money on a regular basis to Plaintiffs. Defendants allege that R.A.M. has had  
7 little on-going relationship with Decedent and that he cannot therefore maintain a Fourteenth  
8 Amendment claim against Defendants. At the same time, Defendants admit that R.A.M. had  
9 at least one instance of direct contact with his father.

10           While Defendants' motion for summary judgment on the issue of Plaintiffs' loss of  
11 companionship and support claim is mostly barren of facts that would be relevant to the  
12 court's determination, Plaintiffs' claim for summary adjudication is relatively rich in facts that  
13 are irrelevant to that motion but are quite relevant to the relationship that existed between  
14 Decedent and his wife and child. Significantly, Defendants did not dispute the truth of the  
15 facts relating to the existing relationship between Decedent and his wife and child, only their  
16 relevance. When the court considers those facts in the context of Defendants' motion for  
17 summary judgment on Plaintiffs' Fourteenth Amendment claims for loss of support and  
18 companionship, the court has no difficulty in determining that Defendants' contention that the  
19 claims of Decedent's wife and child must fail because of the lack of physical closeness is  
20 without merit. Based on Plaintiffs' alleged facts, the court finds that Decedent and his family,  
21 while physically separated, had a relationship based on commitment, sacrifice, effort toward a  
22 commonly held goal and a vision of an improved lot in life. The court cannot say that, as a  
23 matter of law, that relationship was less worthy of Fourteenth Amendment protection than a  
24 more conventional one.

25           Defendants also contend that they are entitled to summary judgment because Plaintiffs  
26 cannot show that the actions of Mejia and Manuele evince deliberate indifference or reckless  
27

1 disregard of the rights of Decedent's wife and child. The court disagrees. Again, taking the  
2 facts that are currently sharply disputed in the light most favorable to Plaintiffs, they tend to  
3 show that Mejia and Manuele knew or should have known that they were entering a private  
4 and separate space where Decedent had a constitutionally-guaranteed privacy interest. After  
5 unlawfully entering the Decedent's apartment space, Mejia and Manuele encountered a plainly  
6 unarmed person who was not advancing on or threatening the officers. Under this set of facts,  
7 which may or may not be proven at trial, the court has no problem finding that a jury could  
8 find the necessary state of mind with regard to Majia and Manuele. The court concludes that  
9 Defendants are not entitled to summary judgment as to Plaintiffs' claims for loss of  
10 companionship and support under the Fourteenth Amendment.

#### 11 **IV. Supervisor Liability – City of Delano and DeRosia**

12 Plaintiffs' SAC alleges a claim against Defendant City of Delano for failure to  
13 properly select and train officers and failure to properly investigate instances of officer  
14 involved shootings and failure to take appropriate remedial action subsequent to officer  
15 involved shootings. A municipal entity is liable only for the actions of "its lawmakers or by  
16 those whose edicts or acts may fairly be said to represent official policy." Monell v. Dep't of  
17 Soc. Services, 436 U.S. 658, 694 (1978). "To hold a local government liable for an official's  
18 conduct, a plaintiff must first establish that the official (1) had final policymaking authority  
19 'concerning the action alleged to have caused the particular constitutional or statutory  
20 violation at issue' and (2) was the policymaker for the local governing body for the purposes of  
21 the particular act." Weiner v. San Diego County, 210 F.3d 1025, 1028 (9th Cir.2000) (quoting  
22 McMillian, 520 U.S. at 785, 117 S.Ct. 1734). "A municipality is not liable for the random acts  
23 or isolated incidents of unconstitutional action by a non-policymaking employee. [Citations.]"  
24 Sepatis v. City and County of San Francisco, 217 F.Supp.2d 992, 1005 (N.D. Cal. 2002).  
25 "Rather, to impose municipal liability for a violation of constitutional rights, a plaintiff must  
26 show: (1) that plaintiff was deprived of a constitutional right; (2) that the municipality had a  
27

1 policy; (3) that this policy amounted to deliberate indifference of plaintiff's constitutional  
2 rights; and (4) that the policy was the moving force behind the constitutional violation." Id.  
3 (citing Plumeau v. Sch. Dist. #40 County of Yamhill, 130 F.3d 432, 438 (9th Cir. 1997).

4 Case authority in this circuit has broadened the meaning of "policy" such that a  
5 plaintiff may establish municipal liability "by demonstrating that (1) the constitutional tort  
6 was the result of a 'longstanding practice or custom which constitutes the standard operating  
7 procedure of the local government entity;' or (2) the tortfeasor was an official whose acts  
8 fairly represent official policy such that the challenged action constituted official policy; or (3)  
9 an official with final policy-making authority 'delegated that authority to, or ratified the  
10 decision of, a subordinate.' [Citation]" Price v. Sery, 513 F.3d 962, 966 (9th Cir. 2008)  
11 (quoting Ulrich v. City & County of San Francisco, 308 F.3d 968, 984-985 (9th Cir. 2002).  
12 Further, a policy "may be inferred from widespread practices or 'evidence of repeated  
13 constitutional violations for which the errant municipal officers were not discharged or  
14 reprimanded.'" Nadell v. Las Vegas Metro. Police Dept., 268 F.3d 924, 929 (9th Cir. 2001)  
15 (quoting Gillette v. Delmore, 979 F.2d 1342, 1349 (9th Cir. 1992). "A plaintiff need not show  
16 that a municipality affirmatively encouraged officers to take the lives of citizens; rather a  
17 municipality may be liable under Section 1983 for constitutional injuries inflicted by its  
18 officers if it fails to adequately guard against such injuries through training and supervision."  
19 Perrin v. Gentner, 177 F.Supp.2d 1115, 1123 (D. Nev. 2001). "A municipality will be held to  
20 a 'constructive notice' standard for failing to take corrective measures where information  
21 about officer misconduct plainly indicates a need for such measures." Id.

22 Plaintiffs' opposition to Defendant Monell claim relies primarily on the Declaration of  
23 Roger Clark, Doc. # 61. The Clark Declaration makes two allegations that are relevant to this  
24 inquiry. First, Clark alleges that Mejia, a Level II reserve officer, had not received critical  
25 POST training, including "'shoot-don't shoot' training reinforced by role play and simulation  
26 required in the POST basic curriculum." Clark Dec. at ¶ f. Clark alleges that this lack of  
27

1 training directly resulted in the shooting of Decedent, which was completely unwarranted and  
2 avoidable with the use of proper procedures. Clark states that Mejia was deployed into  
3 situations such as the one under consideration without any testing “to make sure he could  
4 competently be part of an officer response to a possible residential burglary in progress.” Id.

5 The second area where Clark’s Declaration sets forth opinion that may implicate City  
6 of Delano has to do with the response of Police Department Officials to the Internal Affairs  
7 investigation of the shooting and the failure of that investigation to note any of what Clark  
8 opines are glaring and obvious problems with the investigation itself and with the conclusions  
9 drawn by the investigators. Clark opines that the Internal Affairs investigation outcome “is  
10 reflective of a custom and practice within the Delano Police Department to look the other way  
11 rather than hold to their written and publically expressed policies and procedures.

12 With regard to Clark’s opinion that the Internal Affairs investigation of Mejia’s  
13 shooting of Decedent was inadequately conducted and that the acceptance of the  
14 investigation’s findings constitutes ratification of unconstitutional conduct, the court finds that  
15 these alleged facts are not sufficient to establish a claim for entity or supervisor liability.  
16 Plaintiffs rely heavily on Larez v. City of Los Angeles, for the proposition that failure to  
17 adequately investigate an instance of unconstitutional force can indicate the supervisor’s  
18 ratification and the existence of a policy reflecting deliberate indifference of citizen’s  
19 constitutional rights. District courts in California have, however, declined to apply Larez  
20 where there is no evidence of a history of similarly whitewashed investigations. For example,  
21 this court, in Jones v. County of Sacramento, 2010 WL 2843409 (E.D. Cal. 2010), noted the  
22 fact that in Larez and in Watkins v. City of Oakland, 145 F.3d 1087, 1093-94 (9th Cir. 1997),  
23 a case that followed Larez, the factual predicates of a finding of possible supervisor liability  
24 based on failure to adequately investigate involved the existence of evidence tending to  
25 indicate that the report that was not acted on was preceded by other indications of the type of  
26 unconstitutional behavior complained of. Jones, 2010 WL 2843409 at \*6; see also, Phillips v.

1 City of Fairfield, 406 F.Supp.2d 1101, 1116 (E.D. Cal. 2005) (finding Larez not applicable  
2 where there is no evidence of prior disregard of officer misconduct). The court finds that there  
3 is not enough evidence of past disregard of misconduct of officer involved shootings for the  
4 court to find that Mejia's shooting was the result of a policy established by the disregard of  
5 police officials who had prior notice of patterns of use of unlawful force.

6 Plaintiffs also content that City of Delano and DeRosia are liable because Mejia, a  
7 reserve officer, was inadequately trained to handle the situation into which he was deployed.  
8 Plaintiffs allege Mejia was deployed pursuant to a policy established by a city official (Police  
9 Chief DeRosia) that resulted in Decedent's constitutional injury. There is no allegation that  
10 DeRosia is not an official with policy-making authority within the Police Department. For  
11 purposes of this analysis, the court assumes that Plaintiffs' version of the facts are true, in  
12 which case a constitutional violation of Decedents' rights is established. Plaintiffs' allege that  
13 Mejia did not receive the training normally required of an officer responding to a situation  
14 such as the one at bar because of his status as Reserve Officer II. Essentially all of the  
15 undisputed material facts alleged by Defendants regarding Mejia's level of training and  
16 experience are disputed by Plaintiffs. Resolving all disputed factual issues in favor of the  
17 non-moving party, the court finds there is evidence from which a jury could conclude that  
18 Mejia was not sufficiently qualified to handle the situation into which he had been deployed.

19 If, based on Plaintiffs' version of the facts, a trier of fact were to find that Mejia was  
20 inadequately trained with regard to the use of lethal force, then the constitutional harm  
21 suffered by Decedent can be understood to flow from: (1) the decision of Mejia and Manuele  
22 to enter the apartment, and (2) the position of Mejia as the lead officer or his positioning so as  
23 to be the first to confront Decedent. Plaintiffs' claim for supervisory and entity liability on the  
24 issue of training and supervision therefore turns on the question of whether Mejia entry into  
25 the apartment and his placement in a front position as the officers entered was within  
26 established departmental policy. At present, the court lacks information necessary to make  
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28

1 this determination. Given the level of dispute as to the underlying facts, it is unlikely that  
2 anything short of trial would be sufficient to resolve the underlying factual situation. The  
3 court will therefore deny Defendants' motion for summary judgment on the issue of entity and  
4 supervisory liability without prejudice and subject to renewal at any appropriate point up to  
5 and through trial.

#### 6 **V. Qualified Immunity: Excessive Force Claims**

7 The court has previously discussed the standard for determining claims of qualified  
8 immunity and has found that an issue of qualified immunity remains as to Defendants' claim  
9 for qualified immunity with respect to the unwarranted entry into the apartment. With regard  
10 to Plaintiffs' claims for violation of Fourteenth Amendment rights against use of excessive  
11 force, the court finds qualified immunity is plainly not applicable. The contours of the Fourth  
12 Amendment right against excessive force were thoroughly defined as of the date of the  
13 conduct at issue here. If the court's accepts Plaintiffs' version of the disputed facts as true, as  
14 it must, then there is no doubt that no reasonable officer in Mejia's situation could have  
15 believed that Decedent posed an imminent threat of death or bodily harm to either officer or to  
16 the public. Therefore, a reasonable officer under those facts could not have believed that the  
17 use of lethal force would not be unconstitutional.

18 The court concludes Mejia and Manuele are not entitled to qualified immunity as to  
19 Plaintiff's claims for unconstitutional use of force.

#### 20 **VI. State Law Claims**

##### 21 *A. Battery*

22 Plaintiffs' sixth and seventh claims for relief allege battery against Defendant Mejia  
23 and negligence against both Manuele and Mejia. Defendants contend that the battery claim  
24 against Mejia must be determined by the same reasonableness standard that is used to  
25 determine the excessive force claim under the Fourth Amendment. See Doc. # 42 at 52:15:18  
26 (citing Edison v. Ahaheim, 63 Cal.App.4th 1269, 1274-1275 (1998)). Defendants contend  
27

1 that “once it is determined that an officer’s conduct did not violate Plaintiffs’ federal rights,  
2 their corresponding claims of negligence and battery must be dismissed. Simi Valley  
3 Superior Court, (2003) 111 Cal.App.4th 1077, 1084.” Id. at 19-22. Presuming Defendants  
4 contentions to accurately reflect applicable law, the court must deny Defendants’ motion for  
5 summary judgment as to Plaintiffs’ battery claim because it cannot dismiss the corresponding  
6 federal claim under the Fourth Amendment.

7 ***B. Negligence***

8 As this court has previously noted, negligence is measured by the same standard as  
9 battery and excessive use of force under the Fourteenth Amendment. See Abston v. City of  
10 Merced, 2011 WL 2118517 (E.D. Cal. 2011) at \*16 (“Plaintiffs’ claim for negligence-  
11 wrongful death flows from the same facts as the alleged Fourth Amendment violation for  
12 excessive force and are measured by the same reasonableness standard.”). To this, Defendants  
13 add the contention that negligence cannot be found from the manner in which the officers  
14 deployed. See Doc. # 42 at 53:1-5 (citing Brown v. Ransweiler, 171 Cal.App.4th 516, 535  
15 (2009). Defendants’ motion for summary judgment on Plaintiffs’ claim for negligence must  
16 fail for the same reason as the motion for summary judgement on the claims for excessive  
17 force and battery must fail; the facts, taken in the light most favorable to Plaintiffs are  
18 sufficient to support these claims. That a claim for negligence cannot be based on the manner  
19 in which the officer or the force was deployed is not determinative of the validity of Plaintiffs’  
20 claim. Seen in the factual light most favorable to Plaintiffs, no amount of force would have  
21 been reasonable against a person known to be unarmed and not threatening and lawfully on  
22 the premises.

23 ***C. Wrongful Death***

24 “The elements of the cause of action for wrongful death are the tort (negligence or  
25 other wrongful act), the resulting death, and the damages, consisting of the pecuniary loss  
26 suffered by the heirs.” Quiroz v. Seventh Ave. Center, 140 Cal.App.4th 1256, 1263 (2006);  
27



1 Wright v. City of Los Angeles, 219 Cal.App.3d 318, 344, (1990). The California Supreme  
2 Court has held that “an officer's lack of due care can give rise to negligence liability for the  
3 intentional shooting death of a suspect.” Munoz v. Olin, 24 Cal.3d 629, 634 (1979) (citing  
4 Grudt v. City of Los Angeles, 2 Cal.3d 575, 587 (1970)). Thus, the tort claims for wrongful  
5 death and negligence are connected for purposes of the present motion for summary judgment  
6 in that the ability of either to withstand Defendants’ summary judgment motion is dependent  
7 on Plaintiffs’ ability to show there remains an issue of material fact as to whether Mejia’s  
8 shooting of Decedent was negligent.

9 The court concludes that Defendants are not entitled to summary judgment as to any of  
10 Plaintiffs’ state law claims.

## 11 **VII. Pain and Suffering**

12 Subsection 377.34 of the California Code of Civil Procedure prohibits recovery for  
13 pain and suffering on behalf a decedent by the personal representative or successor in interests  
14 on the decedent’s cause of action. As Plaintiffs note, district courts in California have split on  
15 the issue of whether an section 377.34 is a bar to the recovery for pain and suffering or  
16 hedonic damages in California in actions pursuant to section 1983. In the Eastern District,  
17 courts have, for the most part, followed the decision in Venerable v. City of Sacramento, 185  
18 F.Supp.2d 1128, 1133 (E.D. Cal. 2002) holding that California’s prohibition of recovery for  
19 hedonic damages under section 377.34 is not unconstitutional and does not conflict with the  
20 purpose of 42 U.S.C. section 1983. Other district courts in the Northern and Central Districts  
21 have concluded that California’s limitations on recovery for pain and suffering are  
22 inconsistent with the purposes of section 1983 and have declined to apply California’s  
23 statutory limitation in 1983 cases. See, e.g. Williams v. County of Oakland, 915 F.Supp. 1074  
24 (N.D. Cal. 1996); Garcia v. Whitehead, 961 F.Supp. 230, 233 (C.D. Cal. 1997) (“California’s  
25 survivorship statute is inconsistent with the purposes of section 1983 because it excludes  
26 damages for pain and suffering of the decedent.”). While the trend in the Eastern District to  
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1 exclude damages for pain and suffering in section 1983 cases has been fairly consistent since  
2 the decision in Venerable, see Contreras v. County of Glen, 725 F.Supp.2d 1151, 1155-1156  
3 (E.D. Cal. 2010) some courts have followed only reluctantly. See e.g. Duenez v. City of  
4 Manteca, 2011 WL 5118912 (E.D. Cal. 2011) at \*9.

5 This court will follow the line of cases that predominate in this district by granting  
6 summary judgment on Plaintiffs' claim for pain and suffering for two reasons. First, like the  
7 court in Duenez, this court is concerned that parties that come before District courts in this  
8 district should be treated similarly and second, this court feels the instant case presents a rather  
9 weak set of facts to support a departure from district practice. In this action, there is little  
10 evidence to support a claim for significant pain or suffering and there is, at the same time, a  
11 fairly rich basis for recovery of damages on other grounds.

12 The court will grant Defendants' motion for summary judgment as to Plaintiffs' claims  
13 for compensation for Decedents' pain and suffering.

14  
15 THEREFORE, in accord with the foregoing discussion, it is hereby ORDERED that:

- 16 1. Plaintiffs' motion for summary judgment as to Plaintiffs' claim of violation of  
17 Decedent's Fourth Amendment right against unlawful search is hereby STAYED.  
18 Each party shall submit additional briefing setting forth additional alleged facts and  
19 legal argument on the issue in light of the foregoing discussion. Such additional  
20 briefing shall be filed and served not later than seven (7) days from the date of service  
21 of this order. Defendants' motion for summary judgment on the issue of unlawful  
22 search is correspondingly STAYED.
- 23 2. Defendants' motion for summary judgment as to Mejia and Manuele on Decedent's  
24 claims under the Fourth Amendment, including claims for unlawful use of force, is  
25 hereby DENIED.
- 26 3. Defendants' motion for summary judgment on Plaintiffs' claim of conspiracy to deny  
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1 access to the courts is hereby GRANTED.

2 4. Defendants' motion for summary judgment on Decedent's claim under the Fourteenth  
3 Amendment for failure to provide aid is hereby GRANTED.

4 5. Defendants' motion for summary judgment on Plaintiffs' claim under the Fourteenth  
5 Amendment for loss of support and companionship is hereby DENIED.

6 6. Defendants' motion for summary judgment on Decedent's claims against DeRosia and  
7 the City of Delano on the theory of failure to properly supervise, select or train is  
8 hereby DENIED WITHOUT PREJUDICE. The motion shall be subject to renewal at  
9 any time deemed proper by Defendants.

10 7. Defendants' motion for summary judgment on Decedent's claims under California  
11 state law for battery, wrongful death and negligence are each hereby DENIED.

12 8. Defendants' motion for summary judgment on Decedent's claims for pain and  
13 suffering is hereby GRANTED.

14 IT IS SO ORDERED.

15 Dated: February 14, 2012

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18 CHIEF UNITED STATES DISTRICT JUDGE  
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