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6 **UNITED STATES DISTRICT COURT**

7 EASTERN DISTRICT OF CALIFORNIA

9 ANGEL KEITH TOSCANO, JR., et al.,

10 Plaintiffs,

11 v.

12 CITY OF FRESNO, et al.,

13 Defendants.

Case No. 1:13-cv-01987-SAB

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

(ECF Nos. 45, 46, 47, 50)

14
15 Currently before the Court is Defendants' partial motion for summary judgment filed
16 June 1, 2015. (ECF No. 45.)

17 Oral argument on Defendants' motion for summary judgment was heard on July 22,
18 2015. Counsel Ryan Nelson appeared for Plaintiffs Angel Keith Toscano, Jr., Cole Toscano, and
19 Steven Wade Toscano; counsel Andrew Butler Jones appeared for Plaintiffs Anthony Keith
20 Toscano, Julian Matthew Toscano, Angel Infinity Toscano, and Jimmy Lee Long; and counsel
21 Bruce Daniel Praet appeared for Defendants City of Fresno and Lyon. (Id.) Having considered
22 the moving, opposition and reply papers, the declarations and exhibits attached thereto,
23 arguments presented at the July 22, 2012 hearing, as well as the Court's file, the Court issues the
24 following order.

25 **I.**

26 **BACKGROUND**

27 On August 23, 2013, at approximately 7:30 p.m., decedent Angel Keith Toscano and his
28 friend were riding bicycles in the vicinity of Princeton and Glenn Avenues in the City of Fresno.

1 Officers James Lyon and Kenneth Webb attempted to conduct a traffic stop. While his friend
2 stopped, the decedent rode away and Officer Lyon gave chase. During the chase, the decedent
3 was run over by Officer Lyon’s patrol vehicle. Plaintiffs, as successors-in-interest, filed this
4 action on December 4, 2013. (ECF No. 1.) The operative complaint in this action is the first
5 amended complaint, filed May 9, 2014 against Defendants City of Fresno, Chief Jerry Dyer,
6 Officer James Lyon, and Officer Kenneth Webb alleging violations of the Fourth and Fourteenth
7 Amendments and state law claims. (ECF No. 19.)

8 On June 1, 2015, Defendants filed a motion for partial summary judgment on the Fourth
9 and Fourteenth Amendment claims. (ECF No. 45.) Plaintiff filed an opposition on July 8, 2015.
10 (ECF No. 46.) Defendants filed a reply on July 13, 2015. (ECF No. 50.) On July 15, 2015,
11 Defendants Jerry Dyer and Kenneth Webb and the Monell claims were dismissed from this
12 action based upon the stipulation of the parties. (ECF Nos. 51, 52.)

13 II.

14 SUMMARY JUDGMENT LEGAL STANDARD

15 Under Federal Rule of Civil Procedure 56, “[a] party may move for summary judgment ...
16 if the movant shows that there is no genuine dispute as to any material fact and the movant is
17 entitled to judgment as a matter of law.” Summary judgment must be entered “against a party
18 who fails to make a showing sufficient to establish the existence of an element essential to that
19 party’s case...” Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). “[A] party seeking summary
20 judgment always bears the initial responsibility of informing the district court of the basis for its
21 motion, and identifying those portions of ‘the pleadings, depositions, answers to interrogatories,
22 and admissions on file, together with the affidavits, if any,’ which it believes demonstrate the
23 absence of a genuine issue of material fact.” Id.

24 If the moving party meets its initial responsibility, the burden then shifts to the opposing
25 party to establish that a genuine issue as to any material fact actually does exist. Matsushita
26 Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In attempting to establish the
27 existence of this factual dispute, the opposing party may not rely upon the denials of its
28 pleadings, but is required to tender evidence of specific facts in the form of affidavits, and/or

1 admissible discovery material, in support of its contention that the dispute exists. Fed. R. Civ. P.
2 56(e); Matsushita, 475 U.S. at 586 n.11.

3 **III.**

4 **UNDISPUTED FACTS**

5 1. On August 23, 2013, at about 7:30 p.m., Officers Lyon and Webb attempted to
6 detain decedent and another subject for observed traffic infractions.

7 2. Decedent elected to flee on his bicycle from Officer Lyon.

8 3. Officer Lyon initially chased the decedent for the minor traffic violations of riding
9 a bicycle on the wrong side of the road and failing to stop at a stop sign.

10 4. Officer Lyon chased the decedent up and down Glenn Avenue and then down an
11 alley for a total of approximately 1,200 feet.

12 5. While traveling on Glenn Avenue before entering the alley, the patrol car
13 operated by Officer Lyon achieved a speed of 43 mph.

14 6. Witness Galvan's impression was that the patrol car went 45 mph down Glenn
15 Avenue during this chase. She remembers thinking "wow, he's speeding."

16 7. The patrol car fishtailed into the alley still going a little fast; there was a really
17 loud revving sound as the patrol car went down the alley.

18 8. Considering the distance of the chase, the investigating officer, Detective Brian
19 Hance, was of the opinion that even he would have been tired riding a bicycle that distance.

20 9. During the chase, Officer Lyon forgot to activate his lights and siren.

21 10. Officer Lyon testified that he nearly always chases cyclists without use of lights
22 or siren.

23 11. The total chase took between one minute and one and one-half minutes.

24 12. As the decedent fled up an alley, Officer Lyon entered the alley at an estimated
25 speed of 15 mph.

26 13. As the decedent was fleeing on his bicycle down the narrow alley, he was struck
27 by Officer Lyon's patrol vehicle.

28 14. Officer Lyon admits exceeding the speed limit in the alley as he pursued the

1 decedent.

2 15. Before striking the decedent, Officer Lyon witnessed that the decedent's right foot
3 kept slipping off the pedal and that he was holding one hand against his chest.

4 16. Decedent died almost instantly after being accidentally run over.

5 17. As this pursuit ensued, Officer Lyon realized his vehicle posed a danger to the
6 decedent.

7 18. On the date of the accident, the patrol vehicle functioned properly. Officer Lyon
8 was responsible for the speed and movement of the vehicle.

9 19. As Officer Lyon chased the decedent in the alley, he admits to getting within five
10 feet of the decedent.

11 20. The investigating officer, Detective Brian Hance, found no evidence of any
12 braking before impact.

13 21. Officer Lyon never exceeded 21 mph while following decedent in the alley.

14 22. Officer Lyon's maximum speed just prior to impact did not exceed 19 mph.

15 23. Officer Lyon admits that he has been taught that it violates departmental
16 procedure to bump a bicycle to the ground; you cannot use a PIT maneuver on a bicycle.

17 24. Officer Lyon admits that it would constitute a use of deadly force to strike
18 someone intentionally with a vehicle.

19 25. Detective Hance is aware of another situation where a Fresno police officer struck
20 an upright bicycle during a chase.

21 26. The Fresno Police Department vehicle pursuit policy includes a duty to keep a
22 safe gap in case a suspect stops suddenly.

23 27. It violates departmental policy and California Vehicle Code section 22350 to
24 negligently run over a cyclist.

25 28. Officer Lyon had received extensive training on the operation of his patrol car,
26 including how to avoid skidding on dirt surfaces, differing stopping distances, etc.

27 29. The investigating officer concluded that Officer Lyon was the primary collision
28 factor for this accident.

1 chase attempting to elude capture. 489 U.S. at 594. The suspect was killed when he crashed into
2 an unlit police roadblock. Id. The roadblock was set up across the two lanes of traffic and
3 placed behind a curve to stop the suspect. A police car had been positioned with its headlights
4 on between the decedent and the roadblock so that he was blinded on his approach of the
5 roadblock. Id. A suit was brought alleging that the officers used excessive force in violation of
6 the Fourth Amendment. Id. Under the Fourth Amendment, a seizure occurs where there is an
7 intentional acquisition of physical control. Id. at 596. The Brower court found that when the
8 suspect was stopped by the roadblock that was intended for that purpose, it was enough for a
9 seizure to have occurred. Id. Where a governmental termination of freedom of movement
10 occurs through means intentionally applied a seizure has occurred. Id. at 596-97.

11 Defendants argue that this action is exactly like Lewis. In Lewis, during a high speed
12 pursuit of a motorcycle, the motorcycle tipped over in front of the officer. 523 U.S. at 833. The
13 officer slammed on his brakes and skidded into the passenger on the motorcycle causing massive
14 head injuries and death. Id. Here, the parties dispute whether the decedent fell over in front of
15 Defendant Lyon's patrol vehicle or if Defendant Lyon intentionally bumped the decedent's
16 bicycle while he was upright. If the evidence viewed in the light most favorable to Plaintiffs
17 could support a finding of excessive force, then Defendants are not entitled to summary
18 judgment. Smith v. City of Hemet, 394 F.3d 689, 701 (9th Cir. 2005). The Ninth Circuit has
19 held that because the excessive force inquiry requires the jury to sift through disputed factual
20 contentions and draw inferences therefrom, summary judgment should be granted sparingly in
21 excessive force cases. Smith, 394 F.3d at 701.

22 Defendant Lyon contends that the decedent fell in front of his patrol vehicle and he was
23 unable to stop, accidently running over the decedent. In support of his motion for summary
24 judgment, Defendant Lyon submits the deposition of Detective Brian Eric Hance. Detective
25 Hance testified that he reconstructed the accident scene and determined that the decedent's
26 bicycle was going down as the police car was approaching because the rider was crashing or
27 intentionally laying it down. (ECF No. 45-5 at 19:5-21, 22:8-17.) If the evidence were to
28 establish that the decedent was accidently run over by Defendant Lyon because his bicycle fell in

1 front of the patrol car or the decedent was laying it down, there would be no seizure under the
2 Fourth Amendment.

3 Defendants contend since Defendant Lyon testified that he did not intend to bump the
4 decedent with his vehicle and there is no evidence that Defendant Lyon intended to strike the
5 decedent with his bike summary judgment is appropriate. Where the officer is the only surviving
6 witness to the incident, the court must carefully examine the evidence in the record, such as the
7 contemporaneous statements of the officer and the available physical evidence as well as the
8 expert testimony proffered by the plaintiff to determine whether the officer's story is internally
9 consistent and consistent with other known facts. Scott v. Henrich, 39 F.3d 912, 915 (9th Cir.
10 1994). The court may not simply accept what may be a self-serving account by the officer. Id.

11 Plaintiffs contend that Defendant Lyon intentionally bumped the bicycle and provide an
12 expert report opining that the bicycle was upright at approximately 90 degrees when it was
13 bumped by the patrol vehicle. (ECF No. 46-4 at 17.) Defendants argue that it is irrelevant if the
14 bicycle was at 60 degrees or 90 degrees when it was struck because there is no evidence that
15 Defendant Lyon intentionally struck the decedent's bicycle. However, if the bicycle was at 90
16 degrees when struck, coupled with the evidence that Defendant Lyon did not apply the brakes,
17 that would be sufficient for a reasonable juror to question Defendant Lyon's testimony that the
18 bicycle was falling over and he accidentally struck it with his vehicle. See Scott, 39 F.3d at 915
19 (The Court "must also look at the circumstantial evidence that, if believed, would tend to
20 discredit the police officer's story, and consider whether this evidence could convince a rational
21 factfinder that the officer acted unreasonably.") If the trier of fact determined that Defendant
22 Lyon intentionally bumped the decedent's bicycle, then pursuant to Brower, a seizure would
23 have occurred. The disputed issue of whether the decedent was struck by the patrol vehicle
24 when it accidentally fell over or if Defendant Lyon intentionally bumped the bicycle is for the trier
25 of fact to decide.

26 Plaintiffs have met their burden of establishing that a triable issue of material fact exists
27 as to whether Defendant Lyon intentionally bumped the decedent's bicycle thereby seizing him
28 under the Fourth Amendment. Accordingly, Defendants' motion for summary judgment on the

1 Fourth Amendment claim is denied.

2 **B. Fourteenth Amendment**

3 Plaintiffs contend that Defendants’ conduct violated their liberty interest in
4 companionship and support of their father and guardian. (ECF No. 19 at ¶ 31.) The Ninth
5 Circuit recognizes that a parent has a constitutionally protected liberty interest under the
6 Fourteenth Amendment in the companionship and society of his or her child. Hernandez v.
7 United States, 62 F. Supp. 3d 1169, 1184 (S.D. Cal. 2014) (quoting Curnow v. Ridgecrest Police,
8 952 F.2d 321, 325 (9th Cir.1991)).

9 The Supreme Court has held that:

10 all claims that law enforcement officers have used excessive force—deadly or
11 not—in the course of an arrest, investigatory stop, or other “seizure” of a free
12 citizen should be analyzed under the Fourth Amendment and its “reasonableness”
13 standard, rather than under a “substantive due process” approach. Because the
14 Fourth Amendment provides an explicit textual source of constitutional protection
15 against this sort of physically intrusive governmental conduct, that Amendment,
16 not the more generalized notion of “substantive due process,” must be the guide
17 for analyzing these claims.

18 Graham v. Connor, 490 U.S. 386, 395 (1989). However, if no Fourth Amendment seizure took
19 place, then Plaintiffs’ claims would be considered under the Fourteenth Amendment.

20 “To challenge an executive action on substantive due process grounds. . . , a plaintiff must
21 show that the defendant’s conduct was ‘so egregious, so outrageous, that it may fairly be said to
22 shock the contemporary conscience.’ ” Hammel v. Tri-Cnty. Metro. Transp. Dist. of Oregon,
23 955 F. Supp. 2d 1205, 1210 (D. Or. 2013), appeal dismissed (Oct. 16, 2013), appeal dismissed
24 (Jan. 23, 2014), appeal dismissed (Jan. 23, 2014). Conduct that is “intended to injure in some
25 way unjustifiable by any government interest is the sort of official action most likely to rise to
26 the conscience-shocking level.” Lewis, 523 U.S. at 849. In the context of due process claims,
27 the standard to be applied depends upon the context of the situation confronted by the officer.
28 Porter v. Osborn, 546 F.3d 1131, 1137 (9th Cir. 2008).

Where actual deliberation is practical, then deliberate indifference by the officer may
suffice to shock the conscience. Wilkinson v. Torres, 610 F.3d 546, 554 (9th Cir. 2010). This
standard will apply when the time frame involved makes it practical for the officer to actually

1 deliberate before acting. Porter, 546 F.3d at 1137. However, where officers are confronted with
2 an evolving situation that takes place over a short period of time necessitating fast actions and
3 competing obligations, due process is violated by an intent to harm. Id. at 1139.

4 In Bingue v. Prunchak, 512 F.3d 1169 (2008), the Ninth Circuit held that “police officers
5 involved in all high-speed chases are entitled to qualified immunity under 42 U.S.C. § 1983
6 unless the plaintiff can prove that the officer acted with a deliberate intent to harm.” Bingue, 512
7 F.3d at 1170-71. The court in Bingue rejected the argument that a deliberate indifference
8 standard should apply and held that the intent to harm standard applies to all emergency and non-
9 emergency high speed chases. Id. at 1177. Further, the Ninth Circuit has held that the purpose
10 to harm standard applies even where the officer creates the very emergency that results in the
11 deadly force. Porter, 546 F.3d at 1139-40.

12 Here, Defendant Lyon was engaged in an active pursuit of the decedent. Although the
13 decedent was on a bicycle, the chase itself lasted approximately one and one half minutes (U.F.
14 11); and the officer was travelling between 15 and 43 miles per hour (U.F. 5, 12, 21, 22). “A
15 police officer deciding whether to give chase must balance on one hand the need to stop a
16 suspect and show that flight from the law is no way to freedom, and, on the other, the high-speed
17 threat to all those within stopping range, be they suspects, their passengers, other drivers, or
18 bystanders.” Lewis, 523 U.S. at 853. Although Plaintiff contends that Defendant Lyon had time
19 to deliberate, given the short length of time involved, the speed of the chase, and the evasive
20 actions taken by the decedent, the Court finds that this is not a situation in which Defendant
21 Lyon had time to stop and deliberate. See Porter, 546 F.3d at 1139-40 (rejecting the deliberate
22 indifference standard even where officer could have deliberated while pursuing the subject). The
23 purpose to harm standard applies to the Fourteenth Amendment claims raised herein.¹ See
24 Moreland v. Las Vegas Metropolitan Police Dept., 159 F.3d 365, 373 (9th Cir. 1998) (purpose to
25 harm standard applies to substantive due process rights to familial association claim in accidental
26 police shooting).

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28 ¹ At the July 22, 2015 hearing, the parties agreed that the intent to harm standard was to be applied in this action.

1 The disputed fact of whether Defendant Lyon intentionally bumped the decedent's
2 bicycle or accidentally ran over the decedent when he fell in front of the patrol vehicle precludes
3 summary adjudication of the Fourteenth Amendment claim. A triable issue of fact exists as to
4 whether this was an accident or whether Defendant Lyon had an intent to harm the decedent by
5 intentionally striking his bicycle with the patrol vehicle. Accordingly, Defendants' motion for
6 summary judgment on the Fourteenth Amendment claims is denied.

7 C. Qualified Immunity

8 Defendant Lyon also contends that he is entitled to qualified immunity. The doctrine of
9 qualified immunity protects government officials from civil liability where "their conduct does
10 not violate clearly established statutory or constitutional rights of which a reasonable person
11 would have known." Pearson v. Callahan, 555 U.S. 223, 231 (2009) (quoting Harlow v.
12 Fitzgerald, 457 U.S. 800, 818 (1982)). To determine if an official is entitled to qualified
13 immunity the court uses a two part inquiry. Saucier v. Katz, 533 U.S. 194, 200 (2001). The
14 court determines if the facts as alleged state a violation of a constitutional right and if the right is
15 clearly established so that a reasonable official would have known that his conduct was unlawful.
16 Saucier, 533 U.S. at 200.

17 The district court is "permitted to exercise [its] sound discretion in deciding which of the
18 two prongs of the qualified immunity analysis should be addressed first in light of the
19 circumstances in the particular case at hand." Pearson, 555 U.S. at 236. The inquiry as to
20 whether the right was clearly established is "solely a question of law for the judge." Dunn v.
21 Castro, 621 F.3d 1196, 1199 (9th Cir. 2010) (quoting Tortu v. Las Vegas Metro. Police Dep't.
22 556 F.3d 1075, 1085 (9th Cir. 2009)). In deciding whether officials are entitled to qualified
23 immunity, the court is to view the evidence in the light most favorable to the plaintiff and resolve
24 all material disputes in the favor of the plaintiff. Martinez v. Stanford, 323 F.3d 1178, 1184 (9th
25 Cir. 2003).

26 As discussed above, there are material issues of fact that exist to preclude a finding on
27 summary adjudication that Defendant Lyon did not violate the decedent's civil rights. A
28 reasonable trier of fact could find that Defendant Lyon violated the Fourth Amendment if he

1 attempted to stop the decedent by bumping the bicycle with his patrol vehicle. Additionally, it is
2 clearly established that “[w]here the suspect poses no immediate threat to the officer and no
3 threat to others, the harm resulting from failing to apprehend him does not justify the use of
4 deadly force to do so.” Tennessee v. Garner, 471 U.S. 1, 11 (1985). In this instance, the
5 decedent was on a bicycle and there are no facts to show that he posed a threat to the officer or
6 others in his attempts to avoid detention. It would be clearly established that Defendant Lyon
7 would violate the decedent’s rights by using deadly force in the circumstances presented here.
8 Accordingly, Defendant Lyon’s motion for summary judgment on the ground that he is entitled
9 to qualified immunity is denied.

10 **D. City of Fresno and Police Chief Jerry Dyer**

11 Defendants contend that since there is no Monell² claim against the City of Fresno the
12 City of Fresno should be dismissed from this action. Plaintiffs concede that there is no Monell
13 claim against the City of Fresno, but assert that the City of Fresno and Officer Lyon are still
14 defendants on both the state and federal claims.

15 Section 1983 provides a cause of action for the violation of a plaintiff’s constitutional or
16 other federal rights by persons acting under color of state law. Nurre v. Whitehead, 580 F.3d
17 1087, 1092 (9th Cir 2009); Long v. County of Los Angeles, 442 F.3d 1178, 1185 (9th Cir. 2006);
18 Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002). There is no respondeat superior liability
19 under section 1983, and therefore, each defendant is only liable for his or her own misconduct.
20 Ashcroft v. Iqbal, 556 U.S. 662, 677 (2009). Further, a local government unit may not be held
21 responsible for the acts of its employees under a respondeat superior theory of liability. Monell
22 v. Department of Social Services, 436 U.S. 658, 691 (1978). Rather, a local government unit
23 may only be held liable if it inflicts the injury complained of through a policy or custom. Waggy
24 v. Spokane County Washington, 594 F.3d 707, 713 (9th Cir. 2010).

25 In their oppositions to the motion for summary judgment, all Plaintiffs concede that they

26 ² A local government unit may not be held responsible for the acts of its employees under a respondeat superior
27 theory of liability. Monell v. Department of Social Services, 436 U.S. 658, 691 (1978). “Instead, it is when
28 execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may
fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §
1983.” Monell, 436 U.S. at 694.

1 do not have a custom or policy claim against the City of Fresno and have presented no evidence
2 to support such a claim. Absent a claim based on a custom or policy, the City of Fresno is
3 entitled to summary judgment on the claims arising from the Fourth and Fourteenth
4 Amendments. The City of Fresno's motion for summary judgment on the section 1983 claims is
5 granted.

6 **III.**

7 **CONCLUSION AND ORDER**

8 Based on the foregoing, IT IS HEREBY ORDERED that:

- 9 1. Defendants' motion for summary judgment is GRANTED IN PART AND
10 DENIED IN PART as follows:
- 11 a. Defendants' motion for summary judgment on Plaintiffs' Fourth and Fourteenth
12 Amendment claims against the City of Fresno is GRANTED;
- 13 b. Defendants' motion for summary judgment on Plaintiffs' Fourth and Fourteenth
14 Amendment claims against Defendant Lyon is DENIED; and
- 15 2. This action is proceeding against Defendant Lyon on Plaintiff's claims arising
16 under the Fourth and Fourteenth Amendments; and against Defendants Lyon and
17 the City of Fresno on the state law claims.

18 IT IS SO ORDERED.

19 Dated: July 24, 2015

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21 _____
22 UNITED STATES MAGISTRATE JUDGE
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