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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

REYNALDA MOLINA, et al.,  
Plaintiffs,  
v.  
CITY OF VISALIA, et al.,  
Defendants.

No. 1:13-cv-01991-DAD-SAB  
ORDER ON MOTIONS IN LIMINE  
(Doc. Nos. 108, 109, 110, 111, 112, 113, 114,  
115, 116, 117, 118)

On June 20, 2014, plaintiffs Reynalda Molina and Jacqueline Mendez-Madueña with minors G.M. and N.A.C. proceeding through *guardian ad litem* Veronica Ayon filed the operative second amended complaint (“SAC”) in this action against the City of Visalia, Officer Adam Collins, Officer Daniel Roberts, Officer Dirk Alfano, and Does four through one hundred. (Doc. No. 40.) The action stems from a high speed chase and encounter with police during which shots were fired that resulted in the deaths of Ruben Molina and Eduardo Madueño. The SAC alleges causes of action for: (1) unreasonable search and seizure and use of excessive force under 42 U.S.C. § 1983; (2) substantive due process under 42 U.S.C. § 1983; (3) wrongful death under California Government Code §§ 815.2(a), 820(a) and California Civil Code § 43; (4) negligence survival action; (5) negligence under California Government Code § 815.2(a); and (6) assault and battery under California Government Code § 815.2(a). (*Id.*)

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1 On July 25, 2016, plaintiffs filed nine motions in limine and defendants filed fourteen  
2 such motions. (Doc. Nos. 108–118.) On August 8, both parties filed oppositions. (Doc. Nos.  
3 119–127.) On August 15, both parties filed replies. (Doc. Nos. 129–137.) The hearing on the  
4 twenty-three motions in limine was held on September 6, 2016. At that hearing, attorneys  
5 Charles Charlton, John Denove, and Peter Bersin appeared in person on behalf of the plaintiffs.  
6 (Doc. No. 141.) Attorney Leonard Herr appeared in person and Ronald Statler appeared  
7 telephonically on behalf of defendants. (*Id.*)

8 The court ruled on several motions in limine from the bench at the hearing. Plaintiffs’  
9 first motion in limine was denied without prejudice as to cumulative overlap between the  
10 testimony of plaintiffs police practices experts George Williams and Joseph Callanan and without  
11 prejudice as to the rebuttal testimony of George Williams. Plaintiffs’ second motion in limine  
12 was granted to the extent that Joseph Callanan will not be allowed to testify to legal conclusions.  
13 For plaintiffs’ fourth motion in limine, the court determined that a pretrial *Daubert* hearing was  
14 necessary. Plaintiffs’ eighth motion in limine was granted with respect to the presence of drugs in  
15 an unspecific amount in autopsy reports. Plaintiffs’ ninth motion in limine was denied based  
16 upon defense counsel’s representations that he will only be asking experts if they relied upon the  
17 under consideration report and he will not be asking about the conclusions set forth in that report.

18 Defendants’ first motion in limine was granted as to evidence that Nicholas Chavez sued  
19 the city or settled his claims, but was denied as to evidence that Chavez was shot. Defendants’  
20 second motion in limine was denied. Defendants’ third motion in limine was granted as to  
21 characterizing the car chase as “wrongful” or “unlawful,” but ruling was deferred as to evidence  
22 about the car chase. Defendants’ fifth motion in limine was denied. Defendants’ ninth motion in  
23 limine was granted as to the unopposed aspects and to the extent that Roger Clark will not be  
24 allowed to testify to legal conclusions, but ruling on the motion in limine was deferred as it  
25 relates to the Peace Officer Standards and Training (“POST”). Defendants’ eleventh motion in  
26 limine was denied. Defendants’ sixth, seventh, eighth, thirteenth, and fourteenth motions in  
27 limine were all unopposed and granted. Counsel for all parties represented that they would  
28 attempt to reach a resolution on defendants’ tenth and twelfth motions in limine prior to trial.

1 The remainder of the motions in limine were taken under submission and the court now  
2 rules on plaintiffs' third, fifth, sixth, and seventh motions in limine and defendants' third, fourth,  
3 and ninth motions in limine. A settlement conference is set for September 30, 2016 at 10:00 AM  
4 in Courtroom 10 (EPG) before Magistrate Judge Erica P. Grosjean. (Doc. No. 138.) Jury trial is  
5 scheduled to commence on November 1, 2016, at 1:00 PM. (Doc. No. 101.) For the reasons  
6 described on the record and in this order, the court issues the following order on the parties'  
7 remaining motions in limine.

8 **A. Plaintiffs' third motion in limine**

9 Plaintiffs move to exclude two portions of the testimony of defendants' police psychology  
10 expert Kris Mohandie, Ph.D. "because the trial is about how the jury interprets the evidence and  
11 determines if the use of deadly force was justified and not about what the expert believes as to  
12 whether the use of deadly force was justified." (Doc. No. 110 at 5.) Specifically, plaintiffs seek  
13 to exclude the following two opinions:

14 It is expected, normal, and reasonable that the responding officers,  
15 under the totality of the circumstances and the highly stressful  
16 nature of this particular event, perceived danger and an immediate  
17 threat from the suspects. Indeed the totality of the circumstances  
18 the officers were subjected to, were more than sufficient to induce a  
19 profound psychophysiological fear response. The normal and  
20 expected reaction would be for the officers to respond as they did,  
21 with behaviors designed to reduce the perceived threat.

22 \* \* \*

23 The officers reported the immediate, strong, and continued belief  
24 and perception that they heard gunfire from the vicinity of the  
25 suspects. Even one of the surviving suspects in the vehicle  
26 perceived gunshots from coming within the vehicle. It is noted that  
27 Tulare County Sheriff's Office has not located any shell cases from  
28 any of the decedents' handguns. Whether the officers fired first or  
not, as noted, the circumstances were such that it was normal,  
expected, and reasonable for them to have perceived immediate  
danger. Whether the officers heard the suspect(s) firing their  
weapons, or their own rounds, the other officers' rounds, or any  
other loud noise (subject kicking the window, or other noises  
stemming from the aftermath of the vehicle accident such as  
backfires), it is normal, expected, and reasonable that the officers  
concluded this was gunfire, under the totality of the circumstances.

(Doc. No. 110-2 at 18, 19-20.)

1 Defendants oppose the motion on the grounds that experts can opine on the ultimate issues  
2 upon which the jury will be called to pass on and the reasonableness of a person's actions is such  
3 an issue. (Doc. No. 122.) Defendants note that, indeed, "[a]n opinion is not objectionable just  
4 because it embraces an ultimate issue." Fed. R. Evid. 704(a).

5 However, whether the officers "perceived" a danger and a threat from the suspects is not  
6 an opinion that requires expert testimony. *See Willis v. City of Fresno*, No. 1:09-cv-01766-BAM,  
7 2013 WL 6145232, at \*1 (E.D. Cal. Nov. 21, 2013) (precluding Dr. Mohandie from testifying  
8 that officers "perceived" a threat in an excessive force case). The proffered expert testimony is  
9 therefore not the type of expert opinion that "will help the trier of fact to understand the evidence  
10 or to determine a fact in issue." *See* Fed. R. Evid. 702. Accordingly, the court precludes Dr.  
11 Mohandie from offering such an opinion.

12 The court also concludes that Dr. Mohandie may also not opine or speculate to the  
13 specific psychophysiological reactions of the officers involved in this case. *See Willis*, 2013 WL  
14 6145232, at \*1 (precluding Dr. Mohandie from testifying or speculating on the specific  
15 psychophysiological reactions of the officers involved in a police shooting). Certainly, however,  
16 Dr. Mohandie appears to be a well-qualified licensed clinical psychologist with experience  
17 treating patients involved in police shootings and other traumatic events. (*See* Doc. No. 110-2 at  
18 16-17). She may, therefore, provide testimony offering general opinions on the  
19 psychophysiological reactions involved in officer shootings.

#### 20 **B. Plaintiffs' fifth motion in limine**

21 Plaintiffs move to exclude evidence of decedents Edwardo Maduena and Ruben Molina's  
22 criminal history as irrelevant, unduly prejudicial, and impermissible character evidence, arguing  
23 that there is nothing to suggest that the officers knew of the criminal histories of the decedents at  
24 the time of the shooting. (Doc. No. 114 at 2.) Defendants oppose the motion on the ground that  
25 the "other acts" evidence is not being used to prove character, but to prove other matters material  
26 to the action. (Doc. No. 124, at 2.) Specifically, defendants argue decedents' criminal histories  
27 and gang affiliations show consciousness of guilt in connection with the high speed chase that  
28 ultimately led to the death of the decedents.

1           The general rule is that character evidence is not admissible when offered to prove that on  
2 a particular occasion the person acted in accordance with the character or trait. Fed. R. Evid.  
3 404(a)(1). Evidence of other crimes, wrongs or acts is inadmissible “to prove a person’s  
4 character in order to show that on a particular occasion the person acted in accordance with the  
5 character.” Fed. R. Evid. 404(b)(1). However, such evidence may be admissible to prove  
6 “motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack  
7 of accident.” 404(b)(2). Evidence is offered for a proper purpose under Rule 404(b) if it is  
8 probative of a material issue other than character. *Huddleston v. United States*, 485 U.S. 681, 685  
9 (1988). The test for admitting evidence under Rule 404(b) is whether: (1) it tends to prove a  
10 material fact; (2) the prior act is not too remote in time; (3) the evidence is sufficient to support a  
11 finding that the person committed the act; and (4) probative value of the evidence must not be  
12 substantially outweigh by unfair prejudice. *United States v. Tsinnijinnie*, 91 F.3d 1285, 1288–89  
13 (9th Cir. 1996). Evidence is “material” to an issue if it shows some fact specifically relevant to  
14 the case at hand. *United States v. Howell*, 231 F.3d 615, 628 (9th Cir. 2000).

15           Here, defendants have not persuasively articulated how the alleged prior acts of Edwardo  
16 Maduena and Ruben Molina’s are relevant to the issue of whether the officers’ use of deadly  
17 force against the decedents was excessive where, as here, it is undisputed that the decedents’  
18 criminal history was not known to the officers at the time of the shooting. Whether the officers’  
19 actions under the circumstances were objectively reasonable is the issue in the case and resolution  
20 of that issue does not turn on any prior acts of Edwardo Maduena and Ruben Molina. *See Davis*  
21 *v. Mason County*, 927 F.2d 1473, 1484 (9th Cir. 1991) (in § 1983 excessive force case, evidence  
22 offered by defendant, in order to show plaintiff’s proclivity for violence, that plaintiff was  
23 involved in drunken altercation five days before the incident in question, was inadmissible under  
24 Rule 404(b)).

25           Moreover, under Rule 403, the court must balance the probative value of decedents’  
26 criminal histories against its prejudicial effect. Any slight probative value such evidence could  
27 conceivably have here is substantially outweighed by the potential that the jury would consider  
28 such evidence beyond the purpose for which it would be admitted—even with a limiting

1 instruction.

2 Accordingly, plaintiffs' motion in limine in this regard will be granted as to the liability  
3 stage of the trial.

4 **C. Plaintiffs' sixth motion in limine**

5 Plaintiffs next move to exclude any evidence of alleged gang affiliation on the part of  
6 decedents and any witnesses as irrelevant and because any probative value is substantially  
7 outweighed by its prejudicial value. (Doc. No. 115.) Just as is the case with respect to plaintiffs'  
8 fifth motion in limine, defendants oppose the motion on the ground that this "other acts" evidence  
9 is not being used to prove character, but to prove other matters material to the action. (Doc. No.  
10 124 at 2.) Defendants' argue that:

11 [Plaintiffs'] protests that [decedents] were just out for an innocent  
12 drive home can be impeached with evidence of potential gang  
13 affiliations, their prior bad act of arming themselves before, or as  
14 they climbed into the Hyundai, and their prior criminal activities  
[particularly gun-related crimes] during their high speed flight from  
a simple traffic stop. These go to motive, intent, knowledge,  
identity, absence of mistake, and lack of accident.

15 (*Id.* at 2-3.) Furthermore, defendants' argue, "consciousness of the conduct is recognized as  
16 relevant to Veh. Code § 2800.2." (*Id.* at 2.)

17 As was the case with respect to plaintiffs' fifth motion in limine, the subjective state-of-  
18 mind and any motivation for fleeing on the part of Maduena, Molina, and the other passengers of  
19 the vehicle are not at issue in this action and are not relevant to a determination of the defendants'  
20 liability because officers Collins, Roberts, and Alfano were unaware of them. *See Estate of Diaz*  
21 *v. City of Anaheim*, \_\_\_F.3d\_\_\_, No. 14-55644, 2016 WL 4446114, at \*4 (9th Cir. Aug. 24, 2016)  
22 (evidence of suspect's gang membership was not relevant to liability issues in a § 1983 action for  
23 excessive use of force arising from an officer's fatal shooting of a suspect, where the officer was  
24 unaware of the suspect's gang membership and had not seen the suspect's tattoos when the officer  
25 shot the suspect). Moreover, the Ninth Circuit "has recognized time and time again that gang  
26 evidence has the potential to be particularly prejudicial." *Id.* at 7 (citing *Kennedy v. Lockyer*, 379  
27 F.3d 1041, 1055 (9th Cir. 2004) ("Our cases make it clear that evidence relating to gang  
28 involvement will almost always be prejudicial[.]"); *United States v. Takahashi*, 205 F.3d 1161,

1 1165 (9th Cir. 2000) (holding the district court did not abuse its discretion in admitting evidence  
2 of gang membership where the court “recognized the need to prevent undue prejudice,” gave  
3 limiting instruction, excluded photographs of gang tattoos as evidence of membership, and  
4 minimized repetition of the gang’s name)).

5 Accordingly, plaintiffs’ motion in limine in this regard is also granted as to the liability  
6 stage of the trial.

7 **D. Plaintiffs’ seventh motion in limine**

8 Plaintiffs also move to exclude evidence of (1) tattoos, (2) name monikers, (3) weapons,  
9 and (4) ammunition found by the police after the shooting scene was under the control of the  
10 officers as irrelevant, prejudicial, and confusing hindsight evidence of circumstances beyond the  
11 officers’ actual or constructive knowledge at the time of the shooting. (Doc. No. 116, at 4–5.)  
12 For the same reasons set forth above as to plaintiffs’ fifth and sixth motion in limine, evidence of  
13 tattoos and name monikers will be excluded from evidence at the liability stage of the trial.  
14 However, plaintiffs’ motion in limine will be denied as to the weapons and ammunition found at  
15 the scene. As defendants have persuasively argued, such evidence goes directly to defendants’  
16 claim of possible gunfire being directed at them from inside the decedents’ vehicle (Doc. No. 125  
17 at 2–3), and it is accordingly clearly relevant to the issue which must be resolved by the jury at  
18 trial.

19 **E. Defendants’ third motion in limine**

20 The court granted defendants’ third motion in limine from the bench at the hearing on the  
21 motions in limine with respect to precluding the characterization of the chase as wrongful or  
22 unlawful. However, defendants also move for an order excluding evidence regarding the car  
23 chase in general. (Doc. No. 112 at 5.)

24 In their opposition to defendants’ motion for partial summary judgment in this case,  
25 plaintiffs explicitly stated that “Plaintiffs 42 U.S.C. § 1983 claims are based on the contention  
26 that the officers used deadly and excessive force against Ruben Molina and Eduardo Madueña  
27 and not because of the manner in which the vehicle pursuit was conducted.” (Doc. No. 93, at 2.)  
28 Plaintiffs reiterated this position during oral argument and, accordingly, summary judgment on

1 plaintiffs' § 1983 claims relating to the high speed chase were denied as having been rendered  
2 moot. (Doc. No. 102 at 7–8.)

3 Evidence of the chase is, however, relevant to plaintiffs' claims based upon the police  
4 shooting that occurred when the chase ended. “[A]n officer’s preshooting conduct is properly  
5 ‘included in the totality of circumstances surrounding [his] use of deadly force, and therefore the  
6 officer’s duty to act reasonably when using deadly force extends to preshooting conduct.’” *Hayes*  
7 *v. County of San Diego*, 736 F.3d 1223, 1236 (9th Cir. 2013) (quoting *Hayes v. County of San*  
8 *Diego*, 57 Cal. 4th 622 (2013)). Moreover, with respect to evaluating a Fourth Amendment claim  
9 of excessive use of force, “[t]he strength of the government’s interest in the force used is  
10 evaluated by examining three primary factors: (1) ‘whether the suspect poses an immediate threat  
11 to the safety of the officers or others,’ (2) ‘the severity of the crime at issue,’ and (3) ‘whether he  
12 is actively resisting arrest or attempting to evade arrest by flight.’” *Glenn v. Washington County*,  
13 673 F.3d 864, 872 (9th Cir. 2011) (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)). Here,  
14 the car chase is relevant because it is evidence that decedents were “actively resisting arrest or  
15 attempting to evade arrest by flight.” *Glenn*, 673 F.3d at 872.

16 Therefore, defendants’ motion in limine is denied to the extent it seeks exclusion of  
17 evidence about the car chase.

#### 18 **F. Defendants’ fourth motion in limine**

19 Defendants move to exclude evidence that the defendant police officers’ conduct is to be  
20 measured by Police Officer Standards and Training (“POST”) standards on the grounds that it  
21 would present a substantial risk of juror confusion and the standard for excessive force here is set  
22 by federal constitutional law and not the POST standards. (Doc. No. 112 at 7–8.) The Ninth  
23 Circuit, however, has stated that a rational jury can rely on evidence of whether an officer’s  
24 conduct comported with law enforcement standards, including the POST standards, in assessing  
25 whether an officers’ use of force was unreasonable. *See Smith v. City of Hemet*, 394 F.3d 689,  
26 703 (9th Cir. 2005) (“Discussing whether the officers’ conduct comported with law enforcement  
27 standards, the expert relied upon California’s Peace Officer Standards and Training, which are  
28 applicable to all state police officers and are a part of Department policy. He concluded that the

1 officers could and should have used control holds to complete the arrest rather than to sic Quando  
2 on him once they had him restrained on the ground. . . . A rational jury could rely upon such  
3 evidence in assessing whether the officers’ use of force was unreasonable.”) (citing *Larez v. City*  
4 *of Los Angeles*, 946 F.2d 630, 635 (9th Cir. 1991) (as amended) (finding that testimony of “an  
5 expert on proper police procedures and policies” was relevant and admissible); *Davis v. Mason*  
6 *County*, 927 F.2d 1473, 1484–85 (9th Cir. 1991) (as amended) (testimony of plaintiffs’ police  
7 practices expert that officers violated law enforcement standards properly received)).

8 Accordingly, defendants’ motion in limine in this regard is denied.

### 9 **G. Defendants’ ninth motion in limine**

10 The remaining portion of defendants’ ninth motion in limine relates to whether expert  
11 Roger Clark should be allowed to testify that the conduct of Officers Alfano, Roberts and Collins,  
12 after they got out of their patrol vehicles, was not consistent with POST training and was part of  
13 the totality of circumstances that led to the officers’ use of deadly force in this case. (Doc. No.  
14 119 at 11.) As noted above, the Ninth Circuit has stated that a rational jury can rely on evidence  
15 of whether an officer’s conduct comported with law enforcement standards, including the POST  
16 standards, in assessing whether an officers’ use of force was unreasonable. *See Smith*, 394 F.3d  
17 at 703. Accordingly, plaintiffs’ expert will be allowed to express an opinion on whether the  
18 officers’ conduct, after they got out of their vehicle, was consistent with POST and constituted  
19 part of the totality of circumstances that led to their use of deadly force.<sup>1</sup>

### 20 **H. Bifurcation of Compensatory Damages**

21 In ruling on the various motions in limine in this order and from the bench, the court has  
22 excluded gang evidence, evidence of drug use, and evidence of criminal histories from the  
23 liability stage of the proceedings. This evidence, however, may have some relevance as to  
24 compensatory damages, which would require bifurcation of the trial and separate proceedings for  
25 compensatory damages. *See Estate of Diaz*, 2016 WL 4446114, at \*7 (gang evidence and  
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27 <sup>1</sup> The court notes, however, that Mr. Clark’s opinion as proffered in his expert report includes an  
28 impermissible legal conclusion (“use of lethal force was unlawful under the circumstances (as  
taught by POST)”), which the court has previously ruled from the bench will be excluded.

1 evidence of drug use, which may have had some relevance to damages, required bifurcation of the  
2 liability stage of the trial in an excessive force case stemming from a fatal police shooting, as this  
3 evidence had no relevance to liability and was highly prejudicial.) However, the undersigned  
4 would observe based upon what is presently before the court that “it is hard to see how most of  
5 this [evidence is] relevant even to damages, absent testimony . . . that [plaintiffs’] knew of the  
6 [criminal histories, gang evidence,] and drug use on the day of the offense, and that that  
7 knowledge undermined the emotional impact of [decedents’] death[s].” *Id.* The court therefore  
8 defers on ruling on whether this evidence is relevant to compensatory damages, and accordingly,  
9 whether bifurcation of the trial is necessary.

### 10 **Conclusion**

11 For all of the reasons set forth above and described on the record,

- 12 1) Plaintiffs’ third motion in limine (Doc. No. 110) is granted as to whether the officers  
13 “perceived” a danger and a threat from the suspects, granted as to whether Dr.  
14 Mohandie may offer an opinion or speculate as to the specific psychophysiological  
15 reactions of the officers involved in this case, but denied as to Dr. Mohandie offering  
16 general opinions on the psychophysiological reactions involved in officer shootings;
- 17 2) Plaintiffs’ fifth motion in limine (Doc. No. 114) is granted;
- 18 3) Plaintiffs’ sixth motion in limine (Doc. No. 115) is granted;
- 19 4) Plaintiffs’ seventh motion in limine (Doc. No. 116) is granted as to tattoos and name  
20 monikers, but denied as to weapons and ammunition found by the police at the scene;
- 21 5) Defendants’ third motion in limine (Doc. No. 112) is denied as to evidence about the  
22 car chase;
- 23 6) Defendants’ fourth motion in limine (Doc. No. 112) is denied; and
- 24 7) Defendants’ ninth motion in limine (Doc. No. 112) is denied as it relates to testimony  
25 regarding the POST standards;
- 26 8) The court ruled from the bench on plaintiffs’ first, second, eighth, ninth motions in  
27 limine (Doc. Nos. 108, 109, 117, 118) and on defendants’ first, second, portions of  
28 third, fifth, sixth, seventh, eighth, and portions of ninth motions in limine (Doc. Nos.

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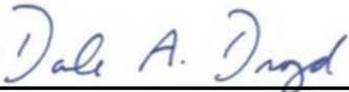
112);

9) A *Daubert* hearing with respect to plaintiffs' fourth motion in limine (Doc. No. 111) will be conducted prior to trial if necessary;

10) Only defendants' tenth and twelfth motions in limine (Doc. No. 112) remain unresolved due to the parties position expressed at the hearing that they wished to meet and confer to determine if they could be resolved prior to trial without further court intervention.

IT IS SO ORDERED.

Dated: September 16, 2016

  
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UNITED STATES DISTRICT JUDGE