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UNITED STATES DISTRICT COURT

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EASTERN DISTRICT OF CALIFORNIA

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MELINDA AVILA; GRETTEL  
LORENZO; ALFREDO LORENZO; and  
JOSE LORENZO,

No. 1:15-cv-00996-JAM-EPG

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Plaintiffs,

**ORDER GRANTING DEFENDANTS VARNER  
AND CALIFORNIA HIGHWAY PATROL'S  
MOTION FOR SUMMARY JUDGMENT AS  
TO GRETTEL LORENZO**

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v.

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STATE OF CALIFORNIA; COUNTY  
OF MADERA; RICHARD GONZALES;  
PAUL VARNER, and DOES 3  
through 100, inclusive,

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Defendants.

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This Court held a hearing on the summary judgment motion

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brought by California Highway Patrol ("CHP") and Officer Varner

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("Varner") (collectively, "CHP Defendants") on June 20, 2017.

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ECF No. 78. At the conclusion of the hearing, the Court asked

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the parties to further brief whether the Court should grant

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summary judgment for CHP Defendants on Gretel Lorenzo's

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("Gretel") first and fifth claims. Tr. 45:18-22, Jun. 20, 2017

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("Tr."), ECF No. 82. CHP Defendants filed their supplemental

1 brief, Supplemental Mot. for Summ. J. ("Supp. Mot."), ECF No. 83,  
2 and Gretel opposed, Opposition to Supp. Mot. ("Opp'n"), ECF No.  
3 88. For the reasons set forth below, the Court GRANTS CHP  
4 Defendants' motion.

5 I. FACTS AND PROCEDURAL BACKGROUND

6 At about 2:00 a.m. on June 2, 2013, security at Chukchansi  
7 Gold Casino called the Madera County Sheriff's Department  
8 regarding a disturbance. Pls.' Resp. to Defs.' Statement of  
9 Undisputed Facts ("UF") #22, ECF No. 63-7. Varner responded to  
10 the scene with another CHP officer and Madera County officers  
11 Gonzales and Rich. UF ##23, 24.

12 Gretel and the other plaintiffs were waiting outside the  
13 casino when the officers approached them. UF #28. The officers  
14 began speaking to Jose, Gretel's father. UF #28. After a few  
15 minutes of conversation, Rich arrested Jose. UF #39. Varner and  
16 Gonzales arrested Jose's brother Alfredo and took him to the  
17 ground. UF #42. While Gonzales and Varner were trying to  
18 handcuff Alfredo, Gretel approached them. UF #43.

19 A video of the incident, reviewed by this Court multiple  
20 times, indisputably shows Gretel reaching out and touching  
21 Varner. The Court stated at the hearing: "I can actually stop  
22 the video, and you can see Gretel's hand on Varner's shoulder."  
23 Tr. 21:12-13. The Court therefore found Gretel clearly "put[]  
24 her hand on a police officer who [wa]s trying to arrest another  
25 person." Tr. 21:23-24. Then, Gonzales pushed Gretel away and  
26 she fell. UF #45. Varner also reached up and possibly touched  
27 Gretel. Because it was unclear if Varner contributed to Gretel's  
28 fall, the Court found a triable issue of fact as to whether

1 Varner actually touched Gretel. Tr. 22:7-13.

2 Gretel brought five claims against CHP Defendants:

3 (1) violation of California Civil Code § 52.1 ("the Bane Act");  
4 (2) false arrest/imprisonment; (3) intentional infliction of  
5 emotional distress ("IIED"); (4) negligent training and  
6 supervision; and (5) excessive force under 42 U.S.C. § 1983.

7 Third Amended Complaint at 6-18, ECF No. 22.

8 Gretel voluntarily dismissed the fourth claim entirely and  
9 the fifth claim as brought against CHP. ECF No. 65. At hearing,  
10 the Court granted CHP Defendants' motion on Gretel's second claim  
11 for false arrest. Tr. 30:14-22. The Court reserved judgment on  
12 Gretel's third claim pending the supplemental briefing on the  
13 first and fifth claims. Tr. 46:22-47:4.

## 14 II. OPINION

### 15 A. Legal Standard

16 The Bane Act "creates a right of action against any person  
17 who interferes by threat, intimidation, or coercion with the  
18 exercise or enjoyment by any individual or individuals of rights  
19 secured by the Constitution or laws of the United States."

20 Barragan v. City of Eureka, No. 15-CV-02070-WHO, 2016 WL  
21 4549130, \*7 (N.D. Cal. Sept. 1, 2016) (quoting Cal. Civ. Code  
22 § 52.1(a)) (internal quotation marks omitted). An excessive  
23 force claim brought under § 1983 can give rise to a Bane Act  
24 claim. May v. San Mateo Cty., No. 16-CV-00252-LB, 2017 WL  
25 1374518, at \*13 (N.D. Cal. Apr. 15, 2017). The elements of an  
26 excessive force claim under the Bane Act are the same as under  
27 § 1983. Cameron v. Craig, 713 F.3d 1012, 1022 (9th Cir. 2013).  
28 Thus, Gretel's Bane Act claim depends on whether she can prove

1 her Fourth Amendment excessive force claim.

2 A law enforcement officer violates the Fourth Amendment  
3 right against excessive force when he "carrie[s] out an  
4 unreasonable seizure through a use of force that was not  
5 justified under the relevant circumstances." Cty. of Los  
6 Angeles, Calif. v. Mendez, 137 S. Ct. 1539, 1547 (2017). But  
7 police officers may use force that is "'objectively reasonable'  
8 in light of the facts and circumstances confronting them."  
9 Graham v. Connor, 490 U.S. 386, 397 (1989). The Supreme Court  
10 has explained:

11 The reasonableness of a particular use of force must  
12 be judged from the perspective of a reasonable officer  
13 on the scene, rather than with the 20/20 vision of  
14 hindsight. . . . Not every push or shove, even if it  
15 may later seem unnecessary in the peace of a judge's  
16 chambers, violates the Fourth Amendment. The calculus  
of reasonableness must embody allowance for the fact  
that police officers are often forced to make split-  
second judgments—in circumstances that are tense,  
uncertain, and rapidly evolving—about the amount of  
force that is necessary in a particular situation.

17 Id. at 396–97 (internal citations and quotation marks omitted).

18 A court must assess reasonableness by balancing "the force which  
19 was applied . . . against the need for that force." Liston v.  
20 Cty. of Riverside, 120 F.3d 965, 976 (9th Cir. 1997).

21 B. Analysis

22 CHP Defendants argue Gretel cannot prove her excessive  
23 force claim against Varner because any force Varner used against  
24 her was objectively reasonable. Supp. Mot. at 2. Gretel argues  
25 the Court should let the jury decide whether Varner's use of  
26 force was reasonable. Opp'n at 5.

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1           1.    The Force Applied

2           Gretel argues she "was subjected to a violent shove  
3 that . . . could have resulted in serious bodily injury." Opp'n  
4 at 6. Varner argues he merely "brushed away Gretel's arm."  
5 Reply at 2.

6           The Ninth Circuit has found that a "single push" by an  
7 officer when a plaintiff "lean[s] over [the officer] during the  
8 arrest" of another person is a "minimal intrusion." Jimenez v.  
9 City of Costa Mesa, 174 F. App'x 399, 402 (9th Cir. 2006).  
10 Gretel does not cite to any case where a court considered a  
11 similar push significant or deadly force. The Court finds that  
12 the amount of force, if any, Varner used against Gretel was  
13 minimal.

14           2.    The Need for Force

15           Courts assessing the need for force should consider  
16 (1) "the severity of the crime at issue," (2) "whether the  
17 suspect poses an immediate threat to the safety of the officers  
18 or others," and (3) "whether he is actively resisting arrest or  
19 attempting to evade arrest by flight." Graham, 490 U.S. at 396.  
20 The most important factor is whether the suspect poses an  
21 immediate threat to the safety of the officers or others. Bryan  
22 v. MacPherson, 630 F.3d 805, 826 (9th Cir. 2010).

23           CHP Defendants address only the safety factor. The Court  
24 therefore assumes for purposes of this motion that CHP  
25 Defendants concede that Gretel's alleged crimes were not severe  
26 and that she was not fleeing or resisting her own arrest.

27           As to the safety factor, CHP Defendants argue, "[w]hen  
28 Gretel Lorenzo grabbed at Officer Varner's back, he was in a

1 compromised safety position" because his "hands were occupied  
2 attempting to control Alfredo Lorenzo[,]" and Gretel "was in a  
3 position to grab a weapon from Officer Varner." Id. at 3. CHP  
4 Defendants add, "Gretel also posed a risk to the safety of  
5 Alfredo Lorenzo by grabbing at the officer who was attempting to  
6 safely take Alfredo to the ground." Id.

7 Gretel disputes CHP Defendants' contentions. First, Gretel  
8 argues that one officer wrote in his report that both Gonzales  
9 and Varner pushed Gretel. Opp'n at 1 (citing Ex. 14 at 3, ECF  
10 No. 68-6). Gretel also states the video taken by bystanders  
11 shows Varner pushed Gretel. Opp'n at 1 (citing Exh. 9, Videos 4  
12 and 5 @ 41 sec.). But this argument is irrelevant. The Court  
13 must decide whether any force Varner used was reasonable, not  
14 whether Varner actually used any force.

15 Second, Gretel argues the Court should leave the  
16 reasonableness assessment to the jury. Opp'n at 4. She relies  
17 heavily on Garlick v. Cty. of Kern, 167 F. Supp. 3d 1117 (E.D.  
18 Cal. 2016). While citing to much of the language in the Garlick  
19 opinion in her supplemental opposition brief, Gretel omits a  
20 crucial part of the Court's rationale: the reasonableness issue  
21 should be determined by a jury "especially where cases involve  
22 an in-custody death, because the witness most likely to  
23 contradict [an officer's] story is not available to testify."  
24 Id. at 1145. No such death occurred here, and the plaintiffs  
25 have testified under oath as to what happened. In fact, Gretel  
26 gave detailed testimony about this incident in her deposition,  
27 and she never once indicated Varner pushed her; throughout her  
28 deposition she mentions only one officer pushing her. See

1 Gretel Depo. at 74-77. Gretel has also never testified that it  
2 was Varner's use of force that caused her to fall backwards.  
3 Simply put, the same concerns present in Garlick do not exist  
4 here.<sup>1</sup> The Court therefore finds that under these circumstances,  
5 it can decide as a matter of law whether Varner acted  
6 reasonably.

7 Finally, Gretel argues that CHP Defendants' contention that  
8 Gretel was endangering Varner and Alfredo is merely speculative.  
9 Opp'n at 6. Gretel quotes from Deorle v. Rutherford, which  
10 states that a "simple statement by an officer that he fears for  
11 his safety or the safety of others is not enough; there must be  
12 objective factors to justify such a concern." 272 F.3d 1272,  
13 1281 (9th Cir. 2001). Yet, CHP Defendants' safety argument does  
14 not depend solely on a "simple statement" by Varner that he  
15 feared for his safety. The video objectively shows Gretel  
16 touching Varner while he was trying to arrest Alfredo. In sum,  
17 the Court finds that CHP Defendants' safety argument does not  
18 depend solely on Varner's testimony, and so Deorle does not  
19 require this Court to deny summary judgment on this basis.

20 In considering all the evidence before the Court in the  
21 light most favorable to Gretel, the Court finds that Gretel has  
22 failed to raise a genuine dispute as to any material fact on the  
23 issue of whether Officer Varner was in a compromised safety  
24 position when Gretel put her hands on him. In response to  
25 Gretel's action, Varner raised up and brushed away Gretel's arm.

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27 <sup>1</sup> As CHP Defendants also argue, the facts of Garlick are easily  
28 distinguishable from the case at bar and the case is not of much  
help to this Court in deciding the issue before it.

1 This action was reasonable. He was acting in response to a  
2 possible threat that Gretel posed to the safety of himself and  
3 possibly others (such as Alfredo Lorenzo). The video evidence  
4 clearly establishes that Varner's action was objectively  
5 reasonable.

6 3. Balancing the Force Applied Against the Need for  
7 Force

8 The Court, having found that Varner's use of force against  
9 Gretel was minimal and Varner properly used force for his own  
10 safety, must now balance this important safety interest against  
11 the minimal force Varner used (even assuming Gretel was not  
12 resisting arrest or accused of a serious crime). In doing so,  
13 the Court finds Varner's use of force reasonable and not  
14 excessive. No reasonable jury could find Varner violated  
15 Gretel's constitutional rights by pushing away her arm when  
16 Gretel touched Varner during an arrest.

17 Because Gretel's excessive force claim fails, her Bane Act  
18 claim also fails. Additionally, based on its findings regarding  
19 Varner's use of force, the Court finds Varner's actions towards  
20 Gretel do not rise to the level of "extreme and outrageous  
21 conduct" required for an IIED claim.<sup>2</sup>

22 III. ORDER

23 For the reasons set forth above, the Court GRANTS summary  
24 judgment in favor of CHP Defendants on Gretel's first, third, and

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25 <sup>2</sup> The Court indicated at hearing that Gretel's IIED claim was  
26 "dependent on the Court's findings on the first and fifth  
27 claims." Tr. 46:23-25. The Court stated: "If I grant summary  
28 judgment on the first and fifth claims, then the third claim  
would go away as well." Tr. 47:2-4. Neither party addressed the  
IIED claim in their supplemental briefs.



1 fifth claims.

2 IT IS SO ORDERED.

3 Dated: August 23, 2017

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JOHN A. MENDEZ,  
UNITED STATES DISTRICT JUDGE