UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JOSE GUTIERREZ and IRMA GUTIERREZ,

Plaintiffs,

v.

CITY OF WOODLAND, COUNTY OF YOLO, SERGEANT DALE JOHNSON, DEPUTY HERMAN OVIEDO, DEPUTY HECTOR BAUTISTA, individually, and in their official capacities,

Defendants.

NO. CIV. S-10-1142 LKK/EFB

O R D E R

This is a civil rights case brought by the parents of the decedent, Luis Gutierrez Navarro ("Gutierrez"). Gutierrez fled after undercover officers of the Yolo County Sheriff's Department approached him on the street with the stated intention of speaking with him. After the officers caught up to Gutierrez, there ensued an altercation, which ended when the officers shot and killed Gutierrez. The First Amended Complaint alleges: a Section 1983 claim against the police and the municipality, for the police's unreasonable use of force in violation of the Fourth and Fourteenth

Amendments; and state claims for wrongful death, negligence, negligent hiring and training, and intentional infliction of emotional distress.[1] Plaintiff seeks a summary adjudication of issues, and defendant cross-moves for partial summary judgment, as more specifically described below.

I. INTRODUCTION

A. Facts Relevant to Plaintiffs' Motion for Summary Adjudication.

On April 30, 2009, three officers of the Yolo County Sheriff's Office were working together as part of their duties with the Yolo County Gang Task Force.[2] The officers were: (1) Sergeant Dale Johnson,[3] the person in charge of the Yolo County Gang Task Force; (2) Detective Hernan Oviedo, who was assigned to the Gang Task Force; and (3) Deputy Hector Bautista, who was also assigned to the Gang Task Force.[4] The three, working undercover, rode in an unmarked car in the "Gum Avenue overpass" area in Woodland, California.[5] Bautista drove.[6] All three were wearing street

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[1] Defendant City of Woodland was dismissed from the case by stipulation on January 13, 2012. Dkt. No. 39.

[2] Because defendants are the non-moving party, the facts are described in the light most favorable to them, where there is evidence to support the description.

[3] Currently a Lieutenant. Johnson Decl. ¶ 3.

[4] Johnson Decl. (Dkt. No. 44) ¶¶ 6-8.

[5] Johnson Decl. at p.2.

[6] See Johnson Decl. ¶ 15.

clothes.[7] All three carried guns.[8]

As the three officers rode in the car, they observed Gutierrez, whom they observed to be "a Hispanic male," walking down the street.[9] The officers do not claim that they observed any suspicious or illegal activity by Gutierrez. None of the officers knew Gutierrez, had encountered him before, or knew anything about him. However, the officers did notice Gutierrez's appearance. Gutierrez wore a "long baggy shirt, baggy 'Dickies' style pants," and he had a "shaved head."[10] From their training on the Gang Task Force, the officers associated such clothing with gang activity. Johnson Decl. ¶ 14. Also, the area where Gutierrez was walking was an area known to them to be a location of gang activity – shootings and gang-related grafitti. Bautista Decl. (Dkt. No. 45) ¶ 6; Johnson Decl. ¶ 11.

The officers decided that they would "attempt to talk with this man."[11] Johnson left the car and approached Gutierrez. Johnson tucked in his shirt so as to display his belt, which contained his police badge and his gun.[12] Gutierrez looked down at

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[7] Johnson Decl. ¶ 9; Oviedo Dep. (Dkt. No. 41-1) at pp. 47 & 57.

[8] Johnson Decl. ¶ 16; Oviedo Dep. p. 114

[9] Johnson Decl. ¶ 12.

[10] Johnson Decl. ¶ 14.

[11] Johnson Decl. ¶ 13.

[12] Johnson Dec. ¶ 16.

the belt and then back up at Johnson.[13] Johnson then said to Gutierrez: "Sheriff's Department, may I speak with you?"[14]

Gutierrez then put his hand in his pocket, turned, and fled on foot directly into traffic.[15] Johnson drew his weapon and, with Oviedo following behind, gave chase on foot.[16] As Johnson closed the distance between himself and Gutierrez, he holstered his gun.[17] As Johnson caught up to Gutierrez, he made fleeting contact with Gutierrez's upper torso, in an attempt to stop him.[18] Gutierrez ducked out of the contact however, and Johnson passed by him.[19]

Gutierrez came to a stop at this point, with Johnson in front of him, and Oviedo behind.[20] Immediately, Gutierrez pulled out a knife, leaned toward Johnson and made a "slashing motion" at him, causing Johnson to jump back.[21] At that point, Johnson and Oviedo drew their weapons, and shot and killed Gutierrez.[22]

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[13] Johnson Decl. ¶ 17.

[14] Johnson Decl. ¶ 15.

[15] Johnson Decl. ¶¶ 17 & 18.

[16] Johnson Decl. ¶¶ 22 & 23.

[17] Johnson Decl. ¶ 24.

[18] Johnson Decl. ¶ 25.

[19] Johnson Decl. ¶¶ 25 & 26.

[20] Johnson Decl. ¶ 27.

[21] Johnson Decl. ¶¶ 28-30.

[22] Johnson Decl. ¶ 30.

B. Facts Relevant to Defendants' Cross-Motions

The Yolo County Sheriff's Department has a written "Use of Force" policy.[23] After the shooting, the Department conducted an investigation, and concluded that no laws or policies were violated.[24]

II. THE CROSS MOTIONS

A. Plaintiffs' Motion for Summary Adjudication of Issues.

Plaintiffs move for summary adjudication of two issues.[25]

First, plaintiffs seek a summary adjudication that Gutierrez was "seized" within the meaning of the Fourth Amendment, "prior to shooting him because they intentionally applied physical force to his person that made him stop and stand his ground."

Second, plaintiffs seek a summary adjudication that the seizure was unreasonable, within the meaning of the Fourth Amendment, because the police "initiated the seizure without any articulable, reasonable suspicion of criminal activity."

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[23] Lopez Decl. (Dkt. No. 50) ¶ 3.

[24] Lopez Decl. (Dkt. No. 5) ¶¶ 6-8.

[25] The Federal Rules of Civil Procedure provide for requests for summary adjudication of issues. Rule 56(a) reads: "A party may move for summary judgment, identifying each claim or defense – or the part of each claim or defense – on which summary judgment is sought." Fed. R. Civ. P. 56(a) (emphasis added). According to Moore's Federal Practice 3d, "This language was added to the rule in 2010 to make clear that summary judgment may be requested not only as to an entire case, or as to a complete claim or defense, but also as to parts of claims or defenses." Section 56.122[2] at 56-309 (noting that "This was probably always the rule," and that "the freedom to use summary judgment procedure to address particular issues or elements of a claim is an important feature of Rule 56, making it a much more useful case management device").

B. Defendants' Motion for Partial Summary Judgment.

Defendants request summary judgment on Claims 3 and 5. Claim 3 is for municipal liability under Monell v. Department of Social Servs., 436 U.S. 658 (1978), for the use of excessive force. Claim 5 is a state claim for negligent hiring, retention, training and supervision. They argue that plaintiffs have not shown that a municipal policy or practice caused any unconstitutional conduct here.

III. ARGUMENTS

A. Plaintiffs' Motion for Summary Adjudication.

1. Fourth Amendment "Seizure."

Plaintiffs argue that Gutierrez was "seized" when Sergeant Johnson, while attempting to stop Gutierrez, came into physical contact with Gutierrez's upper torso (grabbed Gutierrez by the shoulders, in plaintiff's view), and the chase ended,[26] citing Brendlin v. California, 551 U.S. 249, 254 (2007). Once the chase ended, Sergeant Johnson was in front of Gutierrez and Sergeant Olviedo was behind, restraining and curtailing Gutierrez's movement. Plaintiffs assert that at this point, the police had effected a "seizure" of Gutierrez. That is because the police had "grabbed" him, he was no longer running, and no reasonable person

[26] Plaintiffs do not assert that Gutierrez was seized when Johnson first asked to speak with him. That appears to be foreclosed by Ninth Circuit law, in any event. See U.S. v. Smith, 633 F.3d 889, 892-93 (9th Cir.), cert. denied, 564 U.S. ____, 131 S. Ct. 3005 (2011). Plaintiffs also do not assert that Gutierrez was "seized" when the police chased him down, guns blazing, shouting whatever they said. That appears to be foreclosed by California v. Hodari D., 499 U.S. 621, 629 (1991).

in his situation would have thought that he was "free to leave." See I.N.S. v. Delgado, 466 U.S. 210, 215 (1984).[27]

Defendants argue that Gutierrez was not seized until he was shot. They concede that he "came to a stop facing Sergeant Johnson." Dkt. No. 48 at 2 (Defendants' Cross-Motion for Summary Judgment on Monell issues). Their view is that even though Gutierrez briefly stopped, he only did so in order to withdraw his knife and try to fight his way out of the confrontation. Under those circumstances, they argue, there was no yielding or submission in any realistic sense, and he was still trying to evade the police. See U.S. v. Smith, 633 F.3d 889, 893 (9th Cir.) (no seizure where defendant "did not submit in any realistic sense"), cert. denied, 564 U.S. ___, 131 S. Ct. 3005 (2011). The police do not dispute that shooting Gutierrez dead was a seizure under Tennessee v. Garner, 471 U.S. 1, 7 (1985) ("there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment").

2. "Reasonableness" of the (Attempted) Seizure

Plaintiffs argue that the police lacked reasonable suspicion that Gutierrez was engaged in criminal activity, and that therefore, they seized Gutierrez – by grabbing him around the shoulders during his flight – in violation of his Fourth Amendment rights.

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[27] Adopting the "free to leave" standard enunciated in U.S. v. Mendenhall, 446 U.S. 544, 554 (1980) (Opinion of Justice Stewart).

Defendants argue that Gutierrez's presence in a high crime area, his gang-associated clothing, his "headlong flight," and his reaching into his pocket while he fled provided them with the reasonable suspicion they needed to seize him, citing Illinois v. Wardlow, 528 U.S. 119 (2000). Accordingly, both sides focus their arguments on whether the police had reasonable suspicion that criminal activity was afoot at the time of the attempted seizure.[28]

Plaintiffs urge the court to find that defendants' reasons for the seizure were insufficient as a matter of law. Defendants argue that they had sufficient cause to attempt to seize Gutierrez: (1) he was in an area associated with criminal street gangs; (2) he wore a "long baggy shirt, baggy 'Dickies' style pants and a shaved head," which was consistent with gang wear; (3) he engaged in "headlong flight" into two lanes of traffic to evade the police; and (4) he put his hand in his pocket when he turned to run, possibly reaching for a weapon or contraband.

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[28] The Fourth Amendment "applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest." United States v. Brignoni–Ponce, 422 U.S. 873, 878 (1975). Accordingly, the Fourth Amendment requires that such seizures be, at a minimum, "reasonable." Id. In order to satisfy the Fourth Amendment's strictures, an investigatory stop by the police may be made only if the officer in question has "a reasonable suspicion supported by articulable facts that criminal activity may be afoot...." U.S. v. Sokolow, 490 U.S. 1, 7 (1989) (internal quotation omitted) (citing Terry v. Ohio, 392 U.S. 1, 30 (1968)).

U.S. v. Montero-Camargo, 208 F.3d 1122, 1129 (9th Cir. 2000).

Plaintiffs argue that Johnson lacked a basis to seize Gutierrez: (1) he relied on generalized "war stories," not specific data, to conclude that they were in a "high crime area;" (2) Gutierrez's clothing did not indicate gang membership, and in any event, gang membership alone is no reason to seize, and not a proxy for criminal activity; (3) Gutierrez's flight was not "unprovoked" and thus provides no reasonable suspicion to seize; and (4) Gutierrez's hand on or in his pocket does not create reasonable suspicion, since possibly he was trying to keep things from falling out. In any event, the "totality of the circumstances" does not support the seizure.

3. Capacity To Sue

Defendants argue that plaintiffs do not have the capacity to sue under State law, citing Cal. Civ. Code § 377.32, and plaintiffs' failure to file the affidavit required by state law.

B. Defendants' Motion For Partial Summary Judgment - Municipal Liability.

The First Amended Complaint alleges that defendant Yolo County Sheriff's Department has an unconstitutional policy, practice and custom that lead to Gutierrez's death. Defendants argue that plaintiffs cannot show, as pertinent here, that the Sheriff's Department ratified the conduct of the police officers.[29]

Plaintiffs argue that ratification can be established – even

[29] Defendant also argues that there is a complete failure of proof because plaintiffs have cited only this one isolated incident, and that there is no evidence of failure to train. Plaintiffs' opposition addresses only the "ratification" issue.

in a single-incident case – by showing that the municipal decision-maker reviewed and approved an inadequate investigation of the incident that exonerated the alleged wrong-doer, citing Fuller v. City of Oakland, 47 F.3d 1522 (9th Cir. 1995), and that they have sufficient evidence of this to create a genuine issue of fact.

IV. SUMMARY JUDGMENT STANDARDS

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); Ricci v. DeStefano, 557 U.S. 557, ____, 129 S. Ct. 2658, 2677 (2009) (it is the movant's burden "to demonstrate that there is 'no genuine issue as to any material fact' and that they are 'entitled to judgment as a matter of law'"); Walls v. Central Contra Costa Transit Authority, 653 F.3d 963, 966 (9th Cir. 2011)(per curiam) (same).

Consequently, "[s]ummary judgment must be denied" if the court "determines that a 'genuine dispute as to [a] material fact' precludes immediate entry of judgment as a matter of law." Ortiz v. Jordan, 562 U.S. ___, 131 S. Ct. 884, 891 (2011), quoting Fed. R. Civ. P. 56(a); Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 657 F.3d 936, 942 (9th Cir. 2011) (en banc) (same), cert. denied, 565 U.S. ____, 132 S. Ct. 1566 (2012).

Under summary judgment practice, the moving party bears the initial responsibility of informing the district court of the basis for its motion, and "citing to particular parts of the materials in the record," Fed. R. Civ. P. 56(c)(1)(A), that show "that a fact

cannot be ... disputed." Fed. R. Civ. P. 56(c)(1); In re Oracle Corp. Securities Litigation, 627 F.3d 376, 387 (9th Cir. 2010) ("The moving party initially bears the burden of proving the absence of a genuine issue of material fact"), citing Celotex v. Catrett, 477 U.S. 317, 323 (1986).

If the moving party meets its initial responsibility, the burden then shifts to the non-moving party to establish the existence of a genuine issue of material fact. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Oracle Corp., 627 F.3d at 387 (where the moving party meets its burden, "the burden then shifts to the non-moving party to designate specific facts demonstrating the existence of genuine issues for trial"). In doing so, the non-moving party may not rely upon the denials of its pleadings, but must tender evidence of specific facts in the form of affidavits and/or other admissible materials in support of its contention that the dispute exists. Fed. R. Civ. P. 56(c)(1)(A).

"In evaluating the evidence to determine whether there is a genuine issue of fact," the court draws "all reasonable inferences supported by the evidence in favor of the non-moving party." Walls, 653 F.3d at 966. Because the court only considers inferences "supported by the evidence," it is the non-moving party's obligation to produce a factual predicate as a basis for such inferences. See Richards v. Nielsen Freight Lines, 810 F.2d 898, 902 (9th Cir. 1987). The opposing party "must do more than simply show that there is some metaphysical doubt as to the

material facts .... Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 586-87 (citations omitted).

V. ANALYSIS - PLAINTIFFS' MOTION FOR SUMMARY ADJUDICATION

A. Plaintiffs' Capacity To Sue.[30]

Plaintiffs' First Cause of Action, under 42 U.S.C. § 1983, alleges that defendants violated the decedent Gutierrez's own constitutional rights. Accordingly, this claim is a survivor action, an exception to the "general rule" that permits only the person whose rights were allegedly violated to sue:

> In § 1983 actions, however, the survivors of an individual killed as a result of an officer's excessive use of force may assert a Fourth Amendment claim on that individual's behalf if the relevant state's law authorizes a survival action.

Moreland v. Las Vegas Metropolitan Police Dept., 159 F.3d 365, 369 (9th Cir. 1998). California law does authorize survivor actions under its survival statute, Cal. Civ. Proc. § 377.30. That statute provides that "[a] cause of action that survives the death of the person entitled to commence an action or proceeding passes to the decedent's successor in interest ... and an action may be commenced by the decedent's personal representative or, if none, by the decedent's successor in interest." Id.; Grant v. McAuliffe, 41 Cal.2d 859 (1953); Duenez v. City of Manteca, 2011 WL 5118912 at *6

[30] Defendants included their "capacity" argument in their opposition to plaintiffs' motion for partial summary adjudication (rather than in their own separate motion for summary judgment), and so the court addresses it here.

(E.D. Cal. 2011) (Karlton, J.).

There are restrictions on the survivor's ability to sue:

> The party seeking to bring a survival action bears the burden of demonstrating that a particular state's law authorizes a survival action and that the plaintiff meets that state's requirements for bringing a survival action.

Moreland, 159 F.3d at 369. California's survival action requires that plaintiffs file an affidavit setting forth the facts enumerated at Cal. Civ. P. § 377.32. It appears to be undisputed that plaintiffs have not filed such an affidavit, although they have since moved separately for leave to file it.

Defendants assert that Section 377.32 "may be considered a statute of repose," citing Myers v. Philip Morris, Inc., 2003 WL 21756086, 2003 U.S. Dist. LEXIS 13031 (E.D. Cal. 2003) (Coyle, J.), and that its requirements therefore cannot be waived. They further argue that the statute of limitations for filing a survivor action expired two years after April 30, 2009, and therefore the claim is now "extinguished."

Defendants' "statute of repose" assertion does not lie. Section 377.32 is not a statute of repose, bears no resemblance to a statute of repose, and the district court case defendants cite makes no reference to a statute of repose.[31] A statute of repose cuts off a claim at a given date, regardless of when the claim accrues or is discovered. See, e.g., McDonald v. Sun Oil Co., 548 F.3d 774, 779-80 (9th Cir. 2008) ("A statute of repose, however,

[31] To the contrary, Myers held that the Section 377.32 affidavit was not even required in that case.

has a more substantive effect because it can bar a suit even before the cause of action could have accrued, or, for that matter, retroactively after the cause of action has accrued. In proper circumstances, it can be said to destroy the right itself. It is not concerned with the plaintiff's diligence; it is concerned with the defendant's peace"), cert. denied, 557 U.S. ___, 129 S. Ct. 2825 (2009).

Section 377.32 makes no reference to cutting off or extinguishing the claim, contains no cutoff date, no start or end date, and in fact no date of any kind that could identify it as a statute of repose. Indeed, Section 377.32 does not indicate that it is a condition precedent to filing the lawsuit, see Parsons v. Tickner, 31 Cal. App.4th 1513, 1523-24 (2d Dist. 1995), only that the affidavit must be filed at some point.

In any event, the affirmative defense of lack of capacity to sue – which is not jurisdictional, and as shown, is not a statute of repose – may be waived:

> Even if defendants are correct that ECG lacked authorization to sue, this court does not lack subject matter jurisdiction in the sense that it would if plaintiffs lacked standing to sue under the "case or controversy" requirement of Article III of the Constitution. "The question of a litigant's capacity or right to sue or to be sued generally does not affect the subject matter jurisdiction of the district court." Summers v. Interstate Tractor & Equip. Co., 466 F.2d 42, 50 (9th Cir. 1972).

De Saracho v. Custom Food Machinery, Inc., 206 F.3d 874, 878 (9th Cir. 2000), cert. denied, 531 U.S. 876 (2000). Plaintiffs filed their lawsuit on May 7, 2010, and their First Amended Complaint on

May 27, 2010. Assuming defendant is correct that a two-year statute of limitations applied to this case, plaintiffs filed their lawsuit well within the limitations period.

Defendants filed their answer to the First Amended Complaint on July 22, 2010. It contained no "specific denial" of plaintiffs' capacity to sue, as required by Fed. R. Civ. P. 9(a). Cooper v. Allustiarte (In Re Allustiarte), 786 F.2d 910, 914 (9th Cir.), 479 U.S. 847 (1986). On August 24, 2010, defendants, with plaintiffs, filed a joint Status Report. Defendants discussed their "factual Contentions and Legal Theories," but again said nothing about plaintiffs' alleged lack of capacity to sue. Instead, defendants waited until they apparently believed the limitations period had expired, in April 2011. Then, in January 2012, for the first time, they raised the issue of capacity to sue in response to plaintiffs' motion for summary adjudication. They further assert that it is too late for plaintiffs to remedy the alleged defect because the limitations period has passed.

This is a clear case for waiver, even assuming the Section 377.32 affidavit was not timely filed. Defendants were required to assert lack of capacity when they filed their answer, or in some responsive pleading or motion:

> Even if we were to review the denial of the motion in limine directly, we would agree with the district court that defendants waived any objection to plaintiffs authorization to sue. A defendant must challenge a plaintiff's authority to sue by making a "specific negative averment." See Fed. R. Civ. P. 9(a). Case law in this circuit states that the "specific negative averment" must be made "in the responsive pleading or by motion before pleading." Summers v. Interstate Tractor

& Equip. Co., 466 F.2d 42, 49-50 (9th Cir. 1972). De Saracho, 206 F.3d at 878. Although there is language in the Ninth Circuit that could possibly be read to allow this challenge to be raised on summary judgment,[32] if so, the summary judgment motion must be filed as the responsive pleading ("by motion before pleading"), not 19 months after the responsive pleading (the Answer) was filed.

Defendants also try to pile a limitations argument onto their capacity claim, saying that plaintiffs are now barred by the limitations period from filing the required documents. That also is unavailing. The statute of limitations was tolled when plaintiffs filed their lawsuit, even if it was defective because of the missing California documents. See Irwin v. Dept. of Veterans Affairs, 498 U.S. 89, 96 (1990) ("We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period").[33]

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[32] In De Saracho, the court found waiver where "Defendants did not raise the authority to sue issue until one week before the trial was scheduled to begin. None of defendants made a "specific negative averment" in their answers, moved to amend their answers, or filed a motion for summary judgment on this issue. Nor was the authority to sue issue among the disputed factual issues listed in the Joint Pretrial Conference Statement filed with the court on April 21, 1997."

[33] Applying tolling where "plaintiff timely filed complaint in wrong court," citing Burnett v. New York Central R. Co., 380 U.S. 424 (1965); and citing American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974) for the proposition that "plaintiff's timely filing of a defective class action tolled the limitations period as to the individual claims of purported class members."

In any event, plaintiffs have now filed a motion permitting them to file the required California document (Dkt. No. 56). Since it is timely for them to do so, given the tolling of the limitations period, that separate motion will be granted.

B. Fourth Amendment "Seizure."

1. When Was Gutierrez Seized?

To be clear, plaintiffs do not seek summary adjudication regarding the officers' initial attempt to stop or speak with Gutierrez.[34] They also do not seek summary adjudication on the reasonableness of the shooting itself.

In order to obtain summary adjudication on the Fourth Amendment issue, plaintiffs must establish beyond genuine dispute that: (1) Gutierrez was "seized" when Officer Johnson made contact with his shoulders or upper body, and Gutierrez stopped running; and (2) that there was no "reasonable suspicion" of criminal activity to support the seizure. Plaintiffs cannot succeed on either score on summary adjudication. Both issues are for the jury.

To meet their burden, plaintiffs assert that Gutierrez was seized when Johnson grabbed him by the shoulders, and that this caused Gutierrez to stop. Indeed, it is undisputed that at some point during the chase, Johnson reached out for Gutierrez and managed to come into contact with some part of Gutierrez's upper

[34] Defendants describe the initial encounter with Gutierrez as "consensual" and therefore not implicating the Fourth Amendment in any way. At best, however, it can only be described as an attempted consensual event.

body. It is also undisputed that immediately after that contact, Gutierrez stopped running. At that point, Gutierrez was stationary and surrounded by two police officers.

Plaintiffs say that these undisputed facts are sufficient to establish that Gutierrez was "seized" at that point. However, defendants have provided evidence that although Gutierrez stopped running, he immediately pulled out a knife, and starting slashing at the officers. Therefore, rather than being "seized," Gutierrez simply stopped briefly so that he could fight his way out. In other words, Gutierrez never stopped fleeing until he was shot. Each side has submitted sufficient evidence to support their version of the facts.

2. Plaintiffs have not shown, beyond genuine dispute, that Gutierrez "submitted."

The question here, is whether Gutierrez "submitted" to the show of authority at the point where he stopped running. Since this is plaintiff's motion for summary adjudication, the court draws all reasonable inferences in favor of the non-moving defendants. Defendants have submitted evidence – the depositions of Johnson and Oviedo and their Declarations – from which the court can reasonably infer that although Gutierrez stopped after Johnson made "fleeting contact" with him, he did not stop to "submit" to authority. Rather, he stopped so that he could grab his knife and try to slash his way out of the circumstances.[35] Reading the

[35] This is a separate issue from whether in plaintiffs' version of the facts, it is reasonable that a person walking

evidence in that light, Gutierrez did not submit in any realistic sense.

Neither party offers a case that is directly on point. Plaintiffs' view, apparently, is that any "stop" that followed Johnson's contact with Gutierrez is a "submission" sufficient to create a seizure. But logically that cannot be so, as that would include a person who stops to hide after being touched, and a fleeing shooter who briefly stops to re-load his gun after being touched. This case is not materially different, when viewed in the light most favorable to defendants. Here, Gutierrez was fleeing with his hand in his pocket. It is a reasonable inference that his hand was on his knife. After the fleeting contact with Sergeant Johnson, Gutierrez stopped, but only long enough to withdraw the knife from his pocket and start fighting. It is too much of a stretch to say that a person who flees, then stops so that he can slash his way to freedom with a knife has "submitted" to authority.[36]

The court has not been directed to any case that says that when a defendant "stops" – regardless of the circumstances of the

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peaceably down the street, when confronted by two armed men in street clothes (but claiming to be police), and chased by them with their guns drawn, would reasonably feel that he needed to fight his way out.

[36] Also, this cannot be what the Supreme Court or Ninth Circuit had in mind when they used the words "submit" and "submission." Their ordinary dictionary definitions refer to a person yielding to the authority or control of another. There is nothing in the act of trying to fight one's way out of a situation that looks like "submission."

stop – he has necessarily submitted to authority. The only cases that seem to address the specific meaning of "submission" address a stop that occurs before flight and prior to any touching, so they are not directly on point. Nevertheless, they hold that a person who merely stops, in response to a police officer's show of authority, and then flees, has not submitted to authority:

> We decline to adopt a rule whereby momentary hesitation and direct eye contact prior to flight constitute submission to a show of authority. Such a rule would encourage suspects to flee after the slightest contact with an officer in order to discard evidence, and yet still maintain Fourth Amendment protections. A seizure does not occur if an officer applies physical force in an attempt to detain a suspect but such force is ineffective. See Hodari, 499 U.S. at 625. [¶] We hold that Hernandez was not seized because he never submitted to authority, nor was he physically subdued.

U.S. v. Hernandez, 27 F.3d 1403, 1407 (9th Cir. 1994), cert. denied, 513 U.S. 1171 (1995). Smith presented a similar situation where the person momentarily engaged with the police, then fled. The Ninth Circuit found that because he did not "yield," there was no seizure.[37]

In this case, Gutierrez's stopping just long enough to withdraw his knife so that he could fight his way out of this

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[37] Defendants have not moved for summary adjudication but nevertheless urge the court to find, as a matter of law, that there was no seizure until Gutierrez was shot. The court will not grant summary adjudication for defendants in the absence of a motion for such relief. However, such a motion would appear to be futile, since viewing the evidence in the light most favorable to Gutierrez, he did submit. The third-party witness, Ms. Navarro, says that she saw the events and that Gutierrez never had a knife in his hands. This evidence, combined with defendants' admission that Gutierrez did stop after the fleeting encounter, requires the court to draw the reasonable inference that Gutierrez's stop was a submission to authority.

predicament – taking the view most favorable to the non-moving defendants – does not satisfy the requirement that he "submit" or "yield" to police authority. Accordingly, plaintiffs cannot be granted summary adjudication on their assertion that Gutierrez was "seized" at that point.

C. Reasonableness of the Attempted Seizure.[38]

Since neither side is entitled to summary adjudication on the question of whether Gutierrez was seized before he was shot, there remains the question of whether, if he was seized prior to the shooting, the seizure was reasonable. This matters because if it was an unreasonable seizure, and if it provoked Gutierrez into pulling his knife, then the officers may be less likely to prevail on their theory that they had to shoot in self-defense.

The officers' bases for the pre-shooting attempted seizure are: (1) Gutierrez was walking in a high-crime area; (2) he wore gang-associated clothing and had a shaved head, also associated with gang membership; (3) he launched into "headlong flight," directly into traffic, and with his hand in his pocket, when the officers tried to talk with him as a "consensual" encounter.

1. High crime area.

Preliminarily, it is worth nothing that even if Gutierrez was

[38] This decision refers to Officer Johnson's contact with Gutierrez's upper body as the "attempted seizure." This language is for convenience only, and does not reflect any conclusion that the attempt was successful or not. Both sides agree that a seizure was attempted, so it makes sense to refer to it in that way, since the parties are in dispute about whether the attempt lead to an actual "seizure."

in a high crime area, his presence there, standing alone, "is not enough to support reasonable, particularized suspicion that the individual in question has committed or is about to commit a crime." U.S. v. Montero-Camargo, 208 F.3d 1122, 1138 (9th Cir.) (en banc), cert. denied, 531 U.S. 889 (2000).[39] At the same time, the officers "'are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation.'" Montero-Camargo, 208 F.3d at 1138, quoting Illinois v. Wardlow, 528 U.S. at 124.

The court will also keep in mind the danger of citing "high crime area" as another way of referring to places where there are high concentrations of poor and minority persons:

> The citing of an area as "high-crime" requires careful examination by the court, because such a description, unless properly limited and factually based, can easily serve as a proxy for race or ethnicity. District courts must carefully examine the testimony of police officers in cases such as this, and make a fair and forthright evaluation of the evidence they offer, regardless of the consequences. We must be particularly careful to ensure that a "high crime" area factor is not used with respect to entire neighborhoods or communities in which members of minority groups regularly go about their daily business, but is limited to specific, circumscribed locations where particular crimes occur with unusual regularity.

Montero-Camargo, 208 F.3d at 1138; U.S. v. Manzo-Jurado, 457 F.3d

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[39] Citing Brown v. Texas, 443 U.S. 47, 52 (1979) (holding that an investigatory stop was not justified when police officers detained two men walking away from each other in an alley in an area with a high rate of drug trafficking because "the appellant's activity was no different from the activity of other pedestrians in that neighborhood").

928, 934-35 (9th Cir. 2006) ("to establish reasonable suspicion, an officer cannot rely solely on generalizations that, if accepted, would cast suspicion on large segments of the lawabiding population").

In this case, the court cannot say that defendants' evidence of a "high crime area" fails "as a matter of law." Plaintiffs assert that the officers recited only "war stories," rather than actual evidence that the area was a high crime area. But that is not correct. Officer Johnson testified in his deposition to specifics that lead him to conclude that the part of Gum Avenue where Gutierrez was walking was a high crime area. He testified that the overpass that Gutierrez used as an escape route "is vandalized repeatedly with Norteno and sureno vandalism." Johnson Depo. (Dkt. No. 41-2) at p.43 (referring to the deposition page number).[40] He testified that "The streets that are located on both sides of the freeway on Gum Avenue have been involved with numerous shootings." Id. He did not simply rely on a blanket statement that Gutierrez was in a "high crime area" (although the officer did repeat that phrase quite often).

In his declaration, Officer Johnson swore that the area "was known to me for high occurrences of gang activity, including numerous gang related shootings." Johnson Dec. (Dkt. No. 44) ¶ 11 (emphasis added). He further swore that "Gang related graffiti was frequently visible from the overpass area." Id. This testimony

[40] According to Johnson, the "Nortenos" and "surenos" were gangs.

lays a sufficient evidentiary foundation for a fact-finder to conclude that Johnson had personal knowledge of the gang activity and shootings that he swore to. Nothing about these statements indicates that they are just "war stories" as opposed to the declarant's personal observations. In any event, the officer can be questioned about it at trial, and the jury can decide for itself whether to believe that he actually witnessed these things, or is simply repeating "war stories."

Officer Bautista gave even more detailed evidence in his declaration that the area was involved in illegal gang activity. His declaration identifies a photograph taken of the area where the officers encountered Gutierrez. Based upon his own personal experience and training, he says, he identified gang grafitti in the area. He also swore that the area "was known to me for high occurrences of street gang activity, including numerous street gang related shootings." Bautista Dec. (Dkt. No. 45) ¶ 6 (emphasis added).

The court cannot conclude that there is no genuine dispute about whether Gutierrez was in a high crime area.

2. Headlong flight.

Viewing the evidence in the light most favorable to non-moving defendants, Officer Johnson approached Gutierrez, who was walking in a high-crime area. Johnson displayed his badge, and asked Gutierrez if they could speak. In response, Gutierrez turned and ran, his hand in his pocket. In this Circuit, these facts are now sufficient to create "reasonable suspicion" that Gutierrez was

engaged in criminal activity. Smith, 633 F.3d at 894.

In Smith, a person walking in a high crime area fled after the police told him to stop and to stand by the police car.[41] The officer then reached for what Smith thought was a gun, at which point Smith turned and ran. There was no suggestion that Smith seemed to be discarding contraband or reaching for a weapon. He just ran. The police then caught Smith, seized him and searched him. The Ninth Circuit found that Smith's flight itself – combined with the fact that this occurred in a "high crime" area – created the reasonable suspicion that justified the search and seizure:

> There may be circumstances where a person's flight has a perfectly innocent and reasonable explanation. Nevertheless, the circumstances here indicate that Smith's flight was sufficient to engender reasonable suspicion. It is undisputed that Smith was in a high-crime neighborhood during the events in question, that Officer Dominguez clearly identified himself as a police officer, and that Smith burst into headlong flight for no other reason than to evade Officer Dominguez. The officer's determination that Smith's sudden flight was suggestive of wrongdoing was reasonable under these circumstances.

Smith, 633 F.3d at 894.

The court cannot conclude that there is no genuine dispute about whether Gutierrez's flight could give rise to reasonable suspicion that he was involved in criminal activity.

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[41] There was no suggestion in Smith that the police politely asked to speak with Smith; they ran their police lights and demanded that he stop. Smith initially engaged the police, asking if they were talking to him. The police confirmed that they were talking to Smith, and again commanded him to stand in front of the police car.

3. Clothing & Shaved Head.

The officers asserted that when they saw Gutierrez walking down the street, he had a shaved head and was wearing clothing associated with gang activity. See e.g., Johnson Depo. (Dkt. No. 41-2) at ¶ 135. The officers do not indicate that the clothing alone was sufficient to create reasonable suspicion that Gutierrez was involved in criminal activity. However, Johnson testified at his deposition that this was one of the factors that caused him to chase Gutierrez and to attempt to seize him, once Gutierrez ran away. Johnson Depo. at ¶¶ 44-45. The officers presented testimony showing why they believed the clothing was gang-related. Plaintiffs presented no evidence to contradict it. At this point, the court cannot say that the clothing was, as a matter of law, irrelevant to the officers' belief that they had reasonable suspicion that Gutierrez was involved in criminal activity.[42]

VI. ANALYSIS - DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT.

For their Third Cause of Action, a Section 1983 claim against the municipal defendants, pursuant to Monell, plaintiffs allege, among other things, that the Yolo County Sheriff's Department "has a policy, practice and custom to tolerate and ratify the use of unreasonable and excessive force and cruel and unusual punishment by its police officers, Sheriffs deputies, employees and agents,"

[42] As a logical matter, it is not impossible for a person's clothing to identify him as belonging to a specific group. Police officers can often be identified by their attire, as can professional baseball players, at least when they are at work. Plaintiffs have not rebutted the evidence presented that gang members can similarly be identified by their clothing.

and that it was the Department's policy to inadequately hire, train and supervise its employees. In their cross-motion for summary judgment, defendants seek dismissal of this cause of action.[43] As relevant to this case, plaintiffs can ultimately prevail – at trial – in one of three ways.

Plaintiffs can prevail at trial if they can show that the alleged constitutional violation was done "pursuant to a formal governmental policy or a 'longstanding practice or custom which constitutes the "standard operating procedure" of the local governmental entity.'" Gillette v. Delmore, 979 F.2d 1342, 1346 (9th Cir. 1992) (per curiam), cert. denied, 510 U.S. 932 (1993).[44] Alternatively, plaintiffs can prevail at trial if they can prove that "an official with final policy-making authority ratified a subordinate's unconstitutional decision or action and the basis for it." Gillette, 979 F.2d at 1346-47.[45] Finally, plaintiffs can prevail if they can show that "the individual who committed the constitutional tort was an official with 'final policy-making authority' and that the challenged action itself thus constituted an act of official governmental policy." See Gillette, 979 F.2d at

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[43] Defendants also seek dismissal of the Fifth Cause of Action, for Negligent Hiring, Retention, Training and Supervision. However, their motion papers offer no explanation for why this claim should be dismissed (nor any mention of it at all, other than the bare request that it be dismissed). Accordingly, the motion will be denied as to this claim.

[44] Quoting Jett v. Dallas Independent School Dist., 491 U.S. 701, 737 (1989).

[45] Citing City of St. Louis v. Praprotnik, 485 U.S. 112, 123-24 (1988) (plurality).

1346.[46]

Even though plaintiffs will bear the burden of proof at trial on the above issues, on summary judgment, it is defendants as moving parties, who bear the initial burden. They must show "that there is no genuine dispute as to any material fact" and that they are "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); In re Oracle, 627 F.3d at 387 (moving parties bears the initial "burden of proving the absence of a genuine issue of material fact"). Moving defendants must support their assertion that a fact cannot be genuinely disputed by citing to evidence in the record, Rule 23(c)(1)(A), or by showing that plaintiffs "cannot produce admissible evidence to support the fact." Rule 23(c)(1)(B). Defendants' Statement of Undisputed Facts must enumerate "each of the specific material facts relied upon in support" of their motion. E.D. Cal. R. 260(a).

Defendants have not taken their burden very seriously, and indeed, have utterly failed to meet their burden. Since defendants seek summary judgment on the lack of the policy alleged by plaintiffs, they were required to make an initial showing that there was no such Yolo County Sheriff's Department policy. Yet defendants' Statement of Undisputed Facts makes no reference to the existence or non-existence of the alleged policies. Moreover, the Lopez Declaration, the sole factual basis for defendants' motion,

[46] This third possibility would only appear to apply to the failure to train and supervise part of the claim, as plaintiffs do not seem to claim that Johnson or Oviedo had final policy-making authority.

makes no reference to the existence or non-existence of the alleged policies.

Instead, defendants direct the court only to the most unremarkable of factual assertions, all undisputed by plaintiffs: that after the shooting there was an Internal Affairs investigation; that the investigation was done in conformity with Yolo County Sheriff's Department procedures;[47] and that the investigation found no problems with the shooting.[48]

Defendants' only showing is that the Department does have a written Use of Force Policy, a fact not disputed by plaintiffs. See Lopez Dec. (Dkt. No. 50) Exh. A. But plaintiffs' claim is not based upon any alleged absence of a written policy. It is based upon, among other things, the alleged "policy, practice and custom" of the Department "to tolerate and ratify the use of unreasonable and excessive force" by its officers. The identification of a piece of paper setting forth one policy does does not show that plaintiffs will be unable to prove – at trial – the existence of a policy quite different from the one the Department put in writing.

Apart from this one document, defendants' motion is based entirely on its unsupported assertion that plaintiffs "cannot offer evidence of an unconstitutional custom or policy." See Dkt. No. 48

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[47] Plaintiffs point out however, that in their view, the investigation was defective even if it followed procedures, because it failed to include key witnesses interviews, and testing of key evidence.

[48] Plaintiffs point out however, that in their view, the IA conclusion is wrong.

at p.5. They make no showing that plaintiffs will be unable to meet their ultimate burden.[49]

Meanwhile, defendants make no showing of any kind regarding the alleged policy of inadequate hiring and training of its officers. It is never mentioned in the Lopez Declaration, nor in any evidence identified by defendants in their motion.

Defendants do address the existence or non-existence of the alleged policies, but only in their briefs.

A. Isolated Incident

Defendants claim that the crux of plaintiff's Monell claim is that "the single encounter with Luis Guitierrez on April 30, 2009 established a policy, practice or custom." Dkt. No. 48 at p.5. That completely misstates plaintiff's Monell case. Plaintiffs do not allege that this one incident established a policy or practice, they allege that this incident occurred because the police acted pursuant to the Department's policy or practice. Defendants' straw-man argument will not prevail on this summary judgment motion.

B. Inadequate Training

Defendants simply assert in their briefs that plaintiffs "cannot demonstrate" a policy to inadequate train the officers, and that "there is no evidence" of it. But it is defendant's burden to show (not simply assert) that there is no genuine issue here.

[49] For example, defendants offer no evidence about the existence or non-existence of excessive force complaints made against the Yolo County Sheriff's Department.

Defendants identify no declaration or other evidence of adequate training, or anything else that would show the absence of a genuine issue here.

C. Ratification By Approval of Inadequate Investigation.

Defendants explicitly reverse the burden of proof in arguing against the "ratification" prong of Monell liability. Here, defendants had a clear opportunity to identify testimony or file a declaration by a Department official establishing that the Department did not ratify the conduct alleged. Instead, they assert only that plaintiffs can point to no evidence "of a deliberate or conscious choice by anyone holding final policymaking authority to adopt the deputies' precise actions" as policy, even though it is not plaintiffs' burden to do so. Defendants had a clear opportunity to meet their burden here, because they submitted the declaration of the apparent decision-maker, Lopez. But Lopez does not address the ratification issue.

D. Plaintiffs' Response to Defendants' Summary Judgment Motion.

Plaintiffs quite sensibly responded to defendants' summary judgment motion on the merits. However, it was improper for defendants to force plaintiffs to expend their time and resources attempting to meet a burden that properly lay on defendants' shoulders. Defendants have thrown only false obstacles in plaintiffs' path toward trial. Accordingly, the court will deny defendants' motion solely on the basis that they have failed to meet their burden on summary judgment. They are free to defend

against the claims at trial.

VII. CONCLUSION

For the foregoing reasons:

1. Plaintiffs' motion (Dkt. No. 56) for leave to file the declaration of Jose Gutierrez and Irma Gutierrez (Dkt. No. 55) is **GRANTED;**

2. Plaintiffs' motion for summary adjudication (Dkt. No. 41), is **DENIED**;

3. Defendants' motion for partial summary judgment (Dkt. No. 47), is **DENIED.**

IT IS SO ORDERED.

DATED: May 8, 2012.

LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT