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 8 UNITED STATES DISTRICT COURT
 9 EASTERN DISTRICT OF CALIFORNIA

11 MARINA RADCHUCK, et al.
 12 Plaintiffs,
 13 vs.
 14 CITY OF CITRUS HEIGHTS, et al.,
 15 Defendants.

No. 2:11-CV-00486-JAM-CKD

**ORDER re DEFENDANTS'
 MOTION FOR SUMMARY
 JUDGMENT**

16 CITY OF CITRUS HEIGHTS,
 17 JEREMY HATCHELL and NANCY
 WIEGEL,
 18 Counter-Claimants
 19 vs.
 20 MARINA RADCHUCK, ESTATE OF
 BARYS RADCHUCK, and DOES 1-
 21 10, inclusive,
 22 Counter-Defendants

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 24 The Motion for Summary Judgment by Defendants was heard on November
 25 7, 2012, by the Honorable John A. Mendez. The issues having been duly
 26 considered and a decision having been duly rendered:

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1 **IT IS HEREBY ORDERED AND ADJUDGED:**

2 1. The following Causes of Action are dismissed with prejudice by
3 stipulation of the parties:

4 a. Second Cause of Action - Violation of the Fourth Amendment of
5 the United States Constitution brought pursuant to 42 U.S.C. § 1983 alleging that
6 the decedent, Barys Radchuck was unlawfully seized (detained) by Defendant
7 Officers Jeremy Hatchell and Nancy Wiegel.

8 b. Third Cause of Action - Violation of the Fourth Amendment of the
9 United States Constitution brought pursuant to 42 U.S.C. § 1983 alleging that the
10 decedent, Barys Radchuck was unlawfully seized (arrested) by Defendant Officers
11 Jeremy Hatchell and Nancy Wiegel.

12 c. Sixth Cause of Action - An allegation that the Defendants
13 conspired to violated the decedent's, Barys Radchuck's, Civil Rights brought
14 pursuant to 42 U.S.C. § 1985.

15 d. Eighth Cause of Action - Violation of the First, Fourth and
16 Fourteenth Amendments to the United States Constitution brought pursuant to 42
17 U.S.C. § 1983 alleging that the Defendants deprived the Plaintiffs to this action
18 their right to a family relationship with the decedent, Barys Radchuck, by the use
19 of unreasonable and unjustified force.

20 e. Tenth Cause of Action - An allegation that the Defendants caused
21 the decedent, Barys Radchuck to ensure great conscious pain and suffering
22 brought pursuant to 42 U.S.C. § 1983 as a 'Survival Action'.

23 f. Thirteenth Cause of Action - Violation of the decedent's, Barys
24 Radchuck's statutory rights brought pursuant to California Civil Code §§ 51, et
25 seq.

26 2. The Plaintiffs' decedent, Barys Radchuck, was provided with adequate
27 medical care and, therefore, the Plaintiffs' Fifth Cause of Action alleging that the
28 Defendants were deliberately indifferent to the decedent's medical needs brought

1 pursuant to 42 U.S.C. § 1983 is hereby dismissed with prejudice.

2 3. The Plaintiffs allege that the Defendants used constitutionally
3 unreasonable force against the decedent, Barys Radchuck, in four separate causes
4 of action, which are: First Cause of Action (Free from unreasonable seizures and
5 searches brought pursuant to 42 U.S.C. § 1983); Fourth Cause of Action (Free
6 from excessive/deadly force brought pursuant to 42 U.S.C. § 1983); Seventh
7 Cause of Action (Wrongful Death brought pursuant to 42 U.S.C. § 1983); and
8 Fifteenth Cause of Action (State of California common law tort actions for assault
9 and battery).

10 a. The Court finds that these allegations raised by the Plaintiffs
11 involve three separate legal theories as described below:

12 (1) Whether the Officers Had Sufficient Back Up: The Court
13 finds that it is factually undisputed that Defendant Officers Jeremy Hatchell and
14 Nancy Wiegel approached a visibly injured man, the decedent, Barys Radchuck, in
15 an outdoor environment with their weapons initially holstered. The Court finds
16 that this did not create a situation similar to that in *Alexander v. City and County*
17 *of San Francisco*, 29 F.3d 1355 (9th Cir. 1994), in that the officers did not
18 approach Mr. Radchuck with their weapons drawn and that they were not entering
19 into his apartment or home. Conversely, Plaintiffs were not able to offer any legal
20 authority to support this theory of liability. Accordingly, this theory is dismissed
21 with prejudice.

22 (2) Whether Officer Nancy Wiegel's Use of the Taser Was
23 Reasonable: Although Officers Wiegel and Hatchell testified that it was not until
24 after Mr. Radchuck took an aggressive step towards Officer Wiegel that she
25 deployed her Electronic Control Device (also referred to as a "Taser"), Plaintiff
26 Marina Radchuck testified during her deposition that Mr. Radchuck was in the
27 process of retreating from the officers and that he never took an aggressive step
28 towards Officer Wiegel before she deployed her Taser. Because the Court takes

1 the facts most favorable to the Plaintiffs, this Court cannot conclude that Officer
2 Wiegel's use of the Taser was constitutionally reasonable force based upon the
3 recent Ninth Circuit cases of *Bryan v. MacPherson*, 630 F.3d 805 (9th Cir. 2010)
4 and *Mattos v. Agarano*, 661 F.3d 433 (9th Cir. 2011) (en banc), *cert. denied*, 132
5 S.Ct. 2681 (2012). Accordingly, the Court denies the Defendants' request to
6 dismiss this theory of unconstitutional use of force.

7 (3) Whether Officer Hatchell's Use of his Firearm Was
8 Reasonable: The Court finds that Officer Hatchell's use of his firearm was
9 constitutionally reasonable and relies, in part, on the decision of *Brosseau v.*
10 *Haugen*, 543 U.S. 194 (2004) in reaching that conclusion. Accordingly, this
11 theory is dismissed with prejudice.

12 b. Because all causes of action against Officer Hatchell alleging
13 individual liability have been dismissed, the Court hereby dismisses with prejudice
14 Defendant Officer Jeremy Hatchell as a Defendant from this action; however, this
15 dismissal does not, in any way, hinder or impair Officer Hatchell's ability to
16 pursue his counter-claims against Plaintiffs or Plaintiffs' decedent's estate.

17 4. Defendants assert that, although this Court cannot find that Officer
18 Wiegel's use of the Taser was constitutionally reasonable that she is, nevertheless,
19 entitled to qualified immunity. However, because the *Bryan, supra*, case was
20 decided three (3) months prior to the incident giving rise to the litigation in this
21 present matter, the Court finds that the law was clearly established. Accordingly,
22 the Court denies without prejudice the Defendants' assertion that qualified
23 immunity applies in this case.

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1 5. Defendants assert that the Plaintiffs' Ninth Cause of Action, a *Monell*
2 allegation brought pursuant to 42 U.S.C. § 1983 fails because any of the causes of
3 action alleging individual misconduct against the Defendant-Officers are, in fact,
4 constitutional. Because the Court has found that there is a triable issue of fact
5 regarding the reasonableness of Officer Wiegel's use of the Taser, the Court
6 denies without prejudice this request. However, the Court cautions that this issue
7 will be re-visited at the Pretrial Conference to determine if there is, in fact, any
8 policy, procedure, pattern or custom to support this allegation at all.

9 6. As to the remaining causes of action brought pursuant to State of
10 California statutory or common law and not already dismissed as indicated above,
11 the Court finds that the scope of these claims brought for intentional infliction of
12 emotional distress, assault and/or battery are limited only to Officer Wiegel's use
13 of the Taser. The Court hereby adopts the same rationale as described in
14 paragraph 3.a. above, which is in accordance with, among other authorities, *Brown*
15 *v. Ransweiler* (2009) 171 Cal.App.4th 516.

16 WHEREFORE, it is hereby ORDERED that:

17 1. Officer Jeremy Hatchell is hereby dismissed with prejudice from this
18 entire action as a Defendant; however, this does not impair his ability to pursue his
19 counter-claims;

20 2. Officer Nancy Wiegel is dismissed with prejudice from this action with
21 the sole exception of her use of the Taser as alleged in the First, Fourth, Seventh,
22 Eleventh, Fourteenth and Fifteenth Causes of Action;

23 3. Officer Jeremy Hatchell's use of his firearm is found to be
24 constitutionally reasonable;

25 4. The Fifth Cause of Action (failure to provide adequate medical care) is
26 dismissed with prejudice against all defendants;

27 5. The Defendants' request to dismiss the Ninth Cause of Action (*Monell*)
28 is denied without prejudice;

1 6. The Plaintiffs may maintain their Twelfth Cause of Action (California's
2 Bane Act) against the City of Citrus Heights only and, as to all remaining
3 Defendants, this Cause of Action is dismissed with prejudice.

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Dated: November 13, 2012

/s/ John A. Mendez
Honorable John A. Mendez
United States District Court Judge