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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

WHITNEY DUENEZ, individually
and as successor-in-interest
for Decedent ERNESTO DUENEZ,
JR.; D.D., a minor, by and
through his guardian ad
litem, WHITNEY DUENEZ;
ROSEMARY DUENEZ,
individually; and ERNESTO
DUENEZ, SR., individually,

Plaintiffs,

v.

CITY OF MANTECA, a municipal
corporation; DAVID BRICKER,
in his capacity as Chief of
Police for the CITY OF
MANTECA; (FNU) AGUILAR,
individually and in his
official capacity as a police
officer for the CITY OF
MANTECA; and DOES 1-100,
inclusive,

Defendants.

No. CIV. S-11-1820 LKK/KJN

ORDER

I. BACKGROUND

On June 8, 2011, defendant John Moody, a Manteca police
officer, shot and killed Ernesto Duenez, Jr. Complaint ¶¶ 1 & 9;
Answer at 3 lines 4-5 and 20-22. The events leading to the

1 shooting, the shooting itself, and subsequent events, were
2 captured on a "dash-cam" video taken from Officer Moody's car.
3 Complaint ¶ 1.¹

4 This lawsuit is brought by decedent's widow, Whitney Duenez,
5 his son, D.D. (Whitney Duenez is D.D.'s guardian ad litem), and
6 his parents, Ernesto and Rosemary Duenez, against Moody, the City
7 of Manteca and David Bricker, the Chief of Police.

8 The Complaint contains eight (8) federal and state claims.
9 The federal claims allege violations of decedent's and
10 plaintiffs' constitutional rights under the Fourth and Fourteenth
11 Amendments to be free from governmental use of excessive force
12 resulting in death, denial of medical attention and denial of
13 rights to familial relationships. The state claims allege
14 negligent and intentional infliction of emotional distress,
15 wrongful death and violation of Cal. Civ. Code § 52.1.

16 Both sides move for summary judgment, each asserting that
17 the video conclusively shows that Moody was, or was not,
18 justified in shooting and killing the decedent. In addition,
19 plaintiffs move to seal certain documents, and to re-open
20 discovery so that they can depose defendants' counsel.

21 For the reasons set forth below, defendants' motion for
22 summary judgment and for partial summary judgment will be granted

23 ¹ Defendants object to plaintiffs' submission of the dash-cam
24 videos from Moody's car, asserting that it is "not
25 authenticated," and is "hearsay." Defendants' Objection to
26 Evidence in Opposition to Plaintiffs' Motion for Summary Judgment
27 ("Defendants' Objections") (ECF No. 89-3 at p.2 lines 3-6. It is
28 not necessary to resolve this puzzling objection, since the
defendants have also submitted the video, and it is not objected
to by plaintiffs.

1 in part and denied in part. Plaintiffs' motions for summary
2 judgment, to seal documents and to re-open discovery will be
3 denied in their entirety.

4 II. UNDISPUTED FACTS

5 1. Initial report on decedent.

6 On June 8, 2011, Officer Armen Avakian (not a defendant),
7 responded to a report of suspicious activity on Ribier Court,
8 where decedent's wife, Whitney Duenez, lived, according to the
9 landlady. Plaintiffs' Statement of Undisputed Facts ("PSUF")
10 (ECF No. 75-1) ¶ 1.² According to the landlady, decedent was in
11 the apartment, and he and Whitney were not getting along at that
12 time. Id.

13 Avakian ran a warrant check on decedent, which indicated
14 that he was "armed and dangerous," and that he was wanted on a
15 "parole hold" meaning, apparently, that his parole had been
16 revoked. PSUF ¶ 3; DSUF ¶¶ 25-26. Avakian spoke to decedent's
17 parole officer and learned that the "parole hold" resulted from
18 decedent having "'peed dirty,'" and his not being in contact with
19 his parole officer. PSUF ¶ 4. Avakian also learned that the
20 "armed and dangerous" label came (at least in part), from the
21 parole officer's having received information that decedent
22

23 ² Unless otherwise noted, the facts cited in the PSUF are
24 "Undisputed for purposes of this motion" by defendants. See
25 Defendants' Opposition to Plaintiffs' Statement of Undisputed
26 Facts ("Def. Opp. To PSUF")(ECF No. 89-2). It appears that
27 defendants are permitted to limit their concessions in this way.
28 See Fed. R. Civ. P. 56(e)(2) ("If a party ... fails to properly
address another party's assertion of fact as required by
Rule 56(c), the court may ... consider the fact undisputed for
purposes of the motion").

1 carried a small firearm in his butt-cheeks. PSUF ¶ 5. Avakian
2 learned from Officer Ranch Johnson (not a defendant) that
3 decedent had reportedly been involved in a recent shooting. PSUF
4 ¶ 6. Finally, Avakian learned that Duenez could sometimes be
5 found at a residence on Flores Court. PSUF ¶ 7. Avakian passed
6 this information on to Moody and others on the incoming work
7 shift. PSUF ¶ 8.

8 At some point, Officer Mark Rangel (not a defendant)
9 responded to a call from a civilian named Michael Henry that
10 decedent and Whitney had recently left a residence on Pillsbury
11 Road where they had been engaged in a shouting match. PSUF ¶ 9.
12 Henry later advised the police that decedent had left the
13 Pillsbury Road residence, in the back of a blue pickup truck, and
14 that decedent had a "throwing knife" with him. PSUF ¶ 10-11.³
15 Henry advised the police that decedent was in the truck with a
16 man (his uncle) and a woman, and that they had left in the truck
17 with decedent willingly. PSUF ¶ 12.

18 **2. Officer Moody.**

19 Defendant Moody has been a "sworn police officer" with the
20 Manteca Police Department since 2000. Defendants' Separate
21 Statement of Undisputed Facts ("DSUF") (ECF No. 80-2) ¶ 2.⁴ Up

22 ³ Plaintiff asserts that decedent was "sitting in the back" of
23 the truck. Defendants point out that the testimony plaintiff
24 cites to for this assertion states that decedent "was hiding in
25 the back" of the truck. See May 13, 2013 Deposition of Officer
Mark Rangel ("Rangel Depo.") (ECF No. 76-3) at 10 (Exhibit A to
August 12, 2013 Nisenbaum Declaration, ECF No. 76).

26 ⁴ Unless otherwise noted, the facts cited in the DSUF are
27 "Undisputed" by plaintiffs. See Plaintiffs' Objections to
28 Defendants' Separate Statement of Undisputed Facts ("Objections")
(ECF No. 92).

1 until the shooting at issue here, the police department had
2 received no complaints about Moody, concerning use of force,
3 provision of medical assistance, truthfulness or concealment of
4 misbehavior. DSUF ¶¶ 3-4. Moody has never been disciplined
5 based upon any claim of excessive force, providing medical care,
6 truthfulness or "concealment" of misbehavior. DSUF ¶ 5.⁵ During
7 the entire time Moody was employed by MPD, he was involved in
8 only one other incident involving his shooting a firearm in the
9 line of duty. DSUF ¶ 6. The MPD examined that incident and

11 Plaintiffs failed to comply with the Local Rules of this court in
12 responding to the DSUF. See E.D. Cal. R. 260(b). The Objections
13 failed to "reproduce the itemized facts" in the DSUF (this is
14 normally done in chart form), to which plaintiffs were
15 responding. In addition, the Objections failed, in two instances
16 (Nos. 32 & 33), to provide a "citation to the particular
17 portions" of the pleadings or evidence upon which the denial was
18 based. Plaintiffs and their counsel are cautioned that the court
19 expects compliance with its local rules, and that failure to
20 comply could result in the imposition of sanctions.

17 ⁵ Defendants support this fact with testimony from defendant
18 Bricker: "Office MOODY ... received no discipline concerning his
19 use of force while at the Department. Nor did he receive ...
20 discipline for any allegations that he was untruthful, or that he
21 'covered up' his use of force or for providing medical care other
22 than in the present action." Declaration of David Bricker
23 ("Bricker Decl.") (ECF No. 82-35) at 2. Plaintiffs "dispute"
24 this fact, but offer no evidence to put it genuinely in dispute.
25 Instead, citing a "confidential" portion of Bricker's deposition
26 testimony, they argue that a witness to an earlier shooting (in
27 which Moody shot out the tire of a car), "criticized" Moody for
28 shooting at the car, and refer to two persons interviewed about
the shooting as "complaining" witnesses. Objections ¶ 5. Even
if there were a proper evidentiary basis for these arguments (and
there is not, as plaintiffs' assertions are based upon, at best,
hearsay within hearsay within hearsay: deposing counsel's
questions about a newspaper account of what these purported
witnesses had said to a reporter), they do not even attempt to
dispute that Moody was not "disciplined."

1 determined that Moody's actions were justified and proper. Id.

2 **3. Moody stakes out 245 Flores Court.**

3 Defendant Moody waited near 245 Flores Court for decedent to
4 arrive. PSUF ¶ 14. When the pickup truck arrived, Moody
5 "radioed dispatch," and immediately pursued the truck. PSUF
6 ¶ 15. When the truck pulled into the driveway, Moody pulled his
7 car up behind it, blocking the truck. PSUF ¶ 17; Moody saw that
8 Duenez was in the back seat of the pickup truck. Id.

9 **4. The confrontation begins.**

10 Moody exited his car and began issuing commands to decedent.
11 PSUF ¶ 18; Bricker Decl. Exh. A ("Exh. A") (ECF No. 80-35) (video
12 of the incident). Upon exiting his car, Moody ordered decedent
13 not to move. Id. He ordered decedent to show his hands or put
14 his hands up. Id. While this was happening, Moody initially
15 drew his weapon, then holstered it, then drew it again. PSUF
16 ¶ 18; Exh. A. Meanwhile, decedent was exiting the pickup truck,
17 or attempting to exit it, on the passenger side. Id. ¶¶ 18 & 19;
18 Exh. A. As he was exiting the truck, decedent appears to have
19 briefly had an object in his right hand. PSUF ¶ 20; Exh. A.⁶

20 **5. Moody shoots decedent to death.**

21 Moody ordered decedent to "drop the knife." PSUF ¶ 21.
22 Immediately upon issuing this order, Moody started shooting
23

24 _____
25 ⁶ Plaintiffs assert that tweezers later found on the scene are
26 consistent with the object seen in the video. PSUF ¶ 20.
27 Defendants say that decedent had a knife in his hand, citing
28 Moody's deposition testimony that decedent had "a large knife,
chrome or silver blade" in his right hand. See Moody Depo.
at 26.

1 decedent.⁷ PSUF ¶ 21; Exh A. Moody fired thirteen (13) shots at
2 decedent, killing him. PSUF ¶ 23; Exh. A; Answer at p.2, lines
3 20-22.⁸ The final shots were fired after decedent had fallen to
4 the ground. PSUF ¶ 22; Exh. A.⁹ After he stopped shooting,
5 Moody radioed in that shots had been fired, causing the police
6 dispatcher to immediately summon emergency medical help to the
7 scene. DSUF ¶ 15; Declaration of John Moody ("Moody Decl.") (ECF
8 No. 80-36) at 5. Moody did not render any medical assistance to
9 decedent as he lay dying, nor did he do anything after the
10 shooting to medically injure the decedent.¹⁰ DSUF ¶ 22-23; Moody
11 Decl. at 5.

12 **6. Whitney Duenez arrives.**

13 Upon the firing of the final shots, Whitney Duenez arrived
14 on the scene. PSUF ¶ 25.¹¹ The police on the scene ordered

15 ⁷ Plaintiffs say Moody began shooting "almost simultaneously"
16 with this command. PSUF ¶ 21. Defendants say Moody began
17 shooting after this command, citing the video. Defendants'
18 Opposition to PSUF ¶ 21.

19 ⁸ Plaintiffs say Moody shot decedent thirteen times. PSUF ¶ 23.
20 However, the evidence plaintiffs cite only indicates that Moody
21 shot at decedent thirteen times, but does not indicate that
22 decedent was hit thirteen times. See Moody Depo. at 37.

23 ⁹ Plaintiffs say decedent was "already shot and on the ground."
24 PSUF ¶ 22. Defendants say decedent was "curling up off the
25 ground towards the open doorway of the pickup truck," citing the
26 video. Defendants' Opposition to PSUF ¶ 22.

27 ¹⁰ Plaintiffs say Moody had a legal obligation to render aid.
28 Defendants say he had no such legal obligation, and in any event,
there was nothing Moody could have done.

¹¹ Plaintiffs say Whitney ran screaming to the scene
"[s]imultaneous with the last shots." PSUF ¶ 25. Defendants say
the video indicates she arrived "several seconds after the last
shot was fired," and was not screaming. Def. Opp. to PSUF ¶ 25.

1 Whitney to "move back." PSUF ¶ 27. Officer Rangel (not a
2 defendant) pulled Whitney away from the scene, handcuffed her,
3 and placed her in a patrol car. PSUF ¶ 29.¹²

4 **7. Moody handcuffs and searches decedent.**

5 After the shooting, Moody tried to pull the decedent away
6 from the truck, but was unable to do so because, as he
7 discovered, decedent's foot was entangled in the seat belt. PSUF
8 ¶ 30. An officer (either Moody or another officer), then cut the
9 seatbelt to release decedent's foot, and Moody "reasonably and
10 properly" pulled decedent away from the truck "for proper safety
11 reasons." DSUF ¶ 16;¹³ PSUF ¶¶ 31 & 32. Moody then "flipped" the
12 decedent over and "properly handcuffed" the decedent "for proper
13 safety reasons." DSUF ¶ 17;¹⁴ PSUF ¶ 33. Decedent was still
14 alive when he was pulled away from the truck, flipped over and
15 handcuffed. PSUF ¶ 33. Moody then searched the decedent for
16 weapons, including a search of decedent's buttocks area. PSUF
17 ¶ 34.¹⁵ The search of decedent's body and clothing did not

18 ¹² Both sides agree that Rangel wanted to avoid contaminating the
19 scene. Defendants assert that he also pulled her away because
20 she was disobeying his orders.

21 ¹³ Plaintiff says "undisputed" to defendants' "reasonably and
22 properly" characterizations and "safety reasons" explanation.

23 ¹⁴ Plaintiff again says "undisputed" to defendants' "reasonably
24 and properly" characterizations and "safety reasons" explanation.

25 ¹⁵ Plaintiffs characterize this as a strip search because, they
26 assert, Moody pulled decedent's pants or underwear down.
27 Defendants say it was not a strip search because Moody only
28 lifted decedent's underwear briefly and glanced at the buttocks
area. The court notes the following language from the Supreme
Court, referring to the search of a person who, unlike the
mortally wounded decedent, is still conscious and able to follow
directions:

1 produce a knife or a gun, or any other weapon. PSUF ¶ 35.

2 From the time of the search until medical help arrived, the
3 scene was sufficiently secure that medical assistance could have
4 been given to the decedent. PSUF ¶ 38. During that time,
5 neither Moody nor any other police officer at the scene provided
6 any medical assistance to the decedent as he lay dying. PSUF
7 ¶ 38. However, Moody did eventually request that someone
8 retrieve a trauma kit from his patrol car, and he cut off
9 decedent's shirt. PSUF ¶ 37. However, paramedics arrived and
10 Moody did not take any further action regarding the decedent.

11
12
13 [S]ome cases of this Court refer to a "strip
14 search." The term is imprecise. It may
15 refer simply to the instruction to remove
16 clothing while an officer observes from a
17 distance of, say, five feet or more; it may
18 mean a visual inspection from a closer, more
19 uncomfortable distance; it may include
20 directing detainees to shake their heads or
to run their hands through their hair to
dislodge what might be hidden there; or it
may involve instructions to raise arms, to
display foot insteps, to expose the back of
the ears, to move or spread the buttocks or
genital areas, or to cough in a squatting
position.

21 Florence v. Board of Chosen Freeholders of County of Burlington,
22 566 U.S. ___, 132 S. Ct. 1510, 1515 (2012). The court also notes
23 this definition of "strip search" contained in the California
Penal Code:

24 As used in this section, "strip search" means
25 a search which requires a person to remove or
26 arrange some or all of his or her clothing so
27 as to permit a visual inspection of the
underclothing, breasts, buttocks, or
genitalia of such person.

28 Cal. Penal Code § 4030(c).

1 PSUF ¶ 37; Exh. A.

2 **8. The on-scene investigation.**

3 Officer Ranch Johnson (not a defendant), looked for evidence
4 at the scene of the shooting. PSUF ¶ 39. He found a "black
5 clip-on knife" holder attached to decedent's belt and a knife in
6 the bed of the truck on the "driver's side tailgate." Id. He
7 also found black tweezers on the ground near the passenger's side
8 of the truck. Id. The tweezers did not belong to any of the
9 officers at the scene. PSUF ¶ 41. In addition, Johnson found a
10 glass drug pipe on the lawn and shell casings scattered about.
11 Id.

12 **9. Defendant David Bricker, Chief of Police.**

13 Defendant Bricker was the Chief of Police at the time of the
14 shooting; he is now retired. PSUF ¶ 42; DSUF ¶ 1. Bricker went
15 to the scene and transported Moody back to the police station.
16 PSUF ¶ 43. Bricker watched the dash cam video of the shooting
17 the next morning. PSUF ¶ 45. Before the DA's investigation was
18 completed, but after getting a preliminary view from the DA
19 investigator, Bricker formed a "preliminary opinion" that the
20 shooting was justified, and was within police department policy.
21 He emailed his view to all police department staff. PSUF ¶ 44.
22 Bricker also publicly announced to the press, before the DA's
23 investigation was completed, that the shooting was justified, and
24 that the police department stood behind Moody. PSUF ¶¶ 47-48;
25 DSUF ¶ 12-13.

26 **10. The DA's investigation.**

27 The San Joaquin County District Attorney's Office (not a
28 defendant) conducted an investigation into the shooting. Accord,

1 PSUF ¶ 48. The investigation was properly conducted under a
2 protocol that ensured that Chief Bricker would not be involved.
3 DSUF ¶ 9 & 10. This investigation concluded that the shooting
4 was justified, and the City was so notified. DSUF ¶ 28. The
5 police department then conducted a "shooting review panel," and
6 determined that Moody "acted properly during this incident."
7 DSUF ¶ 30.

8 Nick Obligation (not a defendant) became Chief of Police
9 while the investigation was still on-going. He also concluded
10 that the shooting was justified and within police department
11 policies. PSUF ¶¶ 50 & 51.

12 **11. Officer Moody - training and qualifications.**

13 The State of California operates the Commission on Peace
14 Officer Standards and Training ("POST"), which specifies the
15 training requirement for peace officers, including Moody,
16 throughout the state. Bricker Decl. at 2. In order for an
17 officer to go on duty as a peace officer, that officer must meet
18 POST required firearm qualifications or requalifications for his
19 service weapons. Id., at 3. Under the City's testing methods, n
20 officer is required to achieve a passing score on one of up to
21 three "attempts" in order to pass the requalification. Id.
22 Receiving a non-passing score on at "attempt" is not a failure of
23 the requalification attempt, however flunking all three attempts
24 "constitutes a failure of the requalification exam." Id.

25 According to an apparently official document discussed
26 during Bricker's "confidential" deposition, Moody failed a
27 firearm requalification on or about May 12, 2008. Confidential
28 Portion of Bricker Depo. at 66. The deposition discussion is not

1 entirely clear about what happened, but from the language of the
2 document - "Test 1, fail. Remedial, pass." - the court infers
3 that Moody flunked all three attempts, and later passed in a
4 remedial exam. On December 7, 2010, Moody again failed the
5 firearms exam by flunking all three attempts. Confidential
6 Portion of Bricker Depo. at 73. It appears that once again Moody
7 eventually passed the requalification. See id. On February 9,
8 2011 Moody again failed the firearm requalification exam by
9 flunking all three attempts, "during a nighttime shooting
10 scenario." Bricker Decl. at 3-4.¹⁶ However, Moody was able to
11 pass the exam on his next attempt the next day, after an apparent
12 defect in the weapon was corrected. Id.

13 **12. Policy.**

14 Police department policy is that a police officer must
15 qualify and then periodically re-qualify on his firearm in order
16 to carry that firearm on duty. See Confidential Bricker Depo.
17 at 78. If an officer failed a requalification exam (that is,
18 flunked all three attempts), and then flunked the remedial exam
19 (that is, again flunked all three attempts), police department
20 policy would be to notify Bricker, who would then take action to
21 take the officer's gun away from him. See Confidential Bricker
22 Depo. at 64-65.

23 Short of being unable to pass on the remedial exam, if an
24 officer has "a continuing pattern of failing the first time and

25 ¹⁶ Bricker declares that Moody "only failed one firearms skills
26 test," which occurred on February 9, 2011. Bricker Decl. at 3.
27 However, he offers no explanation for his prior testimony
28 discussing Moody's apparent failures on or about May 12, 2008,
and on December 7, 2010.

1 passing on the remedials," then policy is to "reassign them to
2 additional firearms training." Confidential Bricker Depo at 68.

3 III. STANDARDS

4 A. Summary Judgment.

5 Summary judgment is appropriate "if the movant shows that
6 there is no genuine dispute as to any material fact and the
7 movant is entitled to judgment as a matter of law." Fed. R. Civ.
8 P. 56(a); Ricci v. DeStefano, 557 U.S. 557, 586 (2009) (it is the
9 movant's burden "to demonstrate that there is 'no genuine issue
10 as to any material fact' and that the movant is 'entitled to
11 judgment as a matter of law'"); Walls v. Central Contra Costa
12 Transit Authority, 653 F.3d 963, 966 (9th Cir. 2011) (per curiam)
13 (same).

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

21 Under summary judgment practice, the moving party bears the
22 initial responsibility of informing the district court of the
23 basis for its motion, and "citing to particular parts of the
24 materials in the record," Fed. R. Civ. P. 56(c)(1)(A), that show
25 "that a fact cannot be ... disputed." Fed. R. Civ. P. 56(c)(1);
26 Nursing Home Pension Fund, Local 144 v. Oracle Corp. (In re
27 Oracle Corp. Securities Litigation), 627 F.3d 376, 387 (9th Cir.
28 2010) ("The moving party initially bears the burden of proving

1 the absence of a genuine issue of material fact") (citing Celotex
2 v. Catrett, 477 U.S. 317, 323 (1986)).

3 A wrinkle arises when the non-moving party will bear the
4 burden of proof at trial. In that case, "the moving party need
5 only prove that there is an absence of evidence to support the
6 non-moving party's case." Oracle Corp., 627 F.3d at 387.

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

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

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

4 **B. Summary Judgment in the Video Age.**

5 At the summary judgment stage, facts must be
6 viewed in the light most favorable to the
7 nonmoving party only if there is a "genuine"
8 dispute as to those facts. Fed. Rule Civ.
9 Proc. 56(c). ... When opposing parties tell
10 two different stories, one of which is
11 blatantly contradicted by the record, so that
12 no reasonable jury could believe it, a court
13 should not adopt that version of the facts
14 for purposes of ruling on a motion for
15 summary judgment.

16 That was the case here with regard to the
17 factual issue whether respondent was driving
18 in such fashion as to endanger human life.
19 Respondent's version of events is so utterly
20 discredited by the record that no reasonable
21 jury could have believed him. The Court of
22 Appeals should not have relied on such
23 visible fiction; it should have viewed the
24 facts in the light depicted by the videotape.

25 Scott v. Harris, 550 U.S. 372, 380-381 (2007) (granting
26 defendant's motion for summary judgment, and holding that
27 defendant's action in forcing the plaintiff - a fleeing suspect -
28 off the road, rendering him a quadriplegic, was reasonable in
light of the videotape showing the danger the suspect posed to
the public, because no reasonable jury could have found that
defendant's actions were unreasonable).

29 **IV. ANALYSIS - STANDING**

30 All defendants move for summary judgment against all
31 plaintiffs on all claims. In the alternative, they seek partial
32 summary judgment.

33 In the First Cause of Action ("Claim 1"), Whitney Duenez and

1 D.D. assert a claim for "Wrongful Death 42 U.S.C. Section 1983."¹⁷
2 Plaintiffs have never been clear about whether their first claim
3 is a state claim for "wrongful death," or a federal claim under
4 42 U.S.C. § 1983. However, the court has previously interpreted
5 it to be a federal claim under Section 1983, in which plaintiffs
6 allege that decedent's death was wrongful because it violated
7 decedent's rights under the Fourth and Fourteenth Amendments to
8 the U.S. Constitution. See ECF No. 35 at 22-23. Moreover,
9 having amended their original complaint, plaintiffs now
10 specifically assert a state claim for wrongful death in their
11 Seventh Cause of Action ("Claim 7") ("Negligence - Wrongful
12 Death"). Accordingly, the court reconfirms that Claim 1 contains
13 federal claims under 42 U.S.C. § 1983 only, and that it does not
14 assert any state claims. In addition, the court construes Claim
15 1 as asserting survival claims, as they involve rights that are
16 personal to the decedent.¹⁸

17 Defendants move to dismiss Claim 1 because (1) D.D., who is

18 ¹⁷ Defendants previously moved to dismiss this claim, asserting
19 that there is no federal claim for "wrongful death." ECF No. 27
20 at 10. The motion was denied because the claim was a federal
21 claim alleging excessive force and denial of the right to medical
22 care under the Fourth and Fourteenth Amendments and Section 1983.
23 ECF No. 35.

24 ¹⁸ The original complaint asserted that all plaintiffs and
25 decedent were deprived of their constitutional rights to be free
26 from unreasonable searches and seizures by the shooting and
27 killing of decedent. See ECF No. 1 ¶ 32. The court granted
28 defendants' motion to dismiss this claim in part, but permitted
the claim to proceed as brought by decedent's widow, as she was
the only person alleged to be his successor-in-interest. ECF
No. 21 at 14-15 ("only Whitney Duenez may assert a claim for
violation of the decedent's Fourth Amendment rights"). The court
dismissed the claim as to all other plaintiffs. Id.

1 not alleged to be decedent's personal representative or successor
2 in interest has no standing to bring a survivor claim, and
3 (2) the claim duplicates the survival claim brought by Whitney
4 Duenez in the fourth claim.

5 **A. D.D.**

6 Claim 1 is a federal Section 1983 claim arising from two
7 alleged constitutional violations.

8 "In § 1983 actions, ... the survivors of an
9 individual killed as a result of an officer's
10 excessive use of force may assert a Fourth
11 Amendment claim on that individual's behalf
12 if the relevant state's law authorizes a
13 survival action. The party seeking to bring
14 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 v. Las
Vegas Metro. Police Dep't, 159 F.3d 365, 369
(9th Cir. 1998) (internal citation omitted).

15 Hayes v. County of San Diego, ___ F.3d ___, 2013 WL 6224281 at
16 *2, 2013 U.S. App. LEXIS 23939 (9th Cir. 2013).

17 In California, with exceptions not asserted to apply here,
18 "a cause of action for or against a person is not lost by reason
19 of the person's death, but survives subject to the applicable
20 limitations period." Cal. Code Civ. P. § 377.20. Further, "[a]
21 cause of action that survives the death of the person entitled to
22 commence an action or proceeding passes to the decedent's
23 successor in interest ... and an action may be commenced by the
24 decedent's personal representative or, if none, by the decedent's
25 successor in interest." Cal. Code Civ. P. § 377.30. The action
26 brought by the successor in interest to a decedent pursuant to
27 Section 377.30 is a "survival" claim. Adams v. Superior Court,
28 196 Cal. App. 4th 71, 78-79 (2nd Dist. 2011) ("[s]urvival causes

1 of action are governed by section 377.30). Unlike a wrongful
2 death claim, "the survival statutes do not create a cause of
3 action but merely prevent the abatement of the decedent's cause
4 of action and provide for its enforcement by the decedent's
5 personal representative or successor in interest.'" Id. (quoting
6 San Diego Gas & Electric Co. v. Superior Court, 146 Cal. App. 4th
7 1545, 1553 (4th Dist. 2007)).

8 Therefore, D.D. has standing to assert this claim as a
9 survival claim if he is a successor in interest to the decedent.
10 The court dismissed D.D.'s claim in the original complaint, with
11 leave to amend, because there was no allegation that he was a
12 successor in interest, and because none of the statutory
13 requirements for making D.D. a successor in interest were
14 apparent. ECF No. 21 at 14 & n.3; see Cal. Civ. Proc. § 377.32.
15 Plaintiffs have now submitted a declaration from Whitney Duenez
16 establishing that she and D.D. have fulfilled the legal
17 requirements for making them both the successors in interest to
18 the decedent. ECF No. 66.¹⁹ Inexplicably, however, the amended
19 Complaint still does not allege that D.D. is a successor in
20 interest. Plaintiffs have nevertheless asserted that they are
21 willing to amend the complaint to allege that D.D. is suing as a
22 co-successor in interest. Accordingly, notwithstanding the
23 plaintiffs' strange way of addressing this issue, the court will
24 construe Claim 1 by D.D. to be a survival action. D.D. has
25 standing to bring this survival action, as it is undisputed at
26 this point that he is a successor in interest to his father's

27 ¹⁹ Defendants have not challenged that declaration.
28

1 estate.

2 **B. Whitney Duenez.**

3 Defendants seek summary judgment against Whitney Duenez on
4 Claim 1, arguing that the claim duplicates the Fourth Cause of
5 Action ("Claim 4"), which is expressly labeled as a Section 1983
6 survival claim. Plaintiffs argue that the two claims are
7 "distinct," but their argument is unintelligible on this point.
8 Among other problems, plaintiffs use the language of "wrongful
9 death" and "survival" claims interchangeably. See ECF No. 97 at
10 15 (referring to the first claim as a "Wrongful Death" claim for
11 damages decedent could have sued for "had he survived" the
12 incident). However, these terms refer to entirely different
13 claims. See Hayes, 2013 WL 6224281 at *3 (wrongful death claim
14 is "based on personal injuries resulting from the death of
15 another," whereas "survival actions ... are based on injuries
16 incurred by the decedent").

17 Indeed, instead of distinguishing the two claims,
18 plaintiffs' arguments simply confirm that the two claims are both
19 survival claims, even though the first claim does not contain the
20 language of a survival claim. According to plaintiffs, the first
21 claim is for "Fourth and Fourteenth Amendment violations the
22 Decedent Duenez suffered and damages for which he would have been
23 entitled to recover had he survived." ECF No. 97 at 15. That is
24 a "survival claim" under California law. The fourth claim is for
25 "Fourth and Fourteenth Amendment violations that Decedent Duenez
26 suffered for damages that he is entitled to which survive his
27 death." That is also a "survival claim" under California law.
28 Both survival claims are brought under 42 U.S.C. § 1983 against

1 Moody, for violations of the Fourth and Fourteenth Amendments to
2 the U.S. Constitution. Both are brought by the successors in
3 interest to the decedent.

4 What is distinct about the claims is that Whitney Duenez's
5 Claim 4 contains a survival Due Process claim for deprivation of
6 familial relationships, which is missing from Claim 1.²⁰ Whitney
7 Duenez's survival Fourth Amendment claim of Claim 1 does
8 duplicate her survival Fourth Amendment claim of Claim 4,
9 however, and so that claim will be dismissed from Claim 1.

10 V. QUALIFIED IMMUNITY

11 A. Claims 1 and 4 - Fourth Amendment Claims Based Upon 12 Moody's Shooting of Decedent.

13
14 The Complaint's first and fourth claims assert Fourth
15 Amendment survival claims against Moody arising from Moody's
16 actions in shooting and killing the decedent. Moody argues that

17
18 ²⁰ However, as this court has previously held,

19 [a]llowing a decedent, through his estate, to
20 sue for his own lost relationships with
21 family members based on his death, and not
22 the death of another family member during his
23 life, violates common sense. Cf. Crumpton v.
24 Gates, 947 F.2d 1418, 1422 (9th Cir. 1991)
25 ("Assume parent and child were run over and
killed by a driver who was at fault. While
both estates could sue for wrongful death,
neither could make out a claim for loss of
familial companionship, for neither would
appreciate the loss of the other.") (dicta).

26 ECF No. 35 at 23-24. Accordingly, the court will sua sponte
27 dismiss the portion of the Fourth Cause of Action which asserts a
28 survival Section 1983 claim for decedent's loss of familial
relationships.

1 he is entitled to qualified immunity on those claims because the
2 video shows beyond reasonable dispute that "a reasonable officer
3 in his position, facing a knife-wielding suspect, could have
4 believed that the use of deadly force was reasonably necessary."
5 ECF No. 80-1 at 35-36. The court notes that plaintiffs assert
6 that they are entitled to summary judgment on these claims
7 because the video of the encounter shows beyond reasonable
8 dispute that Moody used excessive deadly force against the un-
9 armed, non-dangerous decedent, an assertion addressed below.

10 Plaintiffs are correct that a reasonable jury could view the
11 video as they describe it. Moody is correct that a reasonable
12 jury could view the video as he describes it. Accordingly,
13 summary judgment must be denied to both, and the matter must be
14 submitted to the jury.

15 **1. Fourth Amendment - excessive force.**

16 The Fourth Amendment forbids a police officer from seizing
17 "an unarmed, nondangerous suspect by shooting him dead."
18 Tennessee v. Garner, 471 U.S. 1, 11 (1985).²¹ Viewing the
19 evidence, especially the video, in the light most favorable to
20 plaintiffs, a reasonable jury could conclude that Moody seized
21 the decedent, a visibly unarmed, non-dangerous civilian, by
22 shooting him dead. See Exh. A. At a minimum, a reasonable jury
23 could find that Moody's continued shooting of decedent, even

24 _____
25 ²¹ "Whenever an officer restrains the freedom of a person to walk
26 away, he has seized that person. While it is not always clear
27 just when minimal police interference becomes a seizure, there
28 can be no question that apprehension by the use of deadly force
is a seizure subject to the reasonableness requirement of the
Fourth Amendment." Garner, 471 U.S. at 7 (citations omitted).

1 after he had crumpled to the ground, was an excessive use of
2 force.

3 **2. Qualified immunity.**

4 "The doctrine of qualified immunity protects
5 government officials 'from liability for
6 civil damages insofar as their conduct does
7 not violate clearly established statutory or
8 constitutional rights of which a reasonable
9 person would have known.'" Pearson v.
10 Callahan, 555 U.S. 223, 231 (2009) (quoting
11 Harlow v. Fitzgerald, 457 U.S. 800, 818
12 (1982)). Qualified immunity "gives
13 government officials breathing room to make
14 reasonable but mistaken judgments," and
15 "protects 'all but the plainly incompetent or
16 those who knowingly violate the law.'" Ashcroft v. al-Kidd, 563 U.S. ----, ----, 131
17 S. Ct. 2074, 2085 (2011) (quoting Malley v.
18 Briggs, 475 U.S. 335, 341 (1986)). "[W]hether
19 an official protected by qualified immunity
20 may be held personally liable for an
21 allegedly unlawful official action generally
22 turns on the 'objective legal reasonableness'
23 of the action, assessed in light of the legal
24 rules that were 'clearly established' at the
25 time it was taken." Anderson v. Creighton,
26 483 U.S. 635, 639 (1987) (citation omitted).

17 Messerschmidt v. Millender, 565 U.S. ___, 132 S. Ct. 1235, 1244-
18 45 (2012).

19 Because Moody is sued for conduct he undertook while in the
20 line of duty, this court's inquiry into his claim of qualified
21 immunity must balance two competing interests, namely, "'the need
22 to shield officials from harassment, distraction, and liability
23 when they perform their duties reasonably,'" but also, "'the need
24 to hold public officials accountable when they exercise power
25 irresponsibly.'" Johnson v. Bay Area Rapid Transit Dist., 724
26 F.3d 1159, 1168 (9th Cir. 2013) (quoting Pearson, 555 U.S. at
27 231).
28

1 This court applies a two-part test to determine whether this
2 case is about the former, a reasonable exercise of power, or the
3 latter, an irresponsible exercise of power. Keeping in mind that
4 this is a summary judgment motion, the court must decide in the
5 first step whether, viewing the facts in the light most favorable
6 to plaintiffs, those facts demonstrate that Moody's conduct
7 "violated one or more of the plaintiffs' constitutional rights."
8 Johnson, 724 F.3d at 1168 (citing Pearson, 555 U.S. at 236).²² In
9 the second step, the court must decide "whether the right at
10 issue was 'clearly established' at the time of defendant's
11 alleged misconduct." Pearson, 555 U.S. at 232. Put another way,
12 this court, understanding that a "reasonable officer avoids
13 committing acts that have been clearly established as
14 unconstitutional," asks whether "the reasonable officer also
15 would have committed the act that the plaintiffs contend is
16 unconstitutional." Johnson, 724 F.3d at 1168. Moody is entitled
17 to qualified immunity unless his conduct "violated a clearly
18 established constitutional right." Pearson, 555 U.S. at 232.

19 Accordingly, even though a reasonable jury could find that
20 Moody violated decedent's Fourth Amendment right to be free from
21 the official use of deadly force, as discussed above, Moody can
22 still claim qualified immunity if the right was not "clearly
23 established" at the time of the shooting.

24
25 ²² Although the Supreme Court previously mandated that this be the
26 "first" step, Saucier v. Katz, 533 U.S. 194 (2001), it has since
27 retreated from that view, leaving it up to the district court to
28 decide which step to consider first. Pearson, 555 U.S. at 236
("we now hold that the Saucier protocol should not be regarded as
mandatory in all cases," although "we continue to recognize that
it is often beneficial"); Johnson, 724 F.3d at 1168.

1 The court finds that it was clearly established at the time
2 of the shooting that it was a Fourth Amendment violation to seize
3 an unarmed, non-dangerous civilian by shooting him dead. See
4 Garner, 471 U.S. at 11; Torres v. City of Madera, 648 F.3d 1119,
5 1128 (9th Cir. 2011) (“few things in our case law are as clearly
6 established as the principle that an officer may not “seize an
7 unarmed, nondangerous suspect by shooting him dead” in the
8 absence of “probable cause to believe that the [fleeing] suspect
9 poses a threat of serious physical harm, either to the officer or
10 to others”), cert. denied, 565 U.S. ___, 132 S. Ct. 1032 (2012).

11 Moody’s 15-line qualified immunity argument fairly begs not
12 to be taken seriously. It simply asserts facts that might
13 exonerate Moody, without reference to any actual evidence adduced
14 in the case. Moody argues, specifically, that any reasonable
15 officer would have shot decedent because decedent was a “knife-
16 wielding” suspect, who was “waving a knife er[r]atically.” ECF
17 No. 35-36. Moody does not identify any place in his Separate
18 Statement of Undisputed Facts (ECF No. 80-2) that even asserts
19 that the decedent was in possession of a knife when he exited the
20 truck, or was “wielding” a knife at that time, much less that
21 decedent was waving it “erratically,” when Moody shot him. To
22 the contrary, the video of the shooting shows that there may be
23 something briefly in decedent’s hand, but it is not clear beyond
24 reasonable dispute that it is a knife, or a weapon of any kind.
25 See Exh. A. The video certainly does not show the decedent
26 waving a knife erratically. To the contrary, the video shows
27 conclusively that the decedent did not wave any knife (or
28 whatever it was that briefly appeared in his hand), erratically

1 or in a threatening manner.²³ Accordingly, a reasonable jury
2 could find that Moody violated the decedent's clearly established
3 Fourth Amendment rights by seizing an unarmed, non-dangerous
4 civilian by shooting him dead.

5 The court accordingly will deny Moody's motion for summary
6 judgment on the survival claims of Claims 1 and 4, asserting
7 Fourth Amendment violations arising from shooting the decedent.

8 **B. Claim 1 - Qualified Immunity for Not Personally**
9 **Providing Medical Care.**

10 The Complaint alleges that after the shooting, and after the
11 scene had been secured, neither Moody nor any other police
12 officer present personally gave the decedent any medical care.
13 Plaintiffs assert that this violated decedent's Fourth Amendment
14 and Due Process rights to medical care.

15 However, it is undisputed that after the shooting,
16 "emergency medical care was immediately summoned." DSUF ¶ 19.²⁴

17 ²³ In any event, the mere possession of a knife by the decedent,
18 without more, is not enough to conclusively render the use of
19 deadly force "reasonable." Rather, the "most important" factor
20 in determining the reasonableness of the use of deadly force is
21 whether the decedent posed an "immediate threat" to Moody's
22 safety, or the safety of others. Glenn v. Washington County, 673
23 F.3d 864, 872 (9th Cir. 2011) (in concluding that the decedent
(Lukus) was a danger, "the district court relied primarily on
Lukus' possession of a knife." This was error, because "although
there is no question this is an important consideration, it too
is not dispositive").

24 ²⁴ Plaintiffs say this is "Disputed," citing the deposition
25 testimony of John J. Ryan. Plaintiff's Objections to DSUF (ECF
26 No. 92) ¶ 19. However, Ryan's testimony confirms that medical
27 aid was summoned immediately. Ryan Depo. (ECF No. 98-4) at 22.
28 Ryan takes issue with the police failure to personally render aid
to the decedent. Accordingly, what is disputed in the full
statement (DSUF ¶ 19), is whether the officers on the scene
"properly" did nothing other than wait for medical assistance to

1 Defendants argue that immediately calling for medical assistance
2 is all the constitution requires after they have shot someone.
3 Plaintiffs argue that Moody had a constitutional duty to
4 personally render assistance to decedent after shooting him.

5 Moody is entitled to qualified immunity on this claim. In
6 Maddox v. City of Los Angeles, 792 F.2d 1408, 1415 (9th
7 Cir. 1986), the police officers mortally wounded a suspect by
8 applying a "choke hold" in the process of arresting him. After
9 subduing the suspect, the police drove him to the hospital.
10 After arriving at the hospital, the officers "had difficulty
11 finding a pulse." Although the officers were trained in CPR,
12 they did not use it to save the suspect. Instead, they took him
13 to the jail ward on the thirteenth floor of the hospital.
14 Despite the medical staff's subsequent use of CPR, the suspect
15 was pronounced dead later that morning. The Ninth Circuit was
16 clear that taking the mortally wounded suspect to the hospital
17 and up to the jail ward was all the constitution required:

18 The due process clause requires responsible
19 governments and their agents to secure
20 medical care for persons who have been
21 injured while in police custody. We have
22 found no authority suggesting that the due
23 process clause establishes an affirmative
24 duty on the part of police officers to render
25 CPR in any and all circumstances. Due
26 process requires that police officers seek
27 the necessary medical attention for a
28 detainee when he or she has been injured
while being apprehended by either promptly
summoning the necessary medical help or by
taking the injured detainee to a hospital.

Maddox, 792 F.2d at 1415 (emphasis added); accord, City of Revere

arrive.

1 v. Massachusetts General Hosp., 463 U.S. 239, 244-245 (1983)
2 (although “[t]he Due Process Clause ... does require the
3 responsible government or governmental agency to provide medical
4 care to persons ... who have been injured while being apprehended
5 by the police,” the government “fulfilled its constitutional
6 obligation by seeing that [the suspect] was taken promptly to a
7 hospital that provided the treatment necessary for his injury”);
8 accord Tatum v. City and County of San Francisco, 441 F.3d 1090,
9 1099 (9th Cir. 2006) (in a case where the police did not cause
10 the injury, the Ninth Circuit held “that a police officer who
11 promptly summons the necessary medical assistance has acted
12 reasonably for purposes of the Fourth Amendment, even if the
13 officer did not administer CPR”).

14 Plaintiffs argue that the constitution requires the officers
15 to personally administer medical care to a person whom they
16 injure. However, plaintiffs offer no contrary interpretation of
17 the above cases, nor do they identify even a single case that
18 holds that personal medical attention is required by the
19 constitution.

20 Because the undisputed facts show that Moody did not violate
21 the decedent’s right to medical care, the court will grant
22 Moody’s motion for summary judgment, on qualified immunity
23 grounds, on Claim 1’s assertion of a Due Process violation
24 arising from the alleged failure to provide medical assistance.

25 **C. Qualified Immunity for Search of Decedent.**

26 Moody seeks qualified immunity for the search of decedent’s
27 body after the shooting. ECF No. 80-1 at 15-19. The Complaint
28 alleges no claim predicated upon that search. However, both

1 parties treat the search as if it is alleged to be the predicate
2 for a Fourth Amendment claim, so the court will consider the
3 parties' arguments.

4 Plaintiffs assert that Moody conducted a "public strip
5 search" of the decedent after the shooting, while decedent lay
6 dying. Defendants, disputing that any "strip search" occurred,
7 assert qualified immunity for the search that did occur.

8 Defendants are entitled to qualified immunity unless their
9 conduct violated plaintiffs' clearly established constitutional
10 rights. See Johnson, 724 F.3d at 1168.

11 The constitutional right at issue here is decedent's right
12 to be free from unreasonable searches. Plaintiffs apparently
13 assert that it is clearly established the police may not conduct
14 a "public strip search" of an unconscious (or semi-conscious),
15 mortally wounded arrestee on a parole violation, when the officer
16 had been informed that the decedent kept a gun in his butt-
17 cheeks.

18 However, even assuming that such a search violated
19 decedent's Fourth Amendment rights, that is only the first half
20 of the qualified immunity inquiry. Plaintiffs still bear the
21 burden of establishing that the unconstitutional nature of the
22 search was "clearly established." Plaintiffs' opposition brief
23 makes no mention of this, and no attempt to show how such a
24 violation was clearly established.²⁵ However, in their own motion

25 ²⁵ Its cases do not show it, either. See Way v. County of
26 Ventura, 445 F.3d 1157, 1163 (9th Cir. 2006) (although the strip
27 search was unconstitutional, defendants were entitled to
28 qualified immunity because "a reasonable official in the position
of Brooks and Hanson would not have understood that following the
jail's policy violated Way's rights because the

1 for summary judgment on this claim, plaintiffs assert that "it
2 was long established that public strip searches of even parolees
3 pursuant to an arrest warrant are unconstitutional absent exigent
4 circumstances and probable cause," citing Foster v. City of
5 Oakland, 621 F. Supp. 2d 779, 791 (N.D. Cal. 2008).

6 The court interprets plaintiffs' argument to be that the
7 Fourth Amendment right alleged to be violated here is clearly
8 established, apparently by Foster. However, "[a] right is
9 clearly established '[i]f the only reasonable conclusion from
10 binding authority were that the disputed right existed.'" Sweaney v. Ada County, Idaho, 119 F.3d 1385, 1389 (9th Cir. 1997)
11 (emphasis added) (quoting Blueford v. Prunty, 108 F.3d 251, 255
12 (9th Cir. 1997)). Plaintiffs have not identified the binding
13 authority from which this court could conclude that the search at
14 issue here is a violation of decedent's Fourth Amendment rights.
15 Even if Foster were binding authority, and it is not, it does not
16 establish that the search at issue here was unconstitutional, nor
17 is such a conclusion the only reasonable one to be drawn from
18 Foster.

19
20 In Foster, the plaintiffs were subjected to far more
21 intrusive searches than was involved here. The police stopped
22 one plaintiff, purportedly for loitering with intent to sell
23
24 unconstitutionality of the search they conducted was not clearly
25 established at the time"), cert. denied, 549 U.S. 1052 (2006);
26 Smith v. City of Oakland, 2011 WL 3360451 at *3 (N.D. Cal. 2011)
27 (strip search - which involved pulling the suspects "underwear
28 halfway down" - was not justified during a "parole search" where
the suspects had not engaged in any unlawful behavior, and were
not in violation of parole, but were just driving their gold
Cadillac around town).

1 narcotics,²⁶ handcuffed him, searched his testicles by hand,
2 forced him over the hood of a patrol car, pulled his pants and
3 underwear down to his knees, spread his buttocks apart and
4 visually searched his anus, in public. 621 F. Supp. 2d at 783.
5 The police stopped the second plaintiff, purportedly to search
6 for contraband,²⁷ handcuffed him, brought him to the front of a
7 house, pulled his pants down, ordered him to bend over, spread
8 his buttocks and conducted a visual search of his anus, in public
9 and in front of a crowd of people, including some of the
10 plaintiff's acquaintances. Id., at 784. The police pulled the
11 third plaintiff out of his car, purportedly to search for
12 contraband,²⁸ handcuffed him, and after putting him in a patrol
13 car, pulled down his pants and underwear revealing his genitalia,
14 and visually searched him for about a minute. Id., at 784. In
15 each case, there is no question that a "strip search" was
16 involved, as the police pulled the person's pants and underwear
17 down to their knees, exposing their buttocks and genitalia to
18 whoever was present.

19 Foster found that the following criteria governed such
20 searches:

- 21 1) there must be exigent circumstances;
- 22 2) the search may only be performed on persons who have been

23 ²⁶ It turned out that this plaintiff was on the tail end of a five
24 year probation, and had no violations the entire time. All the
charges were later dropped. 621 F. Supp. 2d at 783.

25 ²⁷ No charges were ever brought against this plaintiff. Id., at
26 784.

27 ²⁸ No charges were ever brought against this plaintiff. Id., at
28 784.

1 lawfully arrested on probable cause and may not be performed on
2 anyone for whom there is no probable cause to arrest;

3 3) the search requires probable cause that is independent of
4 the probable cause found for the arrest; [and]

5 4) the search may only be performed when there is probable
6 cause to believe that the arrestee is in possession of weapons,
7 drugs or dangerous contraband.²⁹

8 Even assuming these criteria are binding, or are derived
9 from binding authority, each of them is satisfied here according
10 to the undisputed evidence. There were plainly exigent
11 circumstances for conducting the search where it was done,
12 namely, the decedent was mortally wounded, and dragging or
13 carrying his body to a more private location would have been an
14 outrage in itself. Plaintiffs do not contest that decedent was
15 lawfully arrested; he was in violation of his parole, and had
16 "peed dirty." Plaintiffs do not contest that there was probable
17 cause - independent of the probable cause to arrest - to search
18 decedent's buttocks for a gun that other officers had advised him
19 might be hidden there.

20 Equally important, the search of decedent plainly did not
21 involve exposing his body, or any part of it, to public view, his
22 pants and underwear were not pulled down, and there is no
23 evidence or assertion that anyone other than Moody and the police
24 could witness the search.

25 The court finds that it was not clearly established that the
26

27 ²⁹ A fifth factor involved invasive body cavity searches, which is
28 not alleged to have occurred here.

1 search that occurred here violated decedent's Fourth Amendment
2 rights. Defendants' motion for summary judgment on this portion
3 of Claims 1 and 4 will be granted.

4 **VI. SUMMARY JUDGMENT ON THE MERITS**

5 **A. Claim Two - Due Process - Deprivation of Familial**
6 **Relations.**

7 All plaintiffs - decedent's parents, his widow and his son -
8 sue Moody for deprivation of their constitutional rights to
9 familial relationships with decedent. Moody seeks summary
10 judgment on this claim.

11 **1. Constitutional right - familial relationship.**

12 All four plaintiffs - decedent's widow, his parents and his
13 child - have a cognizable liberty interest in their familial
14 relationship with decedent that is protected by the Due Process
15 Clause of the Fourteenth Amendment. Johnson, 724 F.3d at
16 1168-69;³⁰ Curnow ex rel. Curnow v. Ridgecrest Police, 952 F.2d
17 321, 325 (9th Cir. 1991), cert. denied, 506 U.S. 972 (1992);³¹
18 Ching v. Mayorkas, 725 F.3d 1149, 1157 (9th Cir. 2013).³²
19 Plaintiffs assert that Moody deprived them of this right when he

20 ³⁰ "The Ninth Circuit recognizes that a parent has a
21 constitutionally protected liberty interest under the Fourteenth
22 Amendment in the companionship and society of his or her child."
Curnow ex rel. Curnow v. Ridgecrest Police, 952 F.2d 321, 325
(9th Cir. 1991).

23 ³¹ "This Circuit has recognized that a child has a
24 constitutionally protected liberty interest under the Fourteenth
25 Amendment in the 'companionship and society' of her father."
Hayes, 2013 WL 6224281 at *4 (quoting Curnow, 952 F.2d at 325).

26 ³² "The right to marry and to enjoy marriage are unquestionably
27 liberty interests protected by the Due Process Clause." Ching,
28 725 F.3d at 1157.

1 killed the decedent. If Moody's conduct, when viewed in the
2 light most favorable to plaintiffs, deprived decedent's family
3 members of their familial interests in a manner that "shocks the
4 conscience," then his conduct "is cognizable as a violation of
5 due process.'" Hayes, 2013 WL 6224281 at *4 (quoting Wilkinson
6 v. Torres, 610 F.3d 546, 554 (9th Cir. 2010)³³).

7 **2. Whether the shooting "shocks the conscience."**

8 In determining whether Moody's conduct "shocks the
9 conscience," the court must first decide which "standard of
10 culpability" applies. The two standards that are available from
11 Ninth Circuit jurisprudence are whether Moody acted with
12 (1) "deliberate indifference" to the harm he caused decedent, or
13 (2) a "purpose to harm" decedent. Porter v. Osborn, 546 F.3d
14 1131, 1136 (9th Cir. 2008), quoting County of Sacramento v.
15 Lewis, 523 U.S. 833, 846 (1998).³⁴

16 The appropriate standard of culpability, in turn, depends
17 upon the type of situation that defendant finds himself in at the
18 time of the challenged action. If Moody found himself in a
19 situation where "actual deliberation is practical," then his
20 "deliberate indifference" to the harm he caused may be sufficient
21 to shock the conscience. Gantt v. City of Los Angeles, 717 F.3d
22 702, 707-08 (9th Cir. 2013) (quoting Wilkinson, 610 F.3d at 554).
23 On the other hand, if Moody made a "snap judgment" because he
24 found himself in an "escalating" and/or "fast paced" situation

25 ³³ Cert. denied, 562 U.S. ____, 131 S. Ct. 1492 (2011).

26 ³⁴ Defendants unhelpfully ignore this dichotomy, arguing only that
27 Moody's conduct did not meet the "purpose to harm" test. ECF
28 No. 80-1 at 35.

1 "presenting competing public safety obligations," then his
2 conduct will not shock the conscience unless he acted "with a
3 purpose to harm" decedent that was "unrelated to legitimate law
4 enforcement objectives." Id.; Porter, 546 F.3d at 1139 (citing
5 Lewis, 523 U.S. 833).

6 By its nature, the determination of which situation Moody
7 actually found himself in is a question of fact for the jury, so
8 long as there is sufficient evidence to support both standards.
9 Cf., Gantt, 717 F.3d at 708 (trial court could properly have
10 omitted the "purpose to harm" jury instruction where "[n]one of
11 the evidentiary bases for this claim involved 'a snap judgment
12 because of an escalating situation'" (quoting Wilkinson, 610
13 F.3d at 554). The determination is also a proper matter for
14 summary judgment, so long as the undisputed facts point to one
15 standard or the other. Indeed, in the Ninth Circuit, there
16 appear to be certain circumstances that require the application
17 of one standard or the other.

18 For example, the fabrication of evidence for use at trial by
19 its nature involves deliberation, and therefore the fact-finder
20 can only apply the "deliberate indifference" standard. Id.
21 Similarly, "the decision whether to disclose or withhold
22 exculpatory evidence is a situation in which 'actual deliberation
23 is practical,'" thus requiring the application of the "deliberate
24 indifference" standard. See Tennison v. City and County of San
25 Francisco, 570 F.3d 1078, 1089 (9th Cir. 2009).

26 On the other hand, the "purpose to harm" standard is
27 appropriate for situations involving high-speed car chases,
28 shoot-outs, and armed suspects (with weapons like knives or

1 automobiles) advancing threateningly on the police, as these
2 situations are rapidly "escalating," requiring the police to make
3 "snap judgments." See, e.g., Hayes v. County of San Diego, Case
4 No. 7-cv-1738-DMS (JMA) (S.D. Cal. March 30, 2009) (Sabraw, D.J.)
5 ("the undisputed evidence show[ed] that Mr. Hayes was holding a
6 knife in a raised position and advancing on Deputy King
7 immediately before the shots were fired"), aff'd, 2013 WL
8 6224281; Wilkinson, 610 F.3d at 554 ("[w]ithin a matter of
9 seconds, the situation evolved from a car chase to a situation
10 involving an accelerating vehicle in dangerously close proximity
11 to officers on foot"); Porter, 546 F.3d at 1133 ("an urgent
12 situation" was involved where the decedent revved his car engine
13 and moved his car toward the police officers or their patrol
14 car); Moreland v. Las Vegas Metropolitan Police Dept., 159 F.3d
15 365, 372 (9th Cir. 1998) (police arrived to find a "gunfight in
16 progress" which "threatened the lives of the 50 to 100 people who
17 were trapped in the parking lot," requiring them to "act
18 decisively," as they were "without the luxury of a second chance'
19 to address a life-threatening situation").³⁵

20 In this case, the court finds that the submitted evidence
21 creates a genuine dispute about which standard of culpability

22 ³⁵ The court notes that the Ninth Circuit recently used the
23 "purpose to harm" standard without any discussion of whether it,
24 or the "deliberate indifference" standard, applied to the facts.
25 "Parents have a Fourteenth Amendment right to the companionship
26 of a child, which a police officer violates by 'act[ing] with a
27 purpose to harm' the child 'that [is] unrelated to legitimate law
28 enforcement objectives.'" Porter v. Osborn, 546 F.3d 1131, 1137
(9th Cir. 2008)." Johnson, 724 F.3d at 1168-69. This court does
not read Johnson as overruling any prior precedent, and
accordingly will analyze both standards of culpability.

1 should apply in this case. Moreover, if the "deliberate
2 indifference" standard applies, there is a genuine dispute about
3 whether Moody acted with deliberate indifference. If the
4 "purpose to harm" standard applies, there is a genuine dispute
5 about whether Moody acted with a purpose to harm decedent beyond
6 any legitimate law enforcement objective.

7 When the evidence in this case, including the video, is
8 viewed in the light most favorable to plaintiffs, there is a
9 genuine dispute about whether Moody had the "luxury" of
10 deliberation. Although the video shows that there was much
11 shouting and movement going on, at no time does the decedent
12 appear to be doing anything other than trying to comply with
13 Moody's shouted orders. After Moody begins shooting, the video
14 (viewed in the light most favorable to plaintiffs) shows that he
15 was hit and immediately fell to the ground, writhing in pain.
16 Once the decedent fell to the ground, any reasonable jury could
17 find that Moody had the opportunity to deliberate before he
18 resumed shooting. Moreover, a reasonable jury could find that
19 decedent was unarmed during the entire encounter. Even if it
20 found that decedent had a knife in his hand, that alone would not
21 necessarily bring the situation into a "purpose to harm"
22 situation, since a reasonable jury could find that decedent was
23 not advancing on Moody, nor threatening him with the knife.

24 However, even if a jury were to find that the situation was
25 rapidly escalating, and that Moody had to make snap judgments, it
26 could still find that Moody acted with an intent to harm the
27 decedent and without any legitimate law enforcement purpose. The
28 video shows the action from before decedent's truck drives into

1 view, through the pre-shooting, through the shooting, and through
2 the post-shooting activities. That video, viewed in the light
3 most favorable to plaintiffs, shows Moody shooting an unarmed man
4 struggling to free his leg from a seatbelt strap so that he can
5 get out of a pickup truck, continuing to shoot him as he falls to
6 the ground, and continuing to shoot him after he falls, mortally
7 wounded, to the ground. It shows that Moody kept shooting long
8 after the decedent could possibly have been a threat to anyone.
9 A reasonable jury could infer from the video that since Moody was
10 shooting decedent as he lay mortally wounded on the ground, there
11 may have been some other, non-law enforcement motivation behind
12 the shooting, namely, a purpose to harm the decedent.

13 Thus, a reasonable jury could find Moody acted with
14 deliberate indifference in a non-emergency situation, or that he
15 acted with a purpose to harm decedent. Defendants' motion to
16 dismiss Claim 2 will therefore be denied.

17 **B. Claim Three - Monell Claim Against Bricker and City.**

18 For their Third Claim, Whitney Duenez and D.D. assert a
19 survival claim against Bricker and the City under Monell v. New
20 York City Dept. of Social Services, 436 U.S. 658 (1978), for
21 deprivation of decedent's Fourth Amendment right to be free from
22 unreasonable searches and seizures, and a direct claim for
23 violation of their own Fourteenth Amendment rights to a familial
24 relationship.³⁶

25 ³⁶ As discussed above, although D.D. is not alleged to be a
26 successor in interest to the decedent, plaintiffs have now
27 submitted a declaration (not challenged by defendants), that D.D.
28 is a co-successor in interest with Whitney Duenez. See ECF
No. 66.

1 There are two basic routes to municipal Monell liability
2 under Section 1983: (1) the City itself violated plaintiffs'
3 rights, or directed its employees to do so, acting with the
4 required state of mind; or (2) the City is responsible for a
5 constitutional tort committed by its employee. Gibson v. County
6 of Washoe, Nev., 290 F.3d 1175, 1185-87 (9th Cir. 2002)
7 (describing "two routes" to municipal liability under
8 Section 1983 for deliberate indifference to inmate's medical
9 needs), cert. denied, 537 U.S. 1106 (2003).³⁷

10 In this case, plaintiffs assert that the City is responsible
11 for the constitutional torts committed by Moody. Under § 1983,
12 the City is responsible only for its own "illegal acts," and
13 cannot be held vicariously liable for the actions of its
14 employees. Connick v. Thompson, 563 U.S. ____, 131 S. Ct. 1350,
15 1359-60 (2011).³⁸ However, plaintiffs can establish liability on
16 the part of the City for Moody's conduct if they can establish
17 that, as a matter of City policy, (1) the City's supervision of
18 Moody was so deficient that it constituted "deliberate
19 indifference" to those people Moody would come into contact with,
20 (2) its training of Moody was similarly deficient, or (3) the
21 City ratified, approved and/or encouraged Moody's
22 unconstitutional conduct.

23 A government entity may not be held liable
24 under 42 U.S.C. § 1983, unless a policy,
25 practice, or custom of the entity can be
 shown to be a moving force behind a violation

26 ³⁷ Citing Board of County Comm'rs v. Brown, 520 U.S. 397, 404,
27 406-07 (1994) and Canton v. Harris, 489 U.S. 378, 387 (1989)).

28 ³⁸ Citing Monell, 436 U.S. at 692.

1 of constitutional rights. Monell v. Dep't of
2 Soc. Servs. of the City of New York, 436 U.S.
3 658, 694 (1978). In order to establish
4 liability for governmental entities under
5 Monell, a plaintiff must prove "(1) that [the
6 plaintiff] possessed a constitutional right
7 of which [s]he was deprived; (2) that the
8 municipality had a policy; (3) that this
9 policy amounts to deliberate indifference to
10 the plaintiff's constitutional right; and,
11 (4) that the policy is the moving force
12 behind the constitutional violation."
13 Plumeau v. Sch. Dist. No. 40, County of
14 Yamhill, 130 F.3d 432, 438 (9th Cir. 1997)
15 (internal quotation marks and citation
16 omitted; alterations in original).

17 Dougherty v. City of Covina, 654 F.3d 892, 900 (9th Cir. 2011),
18 cert. denied, 569 U.S. ___, 133 S. Ct. 1725 (2013).

19 Plaintiffs will have the burden of proof on this issue at
20 trial, so they must identify facts in the record that would allow
21 the court to conclude that the City had such a policy or
22 practice. Board of County Com'rs of Bryan County, Okl. V. Brown,
23 520 U.S. 397, 404 (1997 ("in Monell and subsequent cases, we have
24 required a plaintiff seeking to impose liability on a
25 municipality under § 1983 to identify a municipal 'policy' or
26 'custom' that caused the plaintiff's injury"). As for Bricker,
27 he can be held liable under Section 1983 "only for his ... own
28 misconduct," he cannot be made to answer for the torts of those
under his supervision. Iqbal, 556 U.S. at 677.

29 **1. Inadequate supervision - Prior shooting incident.**

30 [A] constitutional violation may arise from
31 training or supervision where the training or
32 supervision is sufficiently inadequate as to
33 constitute "deliberate indifference" to the
34 righ[t]s of persons with whom the police come
35 into contact. City of Canton v. Harris, 489
36 U.S. 378 (1989). Canton dealt specifically
37 with inadequate training. We see no
38 principled reason to apply a different

1 standard to inadequate supervision.
2 Davis v. City of Ellensburg, 869 F.2d 1230, 1235 (9th Cir. 1989).
3 Plaintiffs assert that Bricker and the City (collectively,
4 "Bricker"), knew of repeated acts of misconduct by Moody, but
5 that they were "deliberately indifferent" to the constitutional
6 harms that could result from allowing Moody to continue to do
7 police work armed with his gun. See Complaint ¶¶ 47 & 51.

8 According to plaintiffs, Bricker knew that Moody had been
9 involved in a prior shooting in which he fired an "excessive"
10 number of bullets into a car tire, yet Bricker allowed a
11 "trigger-happy" Moody to go back to police work with his gun.
12 According to plaintiffs' argument, Bricker "ignored a pattern of
13 Defendant Moody using poor tactical judgment and even poorer
14 trigger control in deliberate indifference to the citizenry they
15 are sworn to protect." ECF No. 97 at p.16. Plaintiffs assert
16 that "[t]he evidence reveals" that Moody was involved in a
17 shooting in which he "shot an excessive amount of times" at a
18 tire "that he was near to," and that "[e]yewitnesses" criticized
19 Moody, saying that the shooting was unnecessary and excessive.
20 ECF No. 97.

21 In moving for summary judgment, defendants presented
22 admissible evidence relating to that incident. According to that
23 evidence, in May 2010, Moody and his partner attempted to arrest
24 a suspect who had driven a stolen car into the parking lot of a
25 motel. Bricker Decl. at 2. The driver attempted to flee, and in
26 the process, threatened to run over Moody's partner. Id. In
27 response, Moody "shot the tire out of the vehicle to disable it."
28 Id. Bricker and the police department "evaluated" the incident,

1 and concluded that Moody's "use of force in that instance was
2 justified." Id.; DSUF ¶ 6. This evidence, if undisputed, does
3 not show a lack of proper supervision by Bricker.

4 Plaintiffs have offered no admissible evidence to dispute
5 the account presented by defendants. Plaintiffs offer, at most,
6 newspaper accounts purporting to report on witness accounts of
7 the incident. At best, this is hearsay within hearsay, or
8 "double hearsay." See Mayor of City of Philadelphia v.
9 Educational Equality League, 415 U.S. 605, 618 & n.19 (1974)
10 ("Whether the testimony reflected the newspaper account or a
11 television report, it was nonetheless hearsay," indeed, it was
12 "double hearsay"). What plaintiffs actually offer, however, is
13 the deposition questions that plaintiffs' counsel posed to
14 Bricker about the newspaper accounts of witnesses' purported
15 accounts. Indeed, plaintiffs' counsel does not even purport to
16 be quoting from the newspaper article, but instead he is merely
17 summarizing what he interprets the article to be saying.
18 Clearly, this is not admissible.

19 Even if the questions about the newspaper accounts of the
20 purported witnesses' statements could somehow be converted into
21 admissible evidence,³⁹ it does not support their assertion that

22 ³⁹ As inadmissible as this "evidence" is, it is not even
23 accurately recounted by plaintiffs in their opposition. Nothing
24 in the deposition indicates that any purported witness described
25 the shooting as "excessive." To the contrary, one of the
26 supposed witnesses was the motel manager, whose only comment,
27 apparently, was that he was upset that there was a shooting at
28 his motel. The other witness apparently felt that no amount of
shooting was justified because, he felt, the suspect could not
have gotten away. However, there is no indication that this
purported witness knew that the suspect, rather than trying to
get away, was trying to run down Moody's partner.

1 Bricker ignored a "pattern" of "using poor tactical judgment and
2 even poorer trigger control." See ECF No. 97 at p.16. One prior
3 shooting does not a "pattern" make. Moreover, plaintiffs offer
4 no evidence at all that the prior shooting involved an excessive
5 number of shots fired or was otherwise improper. To the
6 contrary, the only evidence here shows that Moody did not shoot
7 at the driver, he shot at the tire, a plainly restrained response
8 to a car that had already rammed a patrol car and was in the
9 process of trying to run over Moody's partner. Moreover, the
10 only review of this shooting was conducted by the police
11 department, including Bricker, which concluded that the shooting
12 was proper and justified.

13 This is the sole basis for plaintiffs' assertion that the
14 City and Bricker are subject to supervisory liability under
15 Section 1983. It is plainly insufficient. See Davis, 869 F.2d
16 at 1235 (reports showed officers were competent to remain on
17 duty, thus evidence fails to show supervisor acted with
18 deliberate indifference in not removing them from duty).

19 To the degree Claim 3 is predicated upon supervisory
20 liability, defendants are entitled to summary judgment.

21 **2. Inadequate training.**

22 Plaintiffs base their "inadequate training" theory on
23 Moody's performance in firearms tests. The undisputed evidence,
24 discussed above, shows that on three separate occasions - May 12,
25 2008, December 7, 2010 and February 9, 2011 - Moody failed on the
26 requalification exam (that is, flunked all three attempts), and
27

1 then passed the remedial exam.⁴⁰ It appears that despite these
2 repeated failures, followed by passes on remediation, Moody was
3 never required to undergo additional or remedial training on his
4 firearm.⁴¹

5 Viewing this evidence in the light most favorable to
6 plaintiffs, a reasonable jury could find that the City and
7 Bricker inadequately trained Moody by permitting him to
8 repeatedly keep re-taking his firearm exam until he passed,
9 rather than requiring additional training when he failed.

10 Defendants' motion for summary judgment on Claim 3, to the
11 degree it is predicated upon inadequate training, will be denied.

12 **3. Ratification.**

13 Plaintiffs' ratification theory is predicated upon the
14 after-the-fact statements by Bricker that the shooting was
15 justified and was in accordance with police department policy.
16 This theory cannot prevail after Iqbal. Bricker's conduct must
17 have caused the violation, not merely approved it after the fact.
18 There is no evidence of conduct on Bricker's or the City's part
19 that indicated that they approved of any conduct by Moody or
20 anyone else that could have lead to the excessive force allegedly
21 used here.

22 Defendants are entitled to summary judgment on plaintiffs'

23 _____
24 ⁴⁰ There is no evidence in the record that Moody ever failed to
qualify followed by a failure to pass the remedial exam.

25 ⁴¹ Defendants do not address the proffered, and apparently
26 undisputed, evidence regarding Moody's repeated failures, instead
27 referring only to the February 2011 failure as the only one. Nor
do defendants assert that the cited deposition testimony was
28 inaccurate or mistaken in any way.

1 ratification theory of liability.

2 **C. Claim Six - Cal. Civ. Code § 52.1.**

3 Section 52.1 of the California Civil Code provides a right
4 of action to a person if his exercise or enjoyment of federal or
5 state rights is interfered with by anyone by "threats,
6 intimidation, or coercion."⁴² Defendants seek summary judgment on
7 this claim making exactly the same legal argument they made, and
8 that this court rejected, in their most recent motion to dismiss.
9 See Motion To Dismiss of December 21, 2011 (ECF No. 27) at p. 14
10 (arguing that there is no claim where "'the right [allegedly]
11 interfered with is the right to be free of the force ... that was
12 applied'"); Order of February 23, 2012 (ECF No. 35) at pp. 30-32.
13 Defendants have presented no undisputed facts that would change
14 the outcome here, their argument is just a legal one that ignores
15 this court's prior decision, which is the law of the case.

16 This court previously denied defendants' motion to dismiss
17 the Section 52.1 claim, concluding that "[t]he elements of a
18 Section 52.1 excessive force claim are essentially identical to
19 those of a § 1983 excessive force claim." ECF No. 35 at p.31.
20 Without referencing that conclusion, defendants now argue that
21 "[t]he better reasoned cases hold that section 52.1 claims may
22 not 'merely duplicate [plaintiffs'] section 1983 excessive force
23 claim.'" ECF No. 80-1 at p.33. Nor have defendants argued that
24 this court should reconsider its earlier decision.

25 Defendants' motion for summary judgment on this claim will
26

27 ⁴² Whitney Duenez as successor-in-interest to the decedent, is the
28 sole plaintiff for this claim.

1 be denied.

2 **D. Claim Seven - Negligence - Wrongful Death.**

3 Plaintiffs' seventh claim alleges liability for negligence
4 in connection with the shooting and the failure to provide
5 medical care to decedent. Defendants seek partial summary
6 judgment on the failure to provide medical care asserting only
7 "as discussed above, ... there was no duty on the officers to
8 perform medical care, and the absence of personally providing
9 medical care after medical care had been summoned did not cause
10 Decedent any damages."

11 The elements of a negligence cause of action are the
12 existence of a legal duty of care, breach of that duty, and
13 proximate cause resulting in injury. Castellon v. U.S. Bancorp,
14 220 Cal. App. 4th 994, 998 (2nd Dist. 2013). Plaintiffs will
15 have the burden of proof on each element at trial. Because
16 plaintiffs have presented no evidence of any kind on proximate
17 cause, defendants are entitled to summary judgment on this claim,
18 without regard to the other elements.

19 At trial, plaintiffs will have the burden of showing that
20 defendants' failure to personally provide medical attention -
21 after summoning medical assistance - caused some injury to the
22 decedent. Here, defendants have met their summary judgment
23 burden by pointing out the complete lack of evidence that
24 decedent - who Moody had shot thirteen times at close range - was
25 further injured in any way by Moody's subsequent failure to
26 render personal aid beyond immediately summoning medical help.⁴³

27 _____
28 ⁴³ "[T]he moving party need only prove that there is an absence of
evidence to support the non-moving party's case." Oracle Corp.,

1 Plaintiffs have not provided evidence that Moody had the
2 capability of providing personal medical assistance, or that his
3 failure to do so caused any additional injury. Indeed,
4 plaintiffs do not address the issue. Plaintiffs argue only that
5 Moody had a duty, under California law, to render aid. Even if
6 they are correct, with no evidence showing causation, that is not
7 enough to avoid summary judgment.

8 Defendants' motion for summary judgment here will be
9 granted.

10 **E. Claim Eight - Intentional Infliction of Emotional**
11 **Distress.**⁴⁴

12 Decedent's widow, Whitney Duenez, alleges that Moody
13 intentionally inflicted emotional distress on her, through all
14 the conduct recounted above.

15 The elements of a cause of action for
16 intentional infliction of emotional distress
17 are (1) the defendant engages in extreme and
18 outrageous conduct with the intent to cause,
19 or with reckless disregard for the
20 probability of causing, emotional distress;
21 (2) the plaintiff suffers extreme or severe
22 emotional distress; and (3) the defendant's
23 extreme and outrageous conduct was the actual
24 and proximate cause of the plaintiff's
25 extreme or severe emotional distress.
26 "[O]utrageous conduct" is conduct that is
27 intentional or reckless and so extreme as to
28 exceed all bounds of decency in a civilized
community. The defendant's conduct must be
directed to the plaintiff, but malicious or
evil purpose is not essential to liability.

24 Yun Hee So v. Sook Ja Shin, 212 Cal. App. 4th 652, 671 (2nd

25
26 627 F.3d at 387.

27 ⁴⁴ Defendants do not seek summary judgment on the Fifth Cause of
28 Action, for Negligent Infliction of Emotional Distress.

1 Dist. 2013) (citations and internal quotation marks omitted).

2 Moody seeks partial summary judgment on the claim to the
3 degree it is predicated upon his failure to personally render
4 medical assistance, pulling decedent's body away from the truck,
5 handcuffing decedent, and searching decedent.⁴⁵

6 Plaintiffs oppose the motion, arguing that shooting the
7 decedent, "dragging" his body, manipulating his body, handcuffing
8 him, searching him, and "standing by" without offering personal
9 medical assistance is outrageous conduct beyond the pale of a
10 civilized society. ECF No. 97 at 30.

11 Plaintiffs however, have already conceded that moving
12 decedent's body away from the truck, and handcuffing him were
13 entirely reasonable and proper. Plaintiffs' Response to DSUF
14 ¶¶ 16 & 17. As for the body manipulation and search, plaintiffs
15 offer no evidence that Whitney Duenez saw, heard or was otherwise
16 aware of any of these activities. Accordingly, she has failed to
17 show that any of these activities was directed toward her. See
18 Christensen v. Superior Court, 54 Cal.3d 868, 905 (1991) ("[t]he
19 law limits claims of intentional infliction of emotional distress
20 to egregious conduct toward plaintiff proximately caused by
21 defendant").

22 As for the failure to personally render aid, plaintiff fails
23 to proffer any evidence at all that Moody had the ability to
24 render aid beyond what he did, namely, calling immediately for
25 medical assistance. Nor does she proffer any evidence that his
26

27 ⁴⁵ Moody does not seek partial summary judgment to the degree this
28 claim is predicated upon the shooting of decedent.

1 failure to render aid was directed at her, as opposed to being
2 the natural consequence of his inability to render aid. Neither
3 side argues the point, but it does not seem possible that a
4 person can intentionally inflict emotional distress by failing to
5 take action that he is not capable of taking.⁴⁶

6 The defendants' motion for partial summary judgment on
7 Claimn 8 will be granted as to all of Moody's actions except for
8 the shooting itself.

9 **F. Relief - Injunctive Relief.**

10 Defendants seeks partial summary judgment on the claim for
11 injunctive relief based solely upon their argument that they are
12 entitled to summary judgment on both the Monell claim and the
13 Section 52.1 state claim. As discussed above, they are not
14 entitled to summary judgment on the Section 52.1 claim.

15 Accordingly, defendants' motion for partial summary judgment
16 on this issue will be denied.

17 **G. Punitive Damages.**

18 Defendants Moody and Bricker seek summary judgment on the
19 request for punitive damages, essentially because Moody's conduct
20 was not "malicious, oppressive, or in reckless disregard of
21 Plaintiff's rights." Viewed in the light most favorable to
22 plaintiffs, Moody's conduct meets the standard for punitive
23 damages.

24 Defendants' motion for summary judgment on the request for
25 punitive damages will be denied.

26 ⁴⁶ Nor does plaintiff proffer evidence that Moody had a duty to
27 equip himself with the ability to render aid under the
28 circumstances presented.

1 **V. ANALYSIS - PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

2 Plaintiffs move for summary judgment. The motion is based
3 entirely on plaintiffs' view of what the video shows.

4 As to whether the deputies violated the
5 Fourth Amendment, two Supreme Court decisions
6 chart the general terrain. Graham v. Connor,
7 490 U.S. 386 (1989), defines the excessive
8 force inquiry, while Tennessee v. Garner, 471
9 U.S. 1 (1985), offers some guidance tailored
10 to the application of deadly force.

11 "Graham sets out a non-exhaustive list of
12 factors for evaluating [on-the-scene]
13 reasonability: (1) the severity of the crime
14 at issue, (2) whether the suspect posed an
15 immediate threat to the safety of the
16 officers or others, and (3) whether the
17 suspect actively resisted arrest or attempted
18 to escape." In Garner, the Supreme Court
19 considered (1) the immediacy of the threat,
20 (2) whether force was necessary to safeguard
21 officers or the public, and (3) whether
22 officers administered a warning, assuming it
23 was practicable. See Scott v. Harris, 550
24 U.S. 372, 381-82 (2007). Yet, "there are no
25 per se rules in the Fourth Amendment
26 excessive force context." Mattos v. Agarano,
27 661 F.3d 433, 441 (9th Cir. 2011) (en banc)
28 [cert. denied, 566 U.S. ___, 132 S. Ct. 2681
(2012)].

18 George v. Morris, 736 F.3d 829,837-38 (9th Cir. 2013) (citation
19 omitted).

20 Plaintiffs are correct that the court is now required to
21 consider their motion (and defendants') "in the light depicted by
22 the videotape." Scott, 550 U.S. at 381. However, the court must
23 view the video in the light most favorable to the non-moving
24 party, if there is a genuine dispute about what is depicted.
25 Id., 550 U.S. at 380 ("[a]t the summary judgment stage, facts
26 must be viewed in the light most favorable to the nonmoving party
27 only if there is a "genuine" dispute as to those facts").

28 Viewing the video in the light most favorable to Moody (and

1 in the light that will be presented by his attorney to the jury
2 at trial), Moody was shooting at a man who exited the truck with
3 something in his right hand. That "something" could have been a
4 knife and was reasonably believed by Moody to be a knife (and in
5 fact, an empty knife holder was found clipped to decedent's belt,
6 and a knife was later found in the bed of the pickup truck,
7 possibly thrown by decedent during the chaos of the shooting).
8 Before the decedent exited the truck, Moody was shouting at him
9 not to move (which presumably meant, stay in the truck). The
10 decedent disobeyed the order (assuming he heard it), and attempts
11 to exit the truck.

12 Just before the shooting, and as decedent just starts to
13 exit the truck, Moody actually returns his gun to its holster.
14 However, upon trying to exit, the decedent makes a sudden jerking
15 move, which seems to prompt Moody to grab his gun again, demand
16 that decedent "drop the knife," and start shooting. The jerking
17 motion was, no doubt, decedent first getting his leg caught in
18 the seat belt and losing his balance, but, viewed in the light
19 most favorable to Moody, he had no way of knowing this. Indeed,
20 when Moody attempts to pull decedent's body away from the car, he
21 is unable to, apparently because he was still unaware that
22 decedent's leg was caught in the seatbelt.

23 During the shooting, decedent's body continually moved in an
24 erratic manner, occasionally turning away from Moody, such that
25 Moody could have believed that the decedent was reaching for the
26 knife or another weapon.⁴⁷ The shooting continued until the

27 ⁴⁷ Indeed, Moody's repeated failure on his firearms exams could
28 well have contributed to his apparent doubt that he had really

1 decedent was completely still, but Moody did not empty his gun
2 into decedent (Moody had two bullets left).

3 The court finds that there is a genuine dispute about
4 exactly what the video depicts. Defendants say it depicts
5 decedent with a knife, plaintiffs say it depicts decedent with a
6 tweezers. The video is not fine enough to resolve that dispute.⁴⁸
7 Defendants say decedent kept reaching as if for a weapon,
8 plaintiffs say decedent's body was simply responding to being
9 shot. The video does not resolve that dispute. Those are among
10 the main facts that must be resolved to determine whether the
11 shooting was a justified response to a dangerous parolee trying
12 to throw a knife at a police officer, or the unjustified police
13 killing of an unarmed man just trying to get out of a pickup
14 truck.

15 Plaintiffs' motion for summary judgment on claims predicated
16 on the shooting will be denied in its entirety. The remainder of
17 plaintiffs' motion for summary judgment asks the court to view
18 the evidence in the light most favorable to them, the moving
19 parties. That being improper, the court will deny the remainder
20 of plaintiffs' motion for summary judgment.

21 **VI. ANALYSIS - PLAINTIFFS' MOTION TO SEAL DOCUMENTS.**

22 Plaintiffs ask the court to seal certain documents, ECF Nos.
23

24 shot and disabled decedent, leading him to believe that the
25 twitching body was still a threat, rather than an already-
26 disabled person whose body was simply responding to each
27 additional bullet it was hit with.

28 ⁴⁸ Nor does the court have the ability to slow the motion down,
even assuming that such a viewing would be fair, considering that
Moody experienced the incident in real time, not slow motion.

1 82 and 99, pursuant to the stipulated Protective Order entered in
2 this case (ECF No. 45). Defendants, who would appear to be the
3 ones with an interest in keeping the documents confidential, have
4 neither requested that the documents be sealed nor opposed
5 plaintiffs' request.⁴⁹

6 The public has a "general right to inspect
7 and copy public records and documents,
8 including judicial records and documents."

9 Estate of Migliaccio v. Allianz Life Ins. Co., 686 F.3d 1115,
10 1119 (9th Cir. 2012), quoting Nixon v. Warner Commc'ns, Inc., 435
11 U.S. 589, 597 (1978). "This right extends to pretrial documents
12 filed in civil cases." Id., citing San Jose Mercury News, Inc.
13 v. U.S. Dist. Court, 187 F.3d 1096, 1102 (9th Cir. 1999).

14 Although the right is not absolute, the court must "'start with a
15 strong presumption in favor of access to court records.'" Id.,
16 quoting Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122,
17 1129 (9th Cir. 2003).

18 Plaintiffs, as the party requesting to seal court records,
19 bear the burden of "providing 'sufficiently compelling reasons'
20 that override the public policies favoring disclosure." Id. In
21 ruling on the motion, this court must "balance the competing
22

23 ⁴⁹ The Protective Order contemplates that defendants, not
24 plaintiffs, would move to seal these documents, as they are
25 marked confidential at the behest of defendants. ECF No. 45 ¶ 10
26 ("If plaintiffs wish to file with the Court any documents marked
27 Confidential Material, plaintiffs shall notify defendants a
28 reasonable period before hand to afford defendants an opportunity
to seek to have the document sealed under Local Rule 141"). The
parties have offered no explanation for why they have proceeded
by relying on plaintiffs to make this motion.

1 interests of the public and the party seeking to seal judicial
2 records." Id., quoting Kamakana v. City & Cnty. of Honolulu, 447
3 F.3d 1172, 1176 (9th Cir. 2006). If the court seals the records,
4 it must "articulate a factual basis for each compelling reason to
5 seal." Id.

6 Plaintiffs do not even attempt to meet their burden here.
7 Nor do they assert that any exception to the presumption of
8 public access applies here.⁵⁰ They do not explain, even in a
9 general way, why the information is confidential - other than to
10 say, it is stamped "confidential."⁵¹ Moreover, the court cannot
11 even infer a reason from the Protective Order, because that Order
12 does not explain what types of materials are subject to it;
13 materials are confidential simply because a party stamps them
14 with a "Confidential" stamp.

15 The request to seal will be denied.

16 **VII. ANALYSIS - PLAINTIFFS' MOTION TO RE-OPEN DISCOVERY.**

17 Plaintiffs ask to re-open discovery so that they can depose
18 opposing counsel. Plaintiffs assert that one witness's testimony
19 changed between the time he was interviewed by the police
20 investigators soon after the shooting, and the time he testified
21 years later at deposition. They also assert that the witness -

22 ⁵⁰ For example, the presumption does not apply to "judicial
23 records 'filed under seal when attached to a non-dispositive
24 motion,'" or put another way, the presumption is rebutted in that
25 circumstance. Midland, 686 F.3d at 1119, quoting Foltz, 331 F.3d
at 1136 and citing Phillips ex rel. Estates of Byrd v. Gen.
Motors Corp., 307 F.3d 1206, 1210 (9th Cir. 2002).

26 ⁵¹ For example, sealing documents might be appropriate if they
27 disclose the name of decedent's son, certain employment
28 information, or private medical information.

1 Michael Henry - was provided a "manipulated" transcript of his
2 interview statement just before the deposition. It was
3 manipulated because it contained bolding and underlining that was
4 not included in the version of the interview transcript produced
5 to plaintiffs.

6 Plaintiffs have not shown that the difference in testimony
7 is material in any way. Nor have they demonstrated why they need
8 to depose opposing counsel - rather than Henry - to find out why
9 there was a change in his story.

10 In any event, the change in Henry's story is not material,
11 and thus cannot support such an extraordinary remedy. At his
12 initial interview, Henry states that after decedent dropped his
13 knife, decedent himself picked it up and placed it in decedent's
14 tool bag before decedent headed to Flores Court in the pickup
15 truck. At his deposition, Henry states that after decedent
16 dropped his knife, Henry picked it up and handed it to decedent
17 before decedent headed to Flores Court in the pickup truck.
18 Plaintiffs do not explain why the difference in the story
19 matters. It appears that the material point of Henry's testimony
20 is not who picked a knife up off the ground, but rather that
21 decedent had a knife, and that he took it with him to Flores
22 Court. The relevance of how it wound up in decedent's hands is
23 not explained and it is not obvious to the court.

24 Plaintiffs' motion to re-open discovery will be denied.

25 **VIII. SUMMARY**

26 For the reasons stated above, the court orders as follows:

27 1. Defendants are entitled to the following partial
28 adjudication, based upon plaintiffs' concessions, specifically,

1 that no claim in this action arises from defendants' pointing a
2 gun at decedent's widow, pulling decedent away from the pickup
3 truck, handcuffing decedent, searching the house on Flores Court
4 or detaining or arresting any non-parties to this action.

5 Accordingly, the portions of any claim that are predicated upon
6 that conduct are hereby **DISMISSED WITH PREJUDICE**;

7 2. Defendants are entitled to qualified immunity for the
8 search that was performed on decedent after the shooting.

9 Accordingly, the portions of any claims that is predicated upon
10 that conduct are hereby **DISMISSED WITH PREJUDICE**;

11 3. Defendants' motion for summary judgment on Claim 1, to
12 the degree it asserts any state claim, is hereby **DISMISSED WITH**
13 **PREJUDICE**;

14 4. Defendants' motion for summary judgment against Whitney
15 Duenez on Claim 1 is **GRANTED**;

16 5. Defendants' motion for summary judgment against D.D.
17 (as successor in interest to decedent's estate) on Claim 1, is
18 **DENIED** to the degree it is predicated upon the Fourth Amendment,
19 and **GRANTED** to the degree it is predicated upon the alleged
20 denial of medical care;

21 6. Defendants' motion for summary judgment on Claim 2,
22 relating to the claim for deprivation of familial relationships
23 is **DENIED**;

24 7. Defendants' motion for summary judgment on Claim 3, for
25 Monell liability against the City and Bricker, is hereby **DENIED**,
26 and that claim may proceed to the degree it is predicated upon
27 inadequate training only;

28 8. Defendants' motion for summary judgment on Claim 4 is

1 **DENIED**, however, the court sua sponte dismisses Claim 4 to the
2 degree it is predicated upon the deprivation of familial
3 association, brought by Whitney Duenez in her capacity as
4 successor in interest to the decedent's estate;

5 9. Defendants' motion for summary judgment on Claim 6, a
6 claim under Cal. Civ. Code § 52.1, is hereby **DENIED**;

7 10. Defendants' motion for summary judgment on Claim 8, by
8 Whitney Duenez for intentional infliction of emotional distress,
9 is **GRANTED**;

10 11. Defendants' motion for summary judgment on all claims
11 for injunctive relief is **DENIED**;

12 12. Defendants' motion for summary judgment on the request
13 for punitive damages is **DENIED**;

14 13. Plaintiffs' motion for summary judgment is **DENIED** in
15 its entirety;

16 14. Plaintiffs' motion to seal documents is **DENIED**;

17 15. Plaintiffs' motion to re-open discovery, so that they
18 can depose defendants' attorney, is **DENIED**.

19 IT IS SO ORDERED.

20 DATED: December 20, 2013.

21
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23 
24 LAWRENCE K. KARLTON
25 SENIOR JUDGE
26 UNITED STATES DISTRICT COURT
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28