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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JOAN SHELLEY, MICHELLE LOFTIS,
SANDRA HOYOPATUBBI,

Plaintiffs,

v.

COUNTY OF SAN JOAQUIN;
SHERIFF STEVE MOORE, in his
Official Capacity as Sheriff of San
Joaquin County and STEVE MOORE,
individually; Does 1 to 100,

Defendants.

No. 2:13-cv-00266-MCE-DB

MEMORANDUM AND ORDER

Through this action, Plaintiff Joan Shelley¹ ("Plaintiff") seeks to recover damages from the County of San Joaquin ("Defendant" or "County"), on grounds that the County exhumed the body of Plaintiff's daughter, Jo Ann Hobson, in a careless and wrongful fashion. Plaintiff premises federal jurisdiction on alleged violations of the United States Constitution under 42 U.S.C. § 1983. Presently before the Court is Defendant's Motion for Summary Judgment brought on grounds that no genuine triable issues of fact exist

¹ While Plaintiff's surviving daughters, Michelle Loftis and Sandra Hoyopatubbi, were also originally named as Plaintiffs in this action, the parties filed a Notice of Settlement on July 20, 2016, indicating that a settlement had been reached as to any claims brought by Loftis and Hoyopatubbi. Therefore, this action proceeds only as to Plaintiff Shelley's claims.

1 with regard to its liability and that the County is accordingly entitled to judgment as a
2 matter of law under Federal Rule of Civil Procedure 56.²

4 **BACKGROUND**

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6 On or about August 28, 1985, sixteen-year-old Jo Ann Hobson disappeared; her
7 mother, Plaintiff Joan Shelley, reported Ms. Hobson as missing approximately a week
8 later. Def.'s Statement of Undisputed Facts ("SUF"), No. 4-5. Initial investigation efforts
9 proved unavailing and Ms. Hobson's disappearance was ultimately transferred to the
10 "cold case unit" of the San Joaquin County Sheriff's Office ("SJSO") despite suspicion
11 that she had been a victim of the so-called "Speed Freak Killers," Loren Herzog and
12 Wesley Shermantine. Mr. Herzog and Mr. Shermantine were suspected of having
13 murdered as many as 25 different individuals, with the whereabouts of at least 20 victims
14 remaining unknown. Dep. of Sergeant Michael Jones, 53:20-54:7.³

15 In 2012, SJSO Detective Chanda Bassett ("Bassett") received information
16 suggesting that some of the unaccounted for bodies had been buried in an agricultural
17 well on Flood Road in rural San Joaquin County. SUF at 7. When she contacted the
18 property owner of the land on which the well at issue was situated, the owner told
19 Bassett that the well, which was believed to be about 30 feet deep, had been plugged
20 years before with garbage, tree stumps and dirt in order to prevent anyone from falling in
21 and being injured. Id. at 8. The owner nonetheless gave his permission for the well to
22 be searched.

23 The surface soil around the six-foot diameter well consisted of hard, compressed
24 undisturbed clay known as "hard pan". Because of that soil composition and the fact

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26 ² All further references to "Rule" or "Rules" are to the Federal Rules of Civil Procedure unless
otherwise noted.

27 ³ Defendant County lodged with the Court electronic copies of all pertinent depositions taken in
28 this matter. Unless otherwise specified, the Court's reference to deposition testimony in this Memorandum
and Order refers to those lodged transcripts.

1 that heavy foreign material had been dumped into the well, County Public Works
2 Supervisor Larry Waddle recommended that an excavator be used to commence
3 digging. *Id.* at 22. On February 8, 2012, an excavator with a seventeen foot “short
4 reach” arm was delivered to the site. Because of the potential danger of excavating
5 such a deep well, federal safety regulations required that a “competent person” capable
6 of “identifying existing and predictable hazards in the surroundings” be present and
7 ready to “take prompt corrective action to eliminate” such hazards. 29 C.F.R.
8 § 1926.32(f); *SUF* at 39. The County’s Department of Public Works equipment operator
9 David Drum was designated as the appropriate “competent person and was responsible
10 that activities on the site be conducted safely and in compliance with [federal]
11 standards.” *Id.* at 41-42. Mr. Drum also operated the excavator.

12 Consistent with the property owner’s representations, initial excavation on
13 February 8, 2012, removed chunks of concrete, tree stumps, and hard soil up to a depth
14 of approximately 10 feet. *Id.* at 48. On the following day, Bassett advised Plaintiff’s
15 daughter, Michelle Loftis, that the well was being excavated for human remains. Bassett
16 agreed to drive Plaintiff and her daughter to the excavation site. In the meantime, the
17 SJSO had blocked access to Flood Road in an attempt to prevent media and any
18 unauthorized personnel from coming within about a mile of the well. While Bassett
19 would not permit Plaintiff and Loftis to leave the vehicle, it is undisputed that she
20 explained to them that while initial digging to remove dirt and debris would be by
21 excavator, when and if human remains were discovered that excavation would stop. *Id.*
22 at 57. Bassett admits that she indicated that recovery efforts would then change to
23 digging by hand. *Bassett Dep.*, 48:24-49:3. According to Plaintiff, Bassett’s assurances
24 in that regard were made in response to her own concern, upon seeing the steel claws
25 of the excavator, “that my daughter was going to be dug up and chopped into pieces.”
26 *Shelley Decl.*, ¶ 4; *Shelley Dep.*, 58:9-24. Plaintiff claims that while she initially became
27 “hysterical” at this thought, she was calmed by Bassett’s reassurance that as soon as
28 bones were discovered, excavator use would stop. *Shelley Dep.* 58:25-59:8. Plaintiff

1 reiterated that she didn't want a backhoe to remove her daughter's remains, stating that
2 "I don't want them to tear her up, I don't want them to dig her out like that." Shelley
3 Dep., 61:25-62:3; Loftis Dep., 47:23-25.

4 Excavation at the site, which had apparently stopped while Plaintiff and Ms. Loftis
5 were on the scene, resumed once they left. Digging that day uncovered an engine
6 block, animal carcasses, washing machine parts, railroad ties, glass and garbage but no
7 human remains. SUF at 62. The digging was stopped at a depth of approximately 15
8 feet because the "short reach" excavator being used could not extend any deeper. A
9 28-foot "standard reach" arm excavator capable of reaching a 24-foot depth was then
10 brought in. Id. at 63-64. Detective Bassett and Mr. Drum then agreed to dig a
11 descending ramp into the well's center line so as to reach deeper into the well from the
12 bottom of the ramp. Id. at 66-67. Bassett and Drum initially believed that this would
13 allow County personnel to walk down into the ramp up to a depth of 30 feet, and dig any
14 human remains discovered out by hand. Id. at 69. After consulting the regulations,
15 however, Drum determined that the ramp could not go deeper than 25 feet due to the
16 potential for a cave-in. Id. at 70.

17 Once the contemplated ramp was completed, a "long reach" excavator was
18 brought in on February 10 and removed more dirt and debris from the well up to a depth
19 of approximately 35 feet. Id. at 74. No remains were discovered and the next day,
20 digging with the excavator continued from the bottom of the ramp. At approximately
21 2:00 p.m. on the afternoon of February 11, 2012, a human bone was brought to the
22 surface from a depth estimated by the County to be around 50 feet. Id. at 77.⁴ At that
23 point, consistent with the representations that Detective Bassett made to Plaintiff,
24 excavation appears to have ceased for some time, only to resume at the direction of
25 Sergeant Jones on grounds that the dirt was too hard to dig by hand. Id. at 269; Jones
26 Dep., 51:1-3. While there was discussion between Jones, Bassett and Drum about

27 ⁴ The depth at which remains were discovered appears to be the subject of some dispute,
28 however. Deposition testimony suggests that it may have been as little as 35 feet. See, e.g., Jones Dep.,
50:6-8.

1 whether the excavator could widen the well on all four sides to a depth that would allow
2 workers to enter, this would have required the destruction of surrounding encumbrances,
3 including a driveway, within at least 100 feet of the well due to OSHA “benching” and
4 “slope” requirements. SUF at 100-01. There is no evidence that other alternatives
5 permitting hand digging in a more confined space were considered. Jones admitted that
6 he did not consult with anyone in this regard before he issued the order to resume use of
7 the excavator after human remains were discovered. Jones Dep., 52:5-8.

8 At this point, California Department of Justice criminologists who had previously
9 been contacted by the SJSO, arrived at the scene with sifting screens, shovels and
10 brushes, and the excavator continued to bring scoops of soil to the surface. Id. at 80.⁵
11 By the time the criminologists arrived, there were 12 piles of dirt, 3 of which contained
12 human bones and other effects. Terra Dep., 37:4-5; 59:7-23. Moreover, due to the high
13 profile of the case and intense media interest, both television and print media outlets had
14 stationed themselves at the one-mile barricade, including most major television stations
15 from both the Sacramento and San Francisco areas, television stations from Japan and
16 Australia, as well as reporters from the Stockton Record, the Huffington Post, the New
17 York Times, Reuters, CNN, the Associated Press and MSNBC. SUF at 92. Several
18 media outlets went so far as to utilize helicopters and fixed-wing airplanes to fly over the
19 site and take video utilizing high-powered lenses. Id. at 93, 114, 117.

20 This barrage of media attention continued over the following three days,
21 February 12 through 14, as recovery efforts continued. Id. Excavation nonetheless
22 continued, and a total of 56 piles of soil were brought to the surface. Id. at 139. After
23 larger evidentiary items, including remains and personal effects, were isolated from large
24 chunks of dirt, concrete and debris, the remaining dirt was sifted through screens to
25 collect smaller fragmentary pieces. Id. at 84-85. Due to intense public interest, videos of
26 the recovery efforts (apparently taken by airplanes flying overhead), were broadcast on

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28 ⁵ According to the County, it was common practice for the SJSO to call the DOJ for assistance
with forensic matter (SUF at 8), and Bassett had requested assistance accordingly.

1 local television outlets. The County claims it neither authorized nor condoned the
2 media's video surveillance in this regard. Indeed, in an attempt to satisfy public interest
3 in the recovery effort, the County invited a reporter, video camera operator and still
4 photographer to the well site for a limited period of fifteen minutes during which time the
5 excavator was not operating and no material was being brought to the surface. Id. at
6 119-125.

7 During one of the television broadcasts that aired over a period of several days,
8 Shelley alleges to have seen an excavator bringing clothing, as well as what appeared to
9 be a human bone sticking out of a jacket she believed belonged to her daughter, to the
10 surface. Shelley Dep., 164:1-165:20, 127: 1-17.⁶ Plaintiff claims this caused her severe
11 emotional distress, stating as follows:

12 What I saw destroyed me that day, mentally and physically,
13 and for months after. I saw the large earth moving equipment
14 and bucket pulling out and chewing up clothing with bones
15 sticking out of the sleeves, and then being dumped in large
16 piles of dirt like garbage. I thought it was my daughter being
destroyed all over again. I could not imagine this, I felt like I
was going to lose my mind, and I was not able to proceed
with my life or work for some time.

17 Shelley Decl., § 5.

18 At her deposition, Plaintiff reiterated that seeing the experience made her feel like
19 "my child was murdered all over again." Shelley Dep., 123:4-9. Michelle Loftis, who also
20 saw the broadcasts, stated she saw bones hanging from an excavation bucket, as
21 well as a striped sock similar to ones worn by Jo Ann Hobson with a leg or foot bone
22 extending from the sock. Loftis Dep., 97:22-98:11; 99:9-12. Even Assistant Sheriff
23 Ruben Orozco recalled seeing news footage showing a jacket with bones in it. Orozco
24 Dep., 23:17-21.

25 The County discounts Plaintiff's claim that their recovery methods "chewed up,
26 pulverized, destroyed, crushed and commingled [Jo Ann Hobson's] bones" with those of

27 _____
28 ⁶ The County claims that subsequent identification of the bone revealed it was not in fact Jo Ann
Hobson's. SUF at 164.

1 other murder victims. FAC, ¶ 11. Forensic anthropologist Dr. Elizabeth Miller, an expert
2 retained by the County, opined that the remains, particularly given their long fall from the
3 surface to the bottom of the well, would have been commingled and fragmented
4 regardless of technique due to time, moisture, and pressure from soil and debris. Miller
5 Decl., ¶¶ 9-12

6 According to the County, that conclusion is bolstered by the condition of the
7 fragmentary skeletal remains ultimately recovered. Michelle Terra, a California
8 Department of Justice criminalist involved in sifting through the bone fragments,
9 described them as dirty on all sides, indicating that they had broken apart prior to
10 excavation. Id. at 141. Moreover, Ms. Terra stated the bones themselves were “very
11 brittle . . . [they] would literally just crumble in my fingers.” Id. at 143, citing Terra Dep.,
12 66:17-67:3.

13 According to the County, digging reached the bottom of the well on February 15,
14 2012. After all 56 piles brought to the surface were documented, sorted and sifted, a
15 total of 1,700 human bone fragments were identified. Id. at 140. The County maintains
16 that the DOJ criminalists involved in the recovery, Ms. Terra and her supervisor,
17 Kathleen Ciula, at no time objected to the excavator being used in recovery efforts. Id.
18 at 145, 147.

19 In addition, Jill Spriggs, the Department of Justice Chief of Forensic Services
20 during the recovery, argued that given the debris that plugged the well, which included
21 washers, dryers and car parts, the bones could not have been recovered without a
22 backhoe, and it was that debris that commingled the remains rather than use of a
23 backhoe. Id. at 154.

24 The propriety of using an excavator under the circumstances, however, is by no
25 means undisputed. While Dr. Miller opined that hand excavation was neither practical or
26 safe, and that the excavation was conducted in accordance with best practices (see id.
27 at 206, 207), Plaintiff’s expert, Dr. Eric Bartelink, “completely disagrees” with both of
28 those assessments, and opines that there were numerous other feasible and more

1 appropriate ways both to have excavated the well and to have carefully removed the
2 remains found therein. Id. at 272, see also Bartelink Decl., ¶¶ 4F, 4G (finding it
3 inconceivable that any best practice in forensic anthropology would countenance the
4 mass digging of skeletal remains from a burial site). According to Dr. Bartelink, a
5 forensic anthropologist at California State University, Chico, his own analysis of Jo Ann
6 Hobson’s bones showed that some were likely broken apart during the excavation.
7 Bartelink Dep., 50:22-51:1. He believed that using an excavator was unnecessarily
8 destructive and ignored other ways or means to manage the recovery. SUF at 272.
9 Additionally, Dr. Bartelink pointed out that “pictures from the dig showed little or minimal
10 commingling or fragmentation until after the skeletal remains were crushed and dug out
11 of the ground with large dirt moving equipment.” Bartelink Decl., ¶ 4C, 4:1-4. Finally,
12 even the County’s own Chief Medical Examiner, Dr. Bennet Omalu, concluded the
13 skeletal remains were not recovered in accordance with the applicable standard of
14 practice. Omalu Dep., Ex. N to the Decl. of Jeffrey Rinek, 30:12-31:8.

15 To that same end, another expert identified by the County, Daniel O’Connell,
16 admitted that the excavated well could have been shored through use of casing or a
17 “eurorail” system technique, albeit at higher cost.⁷ Id. at 230. According to O’Connell,
18 casing would have cost some \$192,800.00, with the eurorail technique running
19 approximately \$315,394.96, in construction labor and equipment alone. Id. at 231-232.
20 Aside from their cost, these techniques, in conjunction with hand digging, would have
21 taken between 40-45 days to complete, as opposed to the approximate one week period
22 during which the well was excavated with a backhoe, and would thus have required
23 increased personnel costs attendant to that extra period. Id. at 234. In discounting
24 either casing or eurorail techniques, the County basically contends that it was costly, too
25 time-consuming, or both to have conducted the operation differently. There is no

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27 ⁷ Plaintiff suggests that the County actually spent some \$177,000 to recover remains from the well
28 in question, although this figure does not appear to be corroborated. At any rate, it appears safe to
conclude that using an excavator was cheaper than either casing or using a eurorail technique.

1 evidence, however, that Sheriff Moore or anyone at the SJSO looked into these
2 alternatives in order to recover the victims' bodies from the well.

3 Once the recovery operation ended, the remains uncovered were sent to Dr. Sari
4 Miller-Antonio, an independent anthropologist (and a professor and associate dean at
5 California State University, Stanislaus) hired on a contract basis by the Department of
6 Justice, for evaluation. Id. at 34, 168-170. Dr. Miller-Antonio spent some six months
7 evaluating and separating the bones. Id. at 175. Based on the consistency of the bone
8 thickness, their overall size, and differences in condition, the bone fragments were
9 assigned to four different individuals: Jo Ann Hobson, Kimberly Billy, and an unidentified
10 mother and her unborn fetus. Id. at 173, 177. Once Dr. Miller-Antonio's assessment
11 had been completed, Jo Ann Hobson's bones were returned to her family on or about
12 August 15, 2012. Id. at 183. According to Dr Miller Antonio, the way in which the bones
13 were recovered did not prevent DNA analysis or identification. Id. at 174.

14 Plaintiff then proceeded to have her daughter's skeletal remains examined yet
15 again, this time by Dr. Bartelink. Dr. Bartelink spent another 5 months performing his
16 own independent forensic evaluation on the "hundreds" of fragments involved. Id. at
17 186. He definitively identified two bones that did not belong to Jo Ann Hobson: a fetal
18 bone and a bone belonging to Kimberly Billy. Id. at 187. Moreover, the parties
19 "generally agree" that bone fragments assigned to the unidentified female likely
20 contained some bones belonging to Jo Ann Hobson. Id. at 190.

21 Plaintiff filed the instant lawsuit on February 11, 2013 alleging that the County's
22 conduct in exhuming her daughter's remains violated both procedural and substantive
23 due process rights guaranteed by the United States Constitution. At the present time,
24 the matter proceeds only as to Plaintiff's substantive due process claim, brought under
25 the auspices of 42 U.S.C. § 1983, against the County. While Plaintiff previously
26 asserted a procedural due process claim as well, that claim has already been dismissed.
27 ECF No. 32.

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1 not establish the absence or presence of a genuine dispute, or that an adverse party
2 cannot produce admissible evidence to support the fact.” Fed. R. Civ. P. 56(c)(1). The
3 opposing party must demonstrate that the fact in contention is material, i.e., a fact that
4 might affect the outcome of the suit under the governing law. Anderson v. Liberty Lobby,
5 Inc., 477 U.S. 242, 248, 251-52 (1986); Owens v. Local No. 169, Assoc. of W. Pulp and
6 Paper Workers, 971 F.2d 347, 355 (9th Cir. 1987). The opposing party must also
7 demonstrate that the dispute about a material fact “is ‘genuine,’ that is, if the evidence is
8 such that a reasonable jury could return a verdict for the nonmoving party.” Anderson,
9 477 U.S. at 248. In other words, the judge needs to answer the preliminary question
10 before the evidence is left to the jury of “not whether there is literally no evidence, but
11 whether there is any upon which a jury could properly proceed to find a verdict for the
12 party producing it, upon whom the onus of proof is imposed.” Anderson, 477 U.S. at 251
13 (quoting Improvement Co. v. Munson, 81 U.S. 442, 448 (1871)) (emphasis in original).
14 As the Supreme Court explained, “[w]hen the moving party has carried its burden under
15 Rule [56(a)], its opponent must do more than simply show that there is some
16 metaphysical doubt as to the material facts.” Matsushita, 475 U.S. at 586. Therefore,
17 “[w]here the record taken as a whole could not lead a rational trier of fact to find for the
18 nonmoving party, there is no ‘genuine issue for trial.’” Id. 87.

19 In resolving a summary judgment motion, the evidence of the opposing party is to
20 be believed, and all reasonable inferences that may be drawn from the facts placed
21 before the court must be drawn in favor of the opposing party. Anderson, 477 U.S. at
22 255. Nevertheless, inferences are not drawn out of the air, and it is the opposing party’s
23 obligation to produce a factual predicate from which the inference may be drawn.
24 Richards v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff’d,
25 810 F.2d 898 (9th Cir. 1987).

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1 **ANALYSIS**

2
3 **A. Availability of Procedural Due Process**

4 The Due Process Clause includes a substantive component that “bar[s] certain
5 [arbitrary wrongful] government actions regardless of the fairness of the procedures used
6 to implement them.” Daniels v. Williams, 474 U.S. 327, 331 (1986). The substantive
7 due process doctrine is rooted in the notion that some rights are so fundamental that no
8 amount of process justifies governmental interference, County of Sacramento v. Lewis,
9 523 U.S. 833, 840 (1998).

10 Although the Supreme Court has been reluctant to expand the lists of rights
11 protected by substantive due process, it has recognized that the doctrine extends to a
12 “right or privacy” limited to “a person’s most basic decisions about family and parenthood
13 . . . as well as bodily integrity.” Planned Parenthood v. Casey, 505 U.S. 833, 849 (1992);
14 California v. F.C.C., 75 F.3d 1350, 1361 (9th Cir. 1996).

15 In Marsh v. County of San Diego, 680 F.3d 1148, 1154 (9th Cir. 2012), the Ninth
16 Circuit recognized a parent’s “right of privacy” to “control a deceased child’s remains,”
17 and found that said right “flow[ed] from the well-established substantive due process
18 right to family integrity.” Marsh, a case of first impression,⁸ was decided in the context of
19 a governmental employee’s unjustified release of a young child’s autopsy photos in the
20 media, and determined that the child’s parent in that case had a substantive due process
21 right to control the release of such photos. Id. at 1155. Finding that the right of family
22 members to direct and control disposition of the body of a deceased “ingrained in our
23 traditions,” the court recognized a substantive due process right in that context.

24 The County, while recognizing that the respectful treatment of the dead is a
25 deeply rooted cultural tradition, nonetheless urges the Court to limit Marsh’s holding to
26 its particular facts. The language of the Marsh decision, however, belies any such

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28 ⁸ Marsh specifically noted that no court had yet held that substantive due process rights attached to the dissemination or control of images of a dead family member. Id. at 1153.

1 limited interpretation. In addition to applying substantive due process to the public
2 display of death images, the case further applied the same rationale to “[m]utilation of a
3 deceased family member’s body” or “desecration of the burial site” finding that in each
4 instance such conduct is “likely to cause the family profound grief and therefore ‘shocks
5 the conscience’ and ‘offend[s] the community’s sense of fair play and decency.’” Id. at
6 1155, citing Rochin v. California, 342 U.S. 165, 172-73 (1952); see also National
7 Archives and Records Adm., v. Favish, 541 U.S. 157 (2004) (finding that “th[e] well
8 established cultural tradition acknowledging a family’s control over the body and death
9 images of the deceased has long been recognized as common law”). Citing “precisely
10 the same reasons,” Marsh concludes that these rights are “also protected by substantive
11 due process.” 680 F.3d at 1154.

12 Drawing all inferences in favor of the opposing party, as the Court must do on
13 summary judgment, it appears clear that the facts present here arguably implicate both
14 the “mutilation” of Jo Ann Hobson’s body and the “desecration” of her burial site in the
15 abandoned well containing her remains. Consequently, under the rationale of Marsh,
16 this Court cannot rule as a matter of law that Plaintiff’s substantive due process rights
17 were not violated under the circumstances of this case.

18 **B. Whether the County’s Conduct Here Implicates Due Process**

19 In order to implicate substantive due process concerns, which as indicated above
20 the Court finds to exist under the circumstances of this particular case, the alleged
21 conduct must “shock the conscience” and “offend the community’s sense of fair play and
22 decency.” Rochin v. California, 342 U.S. at 172-73. If the facts are undisputed, this
23 determination can be decided as an issue of law. See Preschooler II v. Clark County
24 School Bd. of Trustees, 479 F.3d 1175, 1181 n.5 (9th Cir. 2007).

25 It must first be noted that the conduct involved here may well implicate
26 substantive due process based on its very nature alone. As discussed above, Marsh
27 appears to recognize that in instances involving the mutilation of a deceased family
28 member’s body, or desecration of the family member’s gravesite, conduct that “shocks

1 the conscience” or offends the community’s sense of decency, is necessarily inferred.
2 Marsh, 680 F.3d at 1155. Nonetheless, even if the Court looks at the kind of qualifying
3 conduct as a general matter, the type of conduct most likely to rise to the “conscience-
4 shocking level” is conduct “intended to injure in some way unjustifiable by any
5 government interest.” County of Sacramento v. Lewis, 523 U.S. at 849. The standard is
6 met “by conduct that either consciously or through complete indifference disregards the
7 risk of an unjustified deprivation of liberty.” Tatum v. Moody, 768 F.3d 806, 820-21
8 (9th Cir. 2014).

9 According to the County, no conduct coming close to this standard has been
10 identified. The Court disagrees. The County elected to use large earth moving
11 equipment to excavate a well they knew was likely to contain human remains, including
12 those of Plaintiff’s daughter, Jo Ann Hobson. While initially using an excavator may well
13 have been reasonable, the Court cannot say as a matter of law that the County’s
14 decision to continue using the backhoe was reasonable once digging had proceeded to
15 a level where human remains were discovered.

16 When Detective Bassett initially took Plaintiff to the probable grave site, Plaintiff
17 allegedly became hysterical when she saw the backhoe and feared that her daughter’s
18 remains would be “torn up” and “chopped into pieces.” In order to calm Plaintiff, Bassett
19 reassured her that once remains were uncovered the use of a backhoe would stop and
20 bones would be removed through a hand dig. Then, drawing all inferences in favor of
21 the evidence produced by Plaintiff, the County allegedly determined that it was too
22 difficult, time-consuming, and expensive to proceed with hand digging, and there is no
23 indication that Plaintiff was expressly informed of that change in strategy despite her
24 repeated entreaties that an excavator not be used and the emotional distress Bassett
25 had already observed in conjunction with Plaintiff’s observation of the excavator.
26 Instead, the County simply continued to use the excavator without even considering
27 other options that may have been only slightly more expensive (\$192,500 for casing,
28 along with additional personnel costs as opposed to the \$177,000 that Plaintiff alleges

1 the dig cost anyway). Any need to take advantage of the speed attendant to a
2 mechanized dig (the excavation as performed only took about a week, and according to
3 the evidence proceeded other options may have gone on for 30-45 days) would appear
4 minimal given the fact that the remains had already been in the well for more than 25
5 years, thus mitigating against any emergency in recovering them.

6 Additionally, and again drawing all inferences in Plaintiff's behalf as the party
7 opposing this motion, the County proceeded with machine excavation, bringing loads of
8 dirt, debris and remains to the surface and dumping them on the ground, despite being
9 aware of the intense media interest in the case and the fact that footage of the recovery
10 operation was being taken by aircraft flying overhead. The County did not change its
11 techniques to either conceal the piles being brought to the surface, or change the
12 digging method altogether so that the results would not be exposed to plain view. This
13 resulted in news broadcasts observed by Plaintiff showing body parts that she believed
14 belonged to her daughter being dumped "like garbage." Plaintiff's declaration, as well as
15 her deposition testimony, show that these images caused her severe emotional distress,
16 which the County was on notice from Bassett's prior interaction with Plaintiff would be
17 the result.

18 Viewed accordingly, the Court cannot rule out, as a matter of law, a finding that
19 the County's conduct here "shocks the conscience." Consequently, the County is not
20 entitled to summary judgment on that basis. While the County argues that the recovery
21 of remains from the well was particularly problematic given the well's depth and because
22 the circumstances of the dig were virtually unprecedented, those factors are, at best,
23 factual determinations that must be weighed by the jury in deciding whether the manner
24 in which the County proceeded here shocked the conscience. Whether the cost or time
25 involved precluded other means of recovery also is a question of fact where other
26 methods, like the casing or "eurorail" techniques, were available yet ignored by the
27 County in proceeding with use of an excavator once human remains were discovered.

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1 In addition, the fact that the County did not authorize or participate in video
2 surveillance of the recovery efforts is unpersuasive where there are factual disputes
3 about what the County could or should have done when confronted by those activities.
4 The County neither stopped its chosen method of recovery once it became clear that this
5 method allowed such surveillance, nor changed its technique to one which would have
6 afforded the process to proceed more privately. In the end, a jury must decide whether
7 the County's response in this regard was a reasonable one.

8 Consequently, the Court finds that Plaintiff has identified conduct which implicates
9 behavior sufficiently conscience-shocking to survive summary judgment.⁹

10 **C. Monell Liability**

11 As the County points out, Plaintiff's claim against it is based on a 42 U.S.C. §
12 1983 violation. A municipal entity like the county, however, is only liable under § 1983 if
13 the constitutional injury was the result of a "custom, policy, or practice" pursuant to
14 Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978). Nonetheless, even a "single
15 decision may satisfy Monell's municipal policy requirement" if that decision was "properly
16 made by one of the [entity's] authorized decisionmakers; that is, by an official who
17 'possesses final authority to establish a municipal policy with respect to the challenged
18 action.'" Gobel v. Maricopa County, 867 F.2d 1201, 1206-07 (9th Cir. 1989) (quoting
19 Pembaur v. City of Cincinnati, 475 U.S. 469, 479-81 (1986).

20 According to the County, it can be liable only for such acts which the municipality
21 has officially sanctioned or ordered through such an official. Pembaur, 475 U.S. at 480.
22 A decision by such policymaking officials is not implicated by "the mere failure to
23 investigate the basis of a subordinate's discretionary decision," since such a failure
24 should not be considered "a delegation of policymaking authority." St. Louis v.
25 Praprotnik, 485 U.S. 112, 130 (1988). Instead, as the Supreme Court recognizes, "the

26 ⁹ Because the Court finds that the recovery efforts alone are sufficient to implicate Plaintiff's
27 substantive due process rights, it need not also determine whether the separation and identification of the
28 remains also shocked the conscience, and it declines to do so. In addition, the related issue of whether
Dr. Miller-Antonio, as a private forensic evaluator, acted "under color of law" in separating the remains
need also not be considered.

1 purposes of § 1983 would not be served by treating a subordinate employee's decision
2 as if it were a reflection of municipal policy." Id. at 130.

3 Because Sheriff Steve Moore is both the County Coroner and the Sheriff, by law
4 he is obligated to investigate and take control of any dead body. Indeed the County
5 expressly concedes that Moore "was the County official with 'final policymaking authority'
6 in [the] area of criminal investigation and forensic recovery." Def.'s Mot., 34:3-4. It was
7 therefore Sheriff Moore's legal duty to be made aware of the uncovering of human
8 remains, and to decide how to further recover such remains. The County nonetheless
9 points to testimony suggesting that because it was other County employees, like Bassett
10 and Sergeant Jones, who issued direct orders on proceeding with the recovery, Sheriff
11 Moore is necessarily absolved of any participation in the process. The County therefore
12 claims that it bears no conceivable municipal liability under § 1983 in the absence of any
13 decisions being made by its authorized decision maker, here Sheriff Moore.

14 Again, the Court finds that disputed issues of fact preclude it from deciding as a
15 matter of law that Moore lacked the necessary involvement in the recovery effort. As
16 Plaintiff points out, there is testimony suggesting that Moore's involvement was more
17 than his absence at the crime scene might otherwise suggest. Even Moore testified that
18 he "purposely stayed away from the site" simply because his physical presence would
19 attract even more media attention. Moore Dep., 32:3-6. At the same time, however, he
20 admits he was given ongoing updates as to the status of the investigation as it
21 proceeded. Id. at 32:12-14. He also participated in a meeting to "go over the
22 information and the investigation process" before actual recovery efforts even began. Id.
23 at 27:3-8. In addition, despite being out-of-town when human remains were actually
24 reached, Moore was advised by Assistant Sheriff Ruben Orozco of when that discovery
25 occurred. Id. at 33:3-7.

26 The testimony of Assistant Sheriff Orozco also confirms that Moore was
27 continually kept abreast of recovery efforts. According to Orozco, it was he, as opposed
28 to Moore, who directly discussed with the site crew how human remains would be

1 recovered. Orozco Dep., Ex. W To Rinek Decl., 17:1-5. Orozco nonetheless testified
2 that he, in turn, was in regular contact and reported to his immediate boss, Moore, as the
3 excavation proceeded. Id. at 16:12-16. According to Orozco, Sheriff Moore, was kept
4 apprised of the entire process as it unfolded. Id. at 19:23-25.


5 Thus, even if directives at the site were not specifically made by Moore, under
6 these circumstances the Court cannot discount the possibility that he was involved
7 behind the scenes in all pertinent developments and on that basis satisfied the
8 “authorized decision maker” predicate of § 1983 liability. To the extent the implications
9 of Moore’s and Orozco’s testimony are at odds with other testimony which the County
10 argues minimizes any participation by Moore in the process, those disputes simply raise
11 triable issues of fact. In sum, then, the scope and extent of Moore’s involvement turns
12 on factual determinations not amenable to decision on summary judgment.

13
14 **CONCLUSION**

15
16 For all the foregoing reasons, Defendant County of San Joaquin’s Motion for
17 Summary Judgment (ECF No. 72) is DENIED.

18 IT IS SO ORDERED.

19 Dated: October 11, 2017

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21 
22 MORRISON C. ENGLAND, JR.
23 UNITED STATES DISTRICT JUDGE
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