UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

----oo0oo----

JOSEPH ROSALES,

Plaintiff,

v.

CITY OF CHICO; DAVID BAILEY; and DOES 1-10, (in their official and individual capacities),

Defendants.

CIV. NO. 2:14-02152 WBS CMK

MEMORANDUM AND ORDER RE: MOTION FOR SUMMARY JUDGMENT

----oo0oo----

Plaintiff Joseph Rosales filed this action under 42 U.S.C. § 1983 based on defendant Officer David Bailey's use of force following plaintiff's solo car collision. Officer Bailey and defendant City of Chico now move for summary judgment on all of plaintiff's claims pursuant to Federal Rule of Civil Procedure 56.

I. Factual and Procedural Background

On June 10, 2014, plaintiff lost control of his car and collided with a concrete planter box and a steel awning that was

attached to a building. His car overturned during the accident and ultimately ended up resting on the passenger side. Plaintiff had his dog in his car and was worried about locating his dog after the accident.

When Officer Bailey arrived at the scene, he ordered plaintiff to start climbing out of the driver's side door. Plaintiff did not immediately comply and indicated that he wanted to find his dog. Officer Bailey then used a pain compliance technique on plaintiff's wrist and helped extract plaintiff as he struggled to climb out of the driver's side door. After dragging plaintiff away from the accident and ordering him to stay seated on the curb, Officer Bailey allegedly used further force against him. Two bystanders recorded the incident, with the first video limited to the extraction and the second video including the interactions after the extraction.

In his Complaint, plaintiff alleges that Officer Bailey used excessive force and asserts four claims against Officer Bailey and the City of Chico: 1) a § 1983 claim for excessive force in violation of the Fourth Amendment; 2) state law battery; 3) state law negligence; and 4) excessive force in violation of the Tom Bane Civil Rights Act, Cal. Civ. Code § 52.1. Defendants now move for summary judgment pursuant to Rule 56 on all of plaintiff's claims.

II. Legal Standard

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A material fact is one that could affect the outcome

of the suit, and a genuine issue is one that could permit a reasonable jury to enter a verdict in the non-moving party's favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The party moving for summary judgment bears the initial burden of establishing the absence of a genuine issue of material fact and can satisfy this burden by presenting evidence that negates an essential element of the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Alternatively, the moving party can demonstrate that the non-moving party cannot produce evidence to support an essential element upon which it will bear the burden of proof at trial. Id.

Once the moving party meets its initial burden, the burden shifts to the non-moving party to "designate 'specific facts showing that there is a genuine issue for trial.'" Id. at 324 (quoting then-Fed. R. Civ. P. 56(e)). To carry this burden, the non-moving party must "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). "The mere existence of a scintilla of evidence . . . will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." Anderson, 477 U.S. at 252.

In deciding a summary judgment motion, the court must view the evidence in the light most favorable to the non-moving party and draw all justifiable inferences in its favor. Id. at 255. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury

functions, not those of a judge . . . ruling on a motion for summary judgment . . . ." Id.

III. Analysis

A. Substantive Due Process

Although plaintiff does not assert a § 1983 claim based on a violation of his substantive due process rights, defendants first seek summary judgment on the ground that Officer Bailey's conduct did not shock the conscience. The "shocks the conscience" standard, however, governs only claims under the substantive due process clause. County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998); see also Porter v. Osborn, 546 F.3d 1131, 1138 (9th Cir. 2008).

Moreover, "[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." Albright v. Oliver, 510 U.S. 266, 273 (1994) (internal quotation marks and citation omitted). When an individual is seized, "the Fourth Amendment provides an explicit textual source of constitutional protection against [that] sort of physically intrusive governmental conduct, [and] that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing the[] claims." Graham v. Connor, 490 U.S. 386, 395 (1989).

"A person is seized by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer, by means of physical force or show of authority, terminates or restrains his freedom of movement, through means

intentionally applied." Brendlin v. California, 551 U.S. 249, 254 (2007) (citation and emphasis omitted). Contrary to defendants' argument, an arrest or detention is not required to give rise to Fourth Amendment protection. See id.

A reasonable jury could find that plaintiff was seized because Officer Bailey used force, including the pain compliance technique, to extract plaintiff from the car and continued to restrict plaintiff's freedom of movement after the extraction. See California v. Hodari D., 499 U.S. 621, 626 (1991) ("The word 'seizure' readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful."). Because plaintiff has established a triable issue of fact with respect to whether he was seized, the court will examine his § 1983 claim under the Fourth Amendment as alleged in his Complaint.

B. Fourth Amendment Excessive Force Claim

1. Genuine Dispute as to Violation

To comport with the Fourth Amendment, officers' actions must be "'objectively reasonable' in light of the facts and circumstances confronting them." Graham, 490 U.S. at 397. "[T]he jury must determine not only whether the officers were justified in using force at all, but, if so, whether the degree of force actually used was reasonable." Santos v. Gates, 287 F.3d 846, 854 (9th Cir. 2002). "[W]here there is no need for force, any force used is constitutionally unreasonable." Moore v. Richmond Police Dep't, 497 F. App'x 702, 708 (9th Cir. 2012) (quoting Headwaters Forest Def. v. County of Humboldt, 240 F.3d 1185, 1199 (9th Cir. 2000), vacated on other grounds, 534 U.S.

801 (2001)).

Assuming the use of force was necessary, determining the reasonableness of that force "requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." Graham, 490 U.S. at 396 (internal quotation marks and citations omitted). The inquiry necessitates consideration of all of the relevant circumstances, including "(1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether the suspect actively resists detention or attempts to escape." Liston v. County of Riverside, 120 F.3d 965, 976 (9th Cir. 1997) (citing Graham, 490 U.S. at 388).

The "most important" factor under Graham is whether the suspect posed an "immediate threat to the safety of the officers or others." Smith v. City of Hemet, 394 F.3d 689, 702 (9th Cir. 2005) (quoting Chew v. Gates, 27 F.3d 1432, 1441 (9th Cir. 1994)). "'A simple statement by an officer that he fears for his safety or the safety [of] others is not enough; there must be objective factors to justify such a concern.'" Bryan v. MacPherson, 630 F.3d 805, 826 (9th Cir. 2010) (quoting Deorle v. Rutherford, 272 F.3d 1272, 1281 (9th Cir. 2001)). "A desire to resolve quickly a potentially dangerous situation is not the type of governmental interest that, standing alone, justifies the use of force that may cause serious injury." Id. (quoting Deorle, 272 F.3d at 1281).

Whether an officer used excessive force under the

Fourth Amendment is a question for the jury, which "almost always turn[s] on a jury's credibility determinations." Smith, 394 F.3d at 701. "Because such balancing nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom, [the Ninth Circuit has] held on many occasions that summary judgment or judgment as a matter of law in excessive force cases should be granted sparingly." Santos, 287 F.3d at 853.

Here, defendants contend that plaintiff's failure to immediately climb out of his overturned car posed a serious risk to the safety of the officer, plaintiff, and the public because the steel awning could have fallen. Officer Bailey testified that when he first arrived and was assessing the situation, a bystander told him that the awning was "essentially being pulled away from the attachment point at the building and that he believed that the awning was going to collapse." (Apr. 1, 2015 Bailey Dep. at 30:23-31:11.) It appeared to Officer Bailey that the front beam was "seriously compromised" and "had been completely sheared off and was just being suspended there." (Id. at 31:12-17.) An eye witness at the incident also testified that she heard the awning making creaking noises. (Beckham Dep. at 20:12-23.)

Plaintiff, on the other hand, testified that one of the supporting beams of the awning was bent, but that the beam was still attached to the awning. (Rosales Dep. at 70:6-16.) Plaintiff recognized that the awning was tilting, as depicted in pictures, but indicates that it was still attached in the back and that he did not perceive any risk of the awning falling.

(Id. at 78:15-22, 79:22-25, Exs. B, C.) Neither the videos nor the pictures would preclude a jury from finding plaintiff's assessment about the stability of the beam and awning persuasive. There is also no evidence before the court suggesting that the awning fell after the accident.

Plaintiff has therefore raised a triable issue of fact with respect to whether Officer Bailey was mistaken in believing that the awning was likely to immediately collapse. "Where an officer's particular use of force is based on a mistake of fact, [the relevant inquiry is] whether a reasonable officer would have or should have accurately perceived that fact." Torres v. City of Madera, 648 F.3d 1119, 1124 (9th Cir. 2011). A jury would thus need to weigh the conflicting evidence to determine whether Officer Bailey's belief about the condition of the awning was mistaken and, if it was, whether a reasonable officer arriving on the scene would or should have determined that the awning did not pose an immediate risk of falling.

Officer Bailey also indicated in his report and testified at his deposition that he used no more force than necessary to gain plaintiff's compliance with his demand to climb out of the car. (Apr. 1, 2015 Bailey Dep. at 47:3-20.) Officer Bailey recognized that he continued to use force even after plaintiff verbally assented to his commands, but testified that the continued force was necessary because plaintiff was still resisting by bracing himself against the interior of the car. (Id. at 47:21-49:3; see also Pl.'s Ex. A (first video) at 1:12 (showing that plaintiff said "all right," but Officer Bailey continued to use the pain compliance technique on plaintiff's

wrist).) Defendants' expert acknowledges that this alleged resistance cannot be seen in the video, (Chapman Dep. at 35:7-17), and plaintiff testified that he only "pulled away" because the pain from the wrist hold was "excruciating," (Rosales Dep. at 91:15-25). The jury must weigh these facts and the credibility of each witness to determine whether Officer Bailey was reasonable in continuing to use force after plaintiff verbally indicated he would climb out of the car.

The video also shows that while Officer Bailey was using the wrist hold, plaintiff informed Officer Bailey that his foot was caught. (Pl.'s Ex. A at 1:18.) When plaintiff was ultimately extracted from the car, the video confirms that his foot was caught in the seatbelt and the assistance of a bystander was necessary to untangle it. (Id. at 1:59.) If the jury believes plaintiff's testimony that he was unable to climb out of the car because his foot was caught and finds that Officer Bailey heard plaintiff inform him of that dilemma, it could reasonably find that any use of force to gain compliance with an impossible request was unreasonable.

Plaintiff has also submitted testimony undermining the accuracy and credibility of Officer Bailey's report and recollection of the incident. For example, in his report and at his first deposition before he had seen the second video, Officer Bailey repeatedly testified that plaintiff made "multiple attempts" to walk back toward his car despite Officer Bailey's demands that he remain seated on the curb. (Apr. 1, 2015 Bailey Dep. at 53:5-11, 54:2-8, 55:6-7, 55:21-24, 57:20-25, 59:3-4.) After viewing the second video, (July 23, 2015 Dep. at 87:10-

89:14), Officer Bailey changed his testimony and testified at a second deposition that plaintiff got up from a seated position only once. (July 23, 2015 Bailey Dep. at 105:18-106:5.) At his first deposition, Officer Bailey also testified that he did not force plaintiff to the ground before he was handcuffed and then recanted that testimony at his second deposition. (Id. at 84:18-87:9.) This evidence, which could undermine Officer Bailey's credibility, is precisely the type of evidence the jury must weigh.

The parties also present conflicting accounts as to the force Officer Bailey used after he extracted plaintiff from the vehicle. For example, Officer Bailey testified in his first deposition that he "used the bottom of [his] foot to push on the lower leg . . . to get the knee joint to bend in a natural position" so it was "easier" to "push" plaintiff to the ground. (Apr. 1, 2015 Bailey Dep. at 70:20-24.) Defendants' expert now describes the technique as a "distraction" maneuver or strike that was used to get plaintiff's attention. (Chapman Dep. at 70:16-23.) Plaintiff, on the other hand, testified that Officer Bailey violently slammed him to the ground and kicked him in the lower back. (Rosales Dep. at 105:21-108:11, 109:18-110:20.) Plaintiff's expert testified that the gratuitous kick was unnecessary and that officers are trained to use distraction techniques during fight situations, not under the circumstances of this case. (Lichten Dep. at 72:10-73:6.) The jury must ultimately weigh this conflicting testimony, along with the video of the incident and other relevant evidence, to determine what force was actually used.

Moreover, defendants have not identified any circumstance necessitating the use of force to immediately remove plaintiff from his car other than the awning. After Officer Bailey removed plaintiff from his car, the only circumstances allegedly necessitating Officer Bailey's use of force was that plaintiff was concerned about his dog, not responding to Officer Bailey's questions about whether he needed medical attention, and tried on one occasion to walk toward his car. (Apr. 1, 2015 Bailey Dep. at 52:16-21; July 23, 2015 Bailey Dep. at 105:18-106:5.)

Defendants have not submitted any evidence suggesting that Officer Bailey had any reason to suspect that plaintiff was under the influence of any drugs or alcohol, that he was combative or attempting to flee, or that he was suspected of criminal activity. After weighing all the factors, a jury could easily find that a reasonable officer would not have felt it necessary to resort to any force at all after plaintiff was removed from his car. See Bryan, 630 F.3d at 813 (Wardlaw, J., concurring in the denial of rehearing en banc) ("[While] police officers need not employ the least intrusive degree of force . . . the presence of feasible alternatives is a factor to include in [the] analysis.") (internal quotation marks, citations, and emphasis omitted).

Additionally, "even when police officers reasonably must take forceful actions in response to an incident, and even when such forceful actions are permissible at first, if the officers go too far by unnecessarily inflicting force and pain after a person is subdued, then the force, unnecessary in part of

the action, can still be considered excessive." Guy v. City of San Diego, 608 F.3d 582, 589 (9th Cir. 2010). Even if the jury determines that Officer Bailey's initial use of force to get plaintiff out of the car was reasonable, it must also weigh the evidence and changing circumstances to determine whether additional force throughout the incident, including Officer Bailey's alleged "slamming" of plaintiff to the ground and kicking him, was reasonable.[1]

The Ninth Circuit has also explained that "police officers normally provide [] warnings where feasible, even when the force is less than deadly, and that the failure to give such a warning is a factor to consider." Bryan, 630 F.3d at 831. Here, Officer Bailey never warned plaintiff prior to any of his uses of force. A jury could find that under the circumstances Officer Bailey faced, the failure to warn plaintiff and give him an opportunity to comply before resorting to force was unreasonable.

Overall, a reasonable jury could easily find that the force Officer Bailey used was excessive in light of the circumstances he faced. Plaintiff has thus established the existence of genuine issues of material fact on his § 1983 excessive force claim against Officer Bailey.

---

[1] At some point, Officer Bailey also had other emergency responders available to assist him. According to Officer Bailey's deposition, he was the first officer on the scene and additional emergency responders did not arrive until he had removed plaintiff from his car. (Apr. 1, 2015 Bailey Dep. at 31:18-23, 67:16-23.) Plaintiff, on the other hand, testified that the paramedics and fire department were already on the scene when Officer Bailey arrived. (Rosales Dep. at 84:17-85:16.)

2. Qualified Immunity

In suits under § 1983, "qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known.'" Pearson v. Callahan, 555 U.S. 223, 232 (2009) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). "For purposes of qualified immunity, [the court must] resolve all factual disputes in favor of the party asserting the injury." Ellins v. City of Sierra Madre, 710 F.3d 1049, 1064 (9th Cir. 2013).

To be clearly established, "existing precedent must have placed the statutory or constitutional question beyond debate." Reichle v. Howards, 132 S. Ct. 2088, 2093 (2012) (internal quotation marks and citation omitted). "The proper inquiry focuses on whether 'it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted,' or whether the state of the law [at the time of the incident] gave 'fair warning' to the officials that their conduct was unconstitutional." Clement v. Gomez, 298 F.3d 898, 906 (9th Cir. 2002) (quoting Saucier v. Katz, 533 U.S. 194, 202 (2001)); Hope v. Pelzer, 536 U.S. 730, 741 (2002). The clearly established inquiry "serves the aim of refining the legal standard and is solely a question of law for the judge." Tortu v. Las Vegas Metro. Police Dep't, 556 F.3d 1075, 1085 (9th Cir. 2009).

Even if the law is clearly established, "an officer who makes a reasonable mistake as to what the law requires under a given set of circumstances is entitled to the immunity defense."

Landry v. Berry, 533 F. App'x 702, 703 (9th Cir. 2013) (quoting Boyd v. Benton County, 374 F.3d 773, 781 (9th Cir. 2004)). "The protection of qualified immunity applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'" Pearson, 555 U.S. at 231 (quoting Groh v. Ramirez, 540 U.S. 551, 567 (2004) (Kennedy, J., dissenting)).

Here, numerous factual disputes prevent the court from meaningfully characterizing the right at issue in this case. For example, the jury must determine whether a reasonable officer would have perceived the steel awning as posing an emergency situation that necessitated the immediate removal of plaintiff from his car through the driver's side door. A jury must also determine whether plaintiff's foot was caught in the seatbelt at the time Officer Bailey arrived and whether a reasonable officer would have understood that plaintiff could not have easily climbed out of the car because his foot was caught. A jury must also determine precisely what force was used after Officer Bailey extracted plaintiff.

Until the jury resolves all of the disputed issues of fact, the court cannot characterize the right at issue to assess whether Officer Bailey violated clearly established law of which a reasonable officer would have known. See Santos, 287 F.3d at 855 n.12 ("[I]t is premature to [decide qualified immunity] at this time, because whether the officers may be said to have made a 'reasonable mistake' of fact or law, may depend on the jury's resolution of disputed facts and the inferences it draws therefrom. Until the jury makes those decisions, we cannot know,

for example, how much force was used, and, thus, whether a reasonable officer could have mistakenly believed that the use of that degree of force was lawful.") (internal citation omitted); see also Luchtel v. Hagemann, 623 F.3d 975, 989 (9th Cir. 2010) (explaining that summary judgment should be granted "sparingly" in excessive force cases "even with respect to the issue of qualified immunity").

Accordingly, because plaintiff has established a genuine issue of material fact on his Fourth Amendment excessive force claim against Officer Bailey and numerous factual disputes preclude the court from assessing qualified immunity at this time, the court must deny Officer Bailey's motion for summary judgment on that claim.

C. *Monell* Claim

As § 1983 does not provide for vicarious liability, local governments "may not be sued under § 1983 for an injury inflicted solely by its employees or agents." Monell v. Dep't of Soc. Servs. of the City of N.Y., 436 U.S. 658, 693 (1978). "Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." Id.

Generally, a local government may be held liable under § 1983 under three broad theories: (1) "when implementation of its official policies or established customs inflicts the constitutional injury," id. at 708 (Powell, J. concurring); (2) "for acts of 'omission,' when such omissions amount to the local

government's own official policy," Clouthier v. County of Contra Costa, 591 F.3d 1232, 1249 (9th Cir. 2010); and (3) "when the individual who committed the constitutional tort was an official with final policy-making authority or such an official ratified a subordinate's unconstitutional decision or action and the basis for it," Clouthier, 591 F.3d at 1250 (internal quotation marks and citation omitted).

Here, plaintiff's theory of Monell liability rests on the City of Chico Chief of Police's "Notice of Conclusion" issued to Officer Bailey after an administrative review of the incident. The notice states:

> The administrative review for the complaint involving Joseph Rosales regarding the incident on June 10, 2014, has been concluded. The finding regarding the allegation that you used excessive force during the incident has been determined to be EXHONERATED. You were in compliance with Department policy. Consider this matter closed with no further action necessary.

(Pl.'s Ex. G (Docket No. 17-1).) Plaintiff argues that this notice exposes the City of Chico to Monell liability because the Chief of Police ratified Officer Bailey's conduct.[2]

Relying on City of St. Louis v. Praprotnik, 485 U.S. 112 (1988), the Ninth Circuit has "found municipal liability on the basis of ratification when the officials involved adopted and expressly approved of the acts of others who caused the constitutional violation." Trevino v. Gates, 99 F.3d 911, 920 (9th Cir. 1996). In Praprotnik, Justice O'Connor explained,

[2] There is no dispute in this case that the Chief of Police was a final policymaker for the City of Chico with respect to use of force by the City's police officers.

"when a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with their policies." 485 U.S. at 127. Under such circumstances, "[i]f the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final." Id.

At the same time, the Supreme Court has unequivocally and repeatedly emphasized that local governments can be held responsible under § 1983 "when, and only when, their official policies cause their employees to violate another person's constitutional rights." Id. at 122; see also Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown, 520 U.S. 397, 405 (1997) ("To the extent that we have recognized a cause of action under § 1983 based on a single decision attributable to a municipality, we have done so only where the evidence that the municipality had acted and that the plaintiff had suffered a deprivation of federal rights also proved fault and causation."). The Ninth Circuit has similarly recognized that a plaintiff "cannot, of course, argue that the municipality's later action (or inaction) caused the earlier" use of force in the absence of "any pre-existing policy." Haugen v. Brosseau, 339 F.3d 857, 875 (9th Cir. 2003), overruled on other grounds by, 543 U.S. 194 (2004).

In this case, it is not a mere ratification, but rather the Chief of Police's pronouncement that Officer Bailey's alleged use of force was "in compliance with Department policy" that gives rise to a Monell claim. This is "tantamount to the

announcement or confirmation of a policy for purposes of Monell." Id. at 875. The Chief of Police's finding that Officer Bailey's use of force was "in compliance" with the City of Chico's policies is more than sufficient to raise a genuine issue of material fact with respect to whether the City of Chico had a policy of using the force Officer Bailey did in this case. Although the finding was made after the incident, it constitutes clear evidence from which a rational jury could infer that the policy existed before the incident and therefore was the moving force that caused the injury. If the jury ultimately concludes that Officer Bailey used excessive force and that the use of force comported with the City of Chico's policies, it would be entirely consistent with Monell to hold the City of Chico liable based on its policy promoting that use force.[3]

Accordingly, because plaintiff has raised a genuine issue of material fact with respect to whether the City of Chico had a policy that caused the constitutional violation alleged in this case, the court must deny defendants' motion for summary judgment on plaintiff's § 1983 Monell claim.

D. Bane Act Claim - California Civil Code Section 52.1

The Bane Act gives rise to a claim when "a person . . .

[3] Relying on plaintiff's response to defendants' statement of undisputed facts, defendants argue they are entitled to summary judgment on plaintiff's Monell claim because plaintiff agreed it was "undisputed" that he "failed to provide evidence of a policy . . . that in any way would have contributed to his alleged injuries." (See Pl.'s Resp. to Defs.' Stmt. of Undisputed Fact No. 47 (Docket No. 17-9).) Statements of undisputed facts are not evidence and the court will not rely on an erroneous concession in that type of document when it flatly contradicts the evidence before the court.

whether or not acting under the color of law, interferes by threat, intimidation, or coercion, or attempts to interfere by threat, intimidation, or coercion" with a right secured by federal or state law. Cal. Civ. Code § 52.1(a). "[A]ny individual whose exercise or enjoyment of rights secured by the Constitution or laws of the United States . . . has been interfered with, or attempted to be interfered with, as described in [the Bane Act] . . . may institute . . . a civil action for damages . . . ." Id. § 52.1(b). The California Legislature enacted the Bane Act in response to a rise in hate crimes, but it is not limited to such crimes and does not require proof of discriminatory intent. See Venegas v. County of Los Angeles, 32 Cal. 4th 820, 843 (2004) (holding that "plaintiffs need not allege that defendants acted with discriminatory animus or intent, so long as those acts were accompanied by the requisite threats, intimidation, or coercion").

Generally, establishing an excessive force claim under the Fourth Amendment also satisfies the elements of section 52.1. See Chaudhry v. City of Los Angeles, 751 F.3d 1096, 1105 (9th Cir. 2014) ("The City defendants concede in their briefs to us that a successful claim for excessive force under the Fourth Amendment provides the basis for a successful claim under Section 52.1."); Cameron v. Craig, 713 F.3d 1012, 1022 (9th Cir. 2013) ("Cameron asserts no California right different from the rights guaranteed under the Fourth Amendment, so the elements of the excessive force claim under Section 52.1 are the same as under § 1983."); cf. Venegas, 32 Cal. 4th at 843 ("We need not decide here whether section 52.1 affords protections to every tort

claimant, for plaintiffs in this case have alleged unconstitutional search and seizure violations extending far beyond ordinary tort claims."). Accordingly, because genuine issues of material fact exist with respect to whether Officer Bailey used excessive force in violation of the Fourth Amendment, the court must also deny defendants' motion for summary judgment on plaintiff's Bane Act claim.

E. Battery and Negligence Claims

For his battery and negligence claims under California law, plaintiff must show that the force Officer Bailey used was unreasonable. See Bowoto v. Chevron Corp., 621 F.3d 1116, 1129 (9th Cir. 2010) ("Under California law, a plaintiff bringing a battery claim against a law enforcement official has the burden of proving the officer used unreasonable force."); Carter v. City of Carlsbad, 799 F. Supp. 2d 1147, 1164 (S.D. Cal. 2011) ("Negligence claims stemming from allegations of excessive force by a police officer are also analyzed under the Fourth Amendment's reasonableness standard."). The reasonableness inquiry governing these state law claims is the same as the inquiry governing plaintiff's Fourth Amendment excessive force claim. See Hayes v. County of San Diego, 57 Cal. 4th 622, 632 (2013) (relying on the Graham reasonableness test when assessing a negligence claim against police officers); Atkinson v. County of Tulare, 790 F. Supp. 2d 1188, 1211 (E.D. Cal. 2011) (Wanger, J.) ("Plaintiff's claim for negligence and battery flow from the same facts as the alleged Fourth Amendment Violation for excessive force and are measured by the same reasonableness standard of the Fourth Amendment.") (citing Edson v. City of

Anaheim, 63 Cal. App. 4th 1269, 1272-73 (4th Dist. 1998)).

Plaintiff seeks to hold Officer Bailey liable under common law battery and negligence for his use of force and the City of Chico vicariously liable for Officer Bailey's conduct. California Government Code section 820 provides that, "[e]xcept as otherwise provided by statute (including Section 820.2), a public employee is liable for injury caused by his act or omission to the same extent as a private person." Cal. Gov't Code § 820. With respect to public entities, section 815(a) provides that, "[e]xcept as otherwise provided by statute: A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." Id. § 815(a). Pursuant to section 815.2(a), "[a] public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative." Id. § 815.2(a).

Defendants do not dispute that Officer Bailey could be held liable for battery and negligence pursuant to section 820 and that the City of Chico could be held vicariously liable under section 815.2(a). They nonetheless argue that the court should grant their motion for summary judgment on plaintiff's battery and negligence claims because plaintiff failed to identify these particular statutes in his Complaint. Defendants have not cited any authority requiring plaintiff to plead the existence of these commonly known statutes in order to allege cognizable state law

claims for battery and negligence. Nor did defendants challenge the adequacy of plaintiff's Complaint on a motion to dismiss. While these statutes provide the legal framework for liability against public employees and entities, defendants are not entitled to summary judgment merely because the statutes are not identified by their numbers in the Complaint.

Because plaintiff has established a genuine issue of material fact with respect to whether Officer Bailey used excessive force, the court must deny defendants' motion for summary judgment on plaintiff's battery and negligence claims.

F. Evidentiary Objections

Defendants raise numerous objections to the evidence plaintiff submitted in opposition to their motion for summary judgment. Defendants first object to the video that Dough Churchill indicates he took of the incident and uploaded to YouTube. (Churchill Decl. ¶¶ 2-4 (Docket No. 17-8).) According to defendants, the court should not consider the video because it "is confusing, misleading and unfairly prejudicial because it is heavily edited, it cuts at different stages of the incident and includes time gaps" and "is not date stamped or timed stamped." (Defs.' Reply at 5:5-8.) With allegations of excessive force, video evidence is often the most helpful and relevant evidence because it gives the jury an opportunity to view what occurred and make factual findings without relying exclusively on conflicting testimony. Police departments are free, and often encouraged, to ensure that their encounters with the public are videoed and presumably those videos are "time stamped" as defendants would prefer.

Here, defendants either did not elect or did not have the equipment necessary to video this incident. As media coverage in recent years confirms, bystanders increasingly use their video cameras or cell phones to fill the void of recorded interactions with the police and public. While defendants can challenge the accuracy and completeness of Churchill's video at trial, it is disingenuous to argue that it is prejudicial or should be excluded because the technology used to record the incident is not as advanced as the technology defendants could have utilized. The court therefore overrules defendants' objection to consideration of the first video for purposes of summary judgment.

Plaintiff obtained the second video from an anonymous individual and therefore does not attempt to authenticate the video with a declaration of the individual who recorded it. Federal Rule of Evidence 901 provides that "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is" and that the evidence can be in the form of testimony of a witness with knowledge that the "item is what it is claimed to be." Fed. R. Evid. 901(a), (b)(1). Plaintiff indicates that the video was given to him by an anonymous man who contacted him after the incident and that the video accurately reflects the incident. (Rosales Decl. ¶¶ 2-4 (Docket No. 17-7).) Officer Bailey also viewed the video prior to and during his second deposition and never suggested that the video was not an accurate recording of the incident. (July 23, 2015 Bailey Dep. at 87:12-89:7.) The court therefore finds that plaintiff has sufficiently authenticated the video

for purposes of opposing defendants' motion for summary judgment and overrules defendants' objection to consideration of that video. Cf. Luong v. City & County of San Francisco, Civ. No. 11-05661 MEJ, 2013 WL 1191229, at *6 (N.D. Cal. Mar. 21, 2013) (overruling objection to an anonymously recorded video when plaintiffs could authenticate the video with their testimony "as witnesses with knowledge of the events depicted in the video").

Without citing a single case supporting their position, defendants also object to the declarations plaintiff submitted because they were signed under penalty of perjury "under the laws of the State of California." Because 28 U.S.C. § 1746 permits a general oath under penalty of perjury without reference to any state or federal law, see 28 U.S.C. § 1746(2), plaintiff's reference to state law is not fatal and defendants' objection is overruled.

In what might be defendants' most frivolous objection, defendants seek to exclude evidence because it "violated" the protective order signed by the magistrate judge. The protective order provided that a party must file a motion to seal any documents that were the subject of the protective order prior to filing them. In compliance with the protective order, plaintiff filed a motion to seal exhibits subject to the protective order and the court, in a written and reasoned decision, denied that motion. (See Docket No. 16.) Defendants attempt to fault plaintiff for failing to persuade the court that the documents should be sealed. Defendants attribute far too much significance to the protective order. Plaintiff complied with the protective order by filing a request to seal the documents,

(Docket No. 14), and this court determined that the public had a right to view the documents at issue.

Lastly, the court overrules defendants' objection to the Statement of Chico Administrative Services Director, (Pl.'s Ex. F (Docket No. 17-4)), as moot because the court did not rely on the document in denying defendants' motion for summary judgment. The court also overrules defendants' objection to the notice exonerating Officer Bailey because Rule 801's bar against hearsay will not render the evidence inadmissible at trial.

IT IS THEREFORE ORDERED that defendants' motion for summary judgment be, and the same hereby is, DENIED.

Dated: October 20, 2015

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE