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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

CARL BRYAN,  
  
vs.  
  
BRYAN McPHERSON, PAUL CROOK,  
CORONADO POLICE DEPARTMENT,  
CORONADO, DOES 1-20,  
  
Defendants.

CASE NO. 06CV1487-LAB (PCL)  
  
**ORDER GRANTING IN PART  
AND DENYING IN PART  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT; AND  
  
ORDER DISMISSING  
DEFENDANT CROOK**

On December 5, 2007, the Court issued an order granting Defendants' motion for summary judgment as to certain claims, but ordering additional briefing and reserving judgment as to the issue of qualified immunity and Plaintiff's *Monell* claim, state tort claims, and claims under Cal. Civil Code § 52.1.

The parties have submitted additional briefing, and the Court is now prepared to rule on the remaining issues.

On January 18, 2008, the parties jointly moved to dismiss Defendant Crook.

**I. Remaining Summary Judgment Issues**

**A. Qualified Immunity**

Previously, the Court noted undisputed evidence that Plaintiff appeared volatile and his behavior erratic, and that he exited his car quickly even after being given repeated instructions to stay

1 inside. It is beyond dispute that a reasonable officer under these circumstances would have been alert  
2 and cautious. Due to incomplete briefing, however, it was not sufficiently clear whether Defendants  
3 could meet their burden of proof on the issue of qualified immunity. *See Moreno v. Baca*, 431 F.3d  
4 633, 638 (9th Cir. 2005) (explaining burden of proof on issue of qualified immunity).

5 In his supplemental briefing, Plaintiff has provided evidence from which a reasonable jury  
6 could find Defendant McPherson was somewhere between 15 and 25 feet from Plaintiff at the time  
7 the incident took place. (P.'s Supplemental Reply at 2:18–23.) He has similarly presented evidence  
8 from which a reasonable jury could infer the relative positions of Plaintiff and MacPherson, and could  
9 conclude Plaintiff was not facing McPherson when Plaintiff was shot with the Taser. (*Id.* at 4:4–27.)  
10 Plaintiff earlier submitted a photograph showing a blood stain on the pavement which he argues  
11 suggests his position when he fell. (Opp'n to Mot. for Summ. J., Ex. E.) In his supplemental reply,  
12 he argues a jury could infer he fell forward, and could therefore find he was shot from behind. The  
13 photographic evidence does not reasonably show this, because if as Plaintiff argues he was shot from  
14 behind and fell forward, and if as Plaintiff states he did not move away from the car after getting out,  
15 he would have hit the car door and not the pavement. Nevertheless, the evidence could at least show  
16 Plaintiff was not facing Defendant McPherson directly when he was shot with the Taser. Taking all  
17 the evidence into account, a jury could reasonably find Plaintiff did not present an obvious immediate  
18 threat to Defendant McPherson.

19 Unlike certain other weapons, the effects of being shot by a Taser is not common knowledge;  
20 thus, in the absence of evidence, jurors would be left to speculate regarding how dangerous a Taser  
21 might be. The Court pointed out Plaintiff had failed to include evidence regarding how dangerous the  
22 Taser used in this incident could be expected to be, or what alternatives a reasonable officer would  
23 have been aware of when confronted with this situation. (Order of Dec. 5, 2007, at 13:14–18.) The  
24 only gesture towards briefing this is Plaintiff's argument that Plaintiff was standing on an asphalt  
25 pavement at the time he was shot with the Taser, so that when he fell, he might sustain serious injuries.  
26 (P.'s Supplemental Reply at 4:28–5:3.) Plaintiff had previously submitted testimonial evidence he  
27 suffered great pain when hit with the Taser and fell and broke several of his teeth on the pavement.

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1 A reasonable jury might infer from this evidence that a reasonable officer would have known  
2 a Taser was painful and that the resulting fall might cause injury. In a different case, this might not  
3 be sufficient to withstand summary judgment on qualified immunity grounds. However, in view of  
4 the evidence regarding the distance between Plaintiff and Defendant McPherson, and their relative  
5 positions, the Court concludes it is a question for the jury whether a reasonable officer would have  
6 known deploying the Taser under the circumstances was clearly unlawful. *See Saucier v. Katz*, 533  
7 U.S. 194, 202 (2001) (explaining that the qualified immunity inquiry focuses on whether it would be  
8 clear to a reasonable officer that his conduct was unlawful in the situation he confronted.). If the jury  
9 believes Plaintiff's evidence, Plaintiff was standing far from Defendant McPherson and was not facing  
10 or advancing on McPherson when he was hit with the Taser. A jury could reasonably conclude under  
11 the circumstances McPherson was presented with, Plaintiff presented no immediate danger to him and  
12 no use of force was necessary.

13 **B. Tort Claim, § 52.1 Claim**

14 While the complaint brought claims under Cal. Civil Code § 52.1 against all Defendants,  
15 Defendants' motion for summary judgment addressed only the claim against Defendant McPherson.  
16 Defendants' motion argued, based on the text of this section, that it supported only claims based on  
17 attempts to interfere with the exercise of Constitutional rights. While the plain text of the statute  
18 supports such an interpretation, California case law suggests this section should be interpreted more  
19 broadly to encompass intentional violation of an individual's right to be free from police interference.  
20 *See Gillan v. City of San Marino*, 147 Cal.App.4th 1033, 1037 (Cal. App. 2 Dist. 2007) (holding arrest  
21 without probable cause would support recovery under § 52.1). Although the language of the section  
22 refers to "persons," it appears municipal defendants may also be liable under this section. *Id.* at 1037,  
23 1053–53 (affirming denial of judgment notwithstanding the verdict on § 52.1 claim against city and  
24 municipal employees). *See also Austin B. v. Escondido Union School Dist.*, 149 Cal.App.4th 860, 883  
25 (Cal. App. 4 Dist. 2007) (discussing the meaning of § 52.1).

26 Because the state tort claim against Defendant McPherson and § 52.1 claims against all  
27 Defendants are derivative of the excessive force claim, summary judgment on these additional claims  
28 is likewise denied.

1           **C.     *Monell Claim***

2           Plaintiff alleged the City of Coronado (the “City”) subjected Plaintiff and others to a pattern  
3 of using excessive force and refusing to investigate complaints of excessive force, amounting to a *de*  
4 *facto* policy. (Complaint at 7:9–20, 8:24–9:4.) In his opposition to Defendants’ motion for summary  
5 judgment, Plaintiff did not designate any facts specifically in support of his claim brought pursuant  
6 to *Monell v. N.Y. Dep’t of Social Servs.*, 436 U.S. 658 (1978), although he did refer generally to the  
7 City’s alleged failure to train, supervise, investigate, or discipline Defendant MacPherson and others.  
8 (P.’s Memo. in Supp. of Opp’n to Mot. for Summ. J. at 16:10–19:8.)

9           The evidence Plaintiff points to is exceedingly thin. He points to evidence that McPherson  
10 didn’t remember much about his own training in the use of force. (P.’s Memo. in Supp. of Opp’n to  
11 Mot. for Summ. J. at 16:12–27.) This is unhelpful to Plaintiff, because it tends to show the City did  
12 train officers in the reasonable use of force, although McPherson can’t remember the training. The  
13 fact that the City gave general guidance regarding the use of force rather than explaining to officers  
14 what to do in specific scenarios (*id.* at 16:16–22) does not show deliberate indifference to Plaintiff’s  
15 rights.

16           Plaintiff speculates, but provides no evidence, that the City only investigates incidents when  
17 citizens make complaints. (P.’s Memo. in Supp. of Opp’n to Mot. for Summ. J. at 17:1–6.) Plaintiff  
18 points to evidence Defendant Crook, the City’s police chief, did not personally investigate or make  
19 a finding regarding the incident at issue here. (*Id.* at 17:6–11.) This does not, however, tend to show  
20 that no one investigated the incident for the City, nor is there any requirement that a city’s police chief  
21 personally investigate and make findings regarding allegations of misconduct.

22           Plaintiff points to one previous incident in which Defendant McPherson used a Taser on a  
23 citizen when circumstances did not warrant it. (P.’s Memo. in Supp. of Opp’n to Mot. for Summ. J.  
24 at 17:19–18:12.) He alleges, but provides no evidence, that the City took no action to investigate or  
25 train McPherson after this incident. (*Id.* at 18:24–27.)

26           Finally, Plaintiff points to Defendant Crook’s inability to answer specific questions about the  
27 City’s use of force policy. (P.’s Memo. in Supp. of Opp’n to Mot. for Summ. J. at 18:26–19:8.) A  
28 police chief’s lack of knowledge about a city’s policy on the use of force does not show there was no

1 policy, however. More importantly, “the inadequacy of police training may serve as the basis for  
2 § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of  
3 persons with whom the police come into contact.” *Price v. Sery*, 2008 WL 170205, slip op. at \*10  
4 (9th Cir. Jan. 22, 2008) (quoting *City of Canton v. Harris*, 489 U.S. 378, 388 (1989)) (internal  
5 quotation marks omitted).

6 In his opposition to Defendants’ motion for summary judgment, Plaintiff identifies no evidence  
7 from which a reasonable jury could conclude the City was deliberately indifferent to the rights of  
8 persons with whom its officers came into contact. Plaintiff’s allegations of a pattern of police brutality  
9 and failure to investigate the use of force thus have no evidentiary support. At most, Plaintiff’s  
10 evidence supports a finding of negligence, not deliberate indifference.

11 Although not authorized to do so, Plaintiff briefed the *Monell* claim in his supplemental reply  
12 brief. Plaintiff’s late attention to this issue does not to withstand summary judgment. Plaintiff’s new  
13 evidence comes in the form of excerpts from a transcript of the deposition of Sgt. Wall, the supervisor  
14 of Taser instructors for the City’s police department. This deposition was taken September 11, 2007,  
15 and Plaintiff had ample time to ask for leave to supplement the record. He never did so.

16 Even if the Court were to accept the new evidence, it would be insufficient to support the  
17 *Monell* claim. Those portions of Sgt. Wall’s deposition Plaintiff cites establish the City trained its  
18 officers regarding the appropriateness of using the Taser in different situations. Plaintiff’s chief  
19 complaints appear to be twofold. First, he believes the City should have dealt with Taser use by means  
20 of separate Taser-specific policies and training, rather than having a general “use of force” policy;  
21 (1) training officers generally when to use force rather than holding specific training on the  
22 reasonableness of Taser use, and (2) tracking Taser use along with use of all other weapons. Second,  
23 he believes the City should have absolutely forbidden Taser use under certain conditions, rather than  
24 merely providing guidance. At most, this could support a finding of negligence, not a finding of  
25 deliberate indifference.

26 Summary judgment on Plaintiff’s *Monell* claim is therefore granted.

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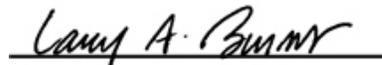
1 **II. Conclusion and Order**

2 The remaining portions of Defendants' motion for summary judgment not disposed of in the  
3 Court's order of December 5, 2007 are **GRANTED IN PART** and **DENIED IN PART**. Defendants'  
4 motion is **GRANTED** with regard to Plaintiff's *Monell* claims, but **DENIED** as to Plaintiff's § 1983  
5 claims, state tort claims, and Cal. Civil Code § 52.1 claims.

6 The parties' joint motion to dismiss Defendant Crook with prejudice as a party is hereby  
7 **GRANTED**. Each of the parties shall bear their own costs in this regard.

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9 **IT IS SO ORDERED.**

10 DATED: February 6, 2008

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12 **HONORABLE LARRY ALAN BURNS**  
13 United States District Judge

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