NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MONICA ORTIZ, individually and as co-successor-in-interest to Decedent Christian Pena; NORMA PENA, individually, Plaintiffs-Appellees, v. CESAR VIZCARRA, individually, and in his official capacity as an officer for the City of Rialto Police Department; JORGE BRAMBILA, individually, and in his official capacity as an officer for the City of Rialto Police Department, Defendants-Appellants, and CITY OF RIALTO, Police Department; DOES, 1-10, inclusive, individually, and in their capacities as law enforcement agents and/or personnel for the City of Rialto Police Department, Defendants.	No. 18-55107 D.C. No. 5:16-cv-01384-JGB-KS MEMORANDUM* (Filed Jul. 17, 2019)

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the Central District of California
Jesus G. Bernal, District Judge, Presiding

Argued and Submitted June 11, 2019
Pasadena, California

Before: FERNANDEZ, WARDLAW, and BYBEE, Circuit Judges.

City of Rialto police officers Cesar Vizcarra and Jorge Brambila appeal the district court's partial denial of their motion for summary judgment on the basis of qualified immunity. We dismiss for lack of appellate jurisdiction.

1. "We have jurisdiction to determine our jurisdiction." *United States v. Decinces*, 808 F.3d 785, 788 (9th Cir. 2015). Here, the district court denied the officers' motion on the excessive force and unlawful seizure claims because it found genuine disputes of material fact as to whether the officers were entitled to qualified immunity. In the qualified immunity context, "[a]ny decision by the district court 'that the parties' evidence presents genuine issues of material fact is categorically unreviewable on interlocutory appeal.' " *George v. Morris*, 736 F.3d 829, 834 (9th Cir. 2013); *see also Johnson v. Jones*, 515 U.S. 304, 313 (1995). "Where there are disputed issues of material fact, our review is limited to whether the defendant would be entitled to qualified immunity as a matter of law, assuming all factual disputes are resolved, and all reasonable inferences are drawn, in plaintiff's favor." *Karl v. City of Mountlake Terrace*, 678 F.3d 1062, 1068 (9th Cir. 2012); *see also*

Kisela v. Hughes, 138 S. Ct. 1148, 1150-51 (2018) (per curiam).

On appeal, the officers rely on their version of the facts to argue that the district court erred because Monica Ortiz[1] could not prove at trial that the officers unreasonably used deadly force in violation of the Fourth Amendment. The officers' argument thus fails to present the facts in the light most favorable to Ortiz, instead merely raising a "question of 'evidence sufficiency,' *i.e.*, which facts a party may, or may not, be able to prove at trial." *Foster v. City of Indio*, 908 F.3d 1204, 1210 (9th Cir. 2018) (per curiam). "But this sort of 'evidence sufficiency' claim does not raise a legal question" we can review. *Id.* at 1213. Accordingly, we dismiss the officers' appeal for lack of jurisdiction, without deciding at this interlocutory stage whether the officers are entitled to qualified immunity.

2. Because the district court denied summary judgment on plaintiff's parallel state law claims based on the same disputes of material fact as the excessive force and unlawful seizure claims, we likewise lack jurisdiction to review the officers' appeal as to those claims.[2]

DISMISSED.

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[1] Plaintiff Norma Peña did not appeal the district court's grant of summary judgment in favor of the officers on her sole claim and therefore no longer remains a party to this case.

[2] The dissent recites the inferences its author draws from video recordings of the incident, but unlike in *Scott v. Harris*, 550 U.S. 372, 380-81 (2007), Ortiz's version of the facts is neither "blatantly contradicted" nor "utterly discredited" by video evidence.

FERNANDEZ, Circuit Judge, dissenting:

I agree with the legal principles set forth by the majority. However, the video recording of the incident shows beyond peradventure[1] that in a period no longer than forty seconds an officer tried to subdue a belligerent man in close quarters while backing away from him and tasing him three times. Still, the man managed to arm himself with a knife and come even closer to the officer, whereupon the officer shot him twice in rapid succession. Given the undeniable and indisputable facts, even if there was a Fourth Amendment violation, I do not believe that this could reasonably be seen as "an obvious case in which any competent officer would have known that shooting [the man] . . . would violate the Fourth Amendment." *Kisela v. Hughes*, ___ U.S. ___, ___, 138 S. Ct. 1148, 1153, 200 L. Ed. 2d 449 (2018) (per curiam); *see also City of Escondido v. Emmons,* ___ U.S. ___, ___, 139 S. Ct. 500, 504, 202 L. Ed. 2d 455 (2019) (per curiam). Thus, because the officers must be entitled to qualified immunity, I respectfully dissent.

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[1] *Scott v. Harris*, 550 U.S. 372, 378-81, 127 S. Ct. 1769, 1775-76, 167 L. Ed. 2d 686 (2007).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No.	**EDCV 16-1384 JGB (KSx)**	Date	January 18, 2018
Title	***Monica Ortiz, et al. v. City of Rialto, et al.***		

Present: The Honorable	JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE

MAYNOR GALVEZ	Not Reported
Deputy Clerk	Court Reporter
Attorney(s) Present for Plaintiff(s):	Attorney(s) Present for Defendant(s):
None Present	None Present

Proceedings: Order (1) GRANTING in Part and DENYING in Part Defendants' Motion for Summary Judgment (Dkt. No. 35)

Before the Court is Defendants City of Rialto, and Rialto police officers Cesar Vizcarra, and Rialto police officer Jorge Brambila (collectively, "Defendants") Motion for summary judgment against Plaintiffs Monica Ortiz and Norma Pena. On January 8, 2018, the Court held a hearing on the Motion. After considering the oral argument and papers filed in support of, and in opposition to, the Motion, the Court GRANTS in part and DENIES in part the Motion.

I. BACKGROUND

This case arises out of the shooting of Decedent Christian Pena by Rialto police officers Vizcarra and Brambila ("Responding Officers") during their response to a domestic violence dispatch. Plaintiffs Monica Ortiz, Decedent's surviving spouse, and Norma Pena, Decedent's mother, filed their First Amended Complaint against Defendants on December 9, 2016. ("FAC," Dkt. No. 17.)

Plaintiffs allege: (1) a § 1983 claim for unlawful seizure in violation of the Fourth Amendment, (2) a §1983 claim for excessive force in violation of the Fourth Amendment, (3) a § 1983 claim for wrongful death, (4) a § 1983 claim for violation of the Fourteenth Amendment due process clause for interference in a familial relationship, (5) a § 1983 claim against the City of Riverside for an unconstitutional custom, policy or practice, (6) a wrongful death negligence claim under California Civil Procedure §§ 377.60 and 377.61, (7) a wrongful death battery claim, (8) violation of California Civil Code § 52.1, (9) violation of California Civil Code § 51.7, (10) intentional infliction of emotional distress, and (11) negligent infliction of emotional distress. (See FAC.)

On December 8, 2017, Defendants moved for summary judgment. ("Motion," Dkt. No. 35.) In support of their Motion, Defendants also filed:

- Statement of Undisputed Facts ("DSUF," Dkt. No. 35-1); and

- Declaration of Bruce Praet, and 6 accompanying exhibits (Dkt. Nos. 35-2-8; 36).

On December 18, 2017, Plaintiffs filed their opposing motion. ("Opposition," Dkt. No. 37.) In support of their Opposition, Plaintiffs also filed:

- Statement of Additional Material Facts ("PAMF," Dkt. No. 38);
- Evidentiary Objections (Dkt. No. 39.);
- Declaration of Hang Le, and 11 accompanying exhibits (Dkt. No. 40, Exs. 1, 4, 8-11; Dkt. No. 42, Exs. 2-3, 5-7) including footage from Responding Officers' body cameras ("Vizcarra Camera," Dkt. No. 42, Ex. 3; "Brambila Camera," Dkt. No. 42, Ex. 7);
- Declaration of Roger Clark, and 1 accompanying exhibit (Dkt. No. 41; Ex. 12)

Defendants replied on December 27, 2017. ("Reply, Dkt. No. 44.) Along with their Reply, Defendants filed a Reply to Plaintiff's Evidentiary Objections (Dkt. No. 44-1) and a Reply to Plaintiff's Statement of Additional Material Facts (Dkt. No. 44-2).

II. FACTS

Except as noted, the following material facts are sufficiently supported by admissible evidence and are uncontroverted.[1] They are "admitted to exist without

[1] The Court considers the parties' objections where necessary. All other objections are OVERRULED.

controversy" for purposes of the Motion. See Fed. R. Civ. P. 56(e)(2); L.R. 56-3. Where videotape of the events exists, the court should view the facts "in the light depicted by the videotape." Scott v. Harris, 550 U.S. 372, 380 (2007).

A. October 2, 2015 Dispatch

On October 2, 2015, Officer Vizcarra and Officer Brambila received a call of domestic disturbance. (PAMF ¶ 36.) Vizcarra responded as a backing officer for Brambila. (PAMF ¶ 37.) Responding Officers arrived on scene at the same time. (PAMF ¶39.) Responding Officers made contact with a woman, later identified as Plaintiff Ortiz, at apartment 7C. (PAMF ¶ 41.) Brambila spoke to Ms. Ortiz. (PAMF ¶ 43.) Brambila recalls Ortiz's hair being all over the place and that she looked sad, though her hair was actually in a neat bun. (PAMF ¶¶ 46, 47.) Brambila never saw bruising or injuries on Ortiz or that her clothing was ripped. (PAMF ¶¶48, 49). Ortiz led Responding Officers upstairs to her residence so that [sic] could contact her boyfriend or husband, later identified as her husband, Christian Pena, the Decedent. (PAMF ¶ 50.)

The landing between the stairs and the apartment door is approximately eight to ten feet long. (PAMF ¶ 51.) Ortiz opened the door to the apartment and said, "The cops are here." (PAMF ¶ 52.) Vizcarra then stepped forward. (Id.) Vizcarra did not see signs of a struggle or that the apartment had been ransacked.

(PAMF ¶53.) Neither officer had ever seen Decedent before and did not know him. (PAMF ¶ 54.)

Decedent stood up from the couch and put his hands in his pockets. (PAMF ¶ 58.) Brambila noted Decedent appeared "really hyped up" but was not sure whether he was under the influence of some type of drug. (PAMF ¶ 57.) Decedent challenged Responding Officers to "come on" as he clenched his fists. (DSUF ¶ 3.) Decedent refused to comply with Responding Officers' orders to "get back" and "show your hands." (DSUF ¶ 2.) Vizcarra initially drew his gun then put his gun away, pulling out his Taser. (PAMF ¶¶ 59, 61, 63.)

Vizcarra deployed his Taser, striking Decedent. (PAMF ¶ 65.) Vizcaraa did not give a verbal warning that he was going to deploy the Taser. (PAMF ¶ 66.) Decedent stiffened, falling to the ground. (PAMF ¶ 69.) Decedent began "squirreling" around. (PAMF ¶ 70.) Brambila pushed down on Decedent's back while giving him commands to get on his back. (PAMF ¶ 71.) Vizcarra then activated the Taser a second time. (PAMF ¶ 73.) Decedent continued to writhe on the ground. (PAMF ¶ 76.) A knife fell from Decedent's pocket onto the floor. (PAMF ¶ 78.) Vizcarra then activated the Taser a third time, while Decedent was on the floor. (PAMF ¶ 79.) Decedent was tased for a total of 15 seconds, and the time elapsed between the first Taser cycle beginning and the third Taser cycle ending was 21 seconds. (PAMF ¶¶ 81, 84.)

Vizcarra then transitioned to his gun. (PAMF ¶ 87.) Brambila had his Taser in one hand and his gun in the other hand. (PAMF ¶88.) Decedent scooted towards Vizcarra. (DSUF ¶ 5.) Vizcarra stepped back onto the threshold of the door. (PAMF ¶ 91.) Decedent grasped the knife and appeared to raise it, with the blade facing down, towards Vizcarra, who was standing less than five feet away. (DSUF ¶ 6; Vizcarra Cam. 4:46-4:48.) Decedent only had the knife in his hand for approximately one second. (PAMF ¶ 1001 [sic].) Vizcarra fired one shot, which struck Decedent. He did not give a warning that he was going to shoot before firing. (DSUF ¶ 7; PAMF ¶ 95.) At the moment of the first shot, Decedent was sitting on the ground and Vizcarra was standing up. (PAMF ¶ 101.) After the first shot, Decedent's body fell back while his arms and legs flailed. (PAMF ¶ 104.) Decedent began to roll back towards Vizcarra. (Vizcarra Cam. 4:49-4:50.) Within less than two seconds, Vizcarra fired a second shot subsequently shouting, "He's got the knife." (Vizcarra Cam. 4:50-4:52.) Vizcarra never saw the blade of the knife pointed upwards. (PAMF ¶ 97.) The first gunshot struck Decedent in the left shoulder, and the second gunshot struck Decedent in the abdomen. (PAMF ¶¶ 115, 117.) The gunshot to the abdomen was the fatal shot. (PAMF ¶ 118.)

After she went downstairs, Ortiz heard a gunshot. (PAMF ¶ 119.) She heard a total of one or two gunshots. (PAMF ¶ 120.) Ortiz later saw Decedent's body being taken away in a Ziploc bag, and saw his feet and head hanging out. (PAMF ¶ 121.)

B. Police Training and Policies

Officers at the Rialto Police Department are trained regarding use of the Taser by a sergeant who has been certified by Taser International. (PAMF ¶ 124.) Officers are trained that they should never hold both a firearm and a Taser device at the same time. (PAMF ¶ 125.) They are instructed they should give a verbal warning before discharging the Taser when feasible. (PAMF ¶ 126.) Officers are trained that each 5-second Taser cycle is a "window of opportunity" to move in, control and handcuff a suspect. (PAMF ¶ 128.) They may go hands-on with a suspect during a Taser cycle so long as they do not place their hands on or between the Taser probes. (PAMF ¶ 127.) However, Vizcarra claimed they were trained not to go hands-on with a suspect during the five-second Taser cycle. (PAMF ¶ 85.) Moreover, officers are trained that while a Taser cycle is going a subject will have difficulty responding to police commands to move in a certain direction. (PAMF ¶ 133.)

Officers are trained that a knife is a contact weapon and officers should try to keep distance from a person with a knife. (PAMF ¶ 138.) They are also trained that they are responsible for every shot and must reassess the situation after every shot. (PAMF ¶ 141.) Officers are trained to give a warning they are going to use deadly force when feasible, and that deadly force is the highest level of force. (PAMF ¶¶ 143, 135.)

III. LEGAL STANDARD

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The moving party has the initial burden of identifying the elements of the claim or defense and evidence that it believes demonstrates the absence of an issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Where the nonmoving party bears the burden of proof at trial, the moving party need only prove there is an absence of evidence to support the nonmoving party's case. In re Oracle Corp. Sec. Litig., 627 F.3d 376, 387 (9th Cir. 2010). The moving party must show that "under the governing law, there can be but one reasonable conclusion as to the verdict." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

If the moving party has sustained its burden, the nonmoving party must then show that there is a genuine issue of material fact that must be resolved at trial. Celotex, 477 U.S. at 324. The non-moving party must make an affirmative showing on all matters placed at issue by the motion as to which it has the burden of proof at trial. Celotex, 477 U.S. at 322; Anderson, 477 U.S. at 252. "This burden is not a light one. The non-moving party must show more than the mere existence of a scintilla of evidence." In re Oracle Corp. Sec. Litig., 627 F.3d at 387 (citing Anderson, 477 U.S. at 252).

A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson, 477 U.S. at 248. When deciding a motion for summary judgment, the court construes the evidence in the light most favorable to the nonmoving party. Barlow v. Ground, 943 F.2d 1132, 1135 (9th Cir. 1991). Thus, summary judgment for the moving party is proper when a "rational trier of fact" would not be able to find for the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

IV. FEDERAL CLAIMS

Plaintiffs allege five claims under Title 42 U.S.C. § 1983. (See FAC.) Section 1983 provides a cause of action against "[e]very person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws. . . ." 42 U.S.C. § 1983. The purpose of § 1983 is to deter state actors from using the "badge of their authority" to deprive individuals of their federally guaranteed rights and to provide relief if such conduct occurs. Wyatt v. Cole, 504 U.S. 158, 162 (1992).

"The doctrine of 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 would have known.'" Pearson v. Callahan, 555 U.S. 223, 231 (2009) (quoting Harlow v. Fitzgerald, 457

U.S. 800, 818 (1982)). An officer will be denied qualified immunity if (1) taking the alleged facts in the light most favorable to the party asserting injury, the officer committed a constitutional violation, and (2) the officer's specific conduct violated "clearly established" federal law at the time of the alleged misconduct such that a reasonable officer would have understood the conduct to be unlawful. Torres v. City of Madera, 648 F.3d 1119, 1123 (9th Cir. 2011) (citing Saucier v. Katz, 533 U.S. 194, 201-02 (2001)).

A. Excessive Force

1. Constitutional Violation

Plaintiff Ortiz alleges Responding Officers subjected Decedent to excessive force by shooting and killing him without lawful justification. (FAC ¶ 28.) An objectively unreasonable use of force is constitutionally excessive and violates the Fourth Amendment. Graham v. Connor, 490 U.S. 386, 394-96 (1989). The objective reasonableness inquiry is determined by an assessment of the totality of circumstances. Id. at 397. The court must balance "the nature of quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." Scott v. Harris, 550 U.S. 372, 383 (2007).

To determine the strength of the government's interest in the force used, the court considers the severity of the crime at issue, whether the suspect posed an immediate threat to the safety of the officers or others,

and whether the suspect was actively resisting arrest or attempting to evade arrest by flight. Id. at 396. The court also considers whether the suspect posted an immediate threat to the safety of the officers or others. George v. Morris, 736 F.3d 829, 838 (9th Cir. 2013). Other relevant factors may include "the availability of less intrusive force, whether proper warnings were given, and whether it should have been apparent to the officer that the subject of the force used was mentally disturbed." Hughes v. Kisela, 841 F.3d 1081, 1085 (9th Cir. 2016). However, officers "need not employ the least intrusive means available" provided they act "within the range of reasonable conduct." Id.

Here, Vizcarra deployed his Taser three times, before shooting Decedent twice. Vizcarra's use of deadly force can be deemed objectively reasonable only if he had probable cause to believe that Decedent posed a threat of serious physical harm to himself or others. Brosseau v. Haugen, 543 U.S. 194, 197-98 (2004). The court must consider "exactly what was happening when the shot was fired." Gonzalez v. City of Anaheim, 747 F.3d 789, 794 (9th Cir. 2014.) In this case, the body camera footage shows the knife was under Decedent's body after he scooted towards Vizcarra. It is undisputed Decedent was within five feet of Vizcarra, and he held the knife for approximately one second prior to Vizcarra's initial shot. The mere fact that a suspect possesses a weapon does not justify deadly force. See, e.g., Hayes v. Cty. of San Diego, 736 F.3d 1223, 1233 (9th Cir. 2013) (suspect's "unexpected possession of the knife alone" was not sufficient reason for the officers to

employ deadly force); Glenn v. Washingotn [sic] Cty., 673 F.3d 864, 872 (9th Cir. 2011) (suspect's possession of a knife was not dispositive of immediate-threat issue).

Conversely, threatening an officer with a weapon does justify the use of deadly force. See, e.g., Smith v. City of Hemet, 394 F.3d 689, 704 (9th Cir. 2005) (en Banc) (recognizing that where a suspect threatens an officer with a knife or gun, the officer is justified in using deadly force); Reynolds v. Cty of San Diego, 84 F.3d 1162, 1168 (9th Cir. 1996) (holding deadly force reasonable where suspect, who was behaving erratically, swung a knife at an officer). The body camera footage appears to show Decedent's split second attempt to raise the knife towards Vizcarra before being shot. Cf. Hughes, 862 F.3d at 780 (finding there was not an immediate threat to the officer where the suspect "did not raise the knife and did not make any aggressive or threating actions.") Prior to the shooting, Responding Officers had commanded Decedent to "get back" and get on his back. Vizcarra had deployed his Taser three times, but Decedent had still been able to scoot towards the officer while in a seated position, requiring Vizcarra to step back onto the threshold of the door. Therefore, at the time of Vizcarra's initial shot Decedent [sic], Decedent had been tased multiple times after telling the officers to "come on" with clenched fists, moved closer to Vizcarra, and attempted to raise a knife in his direction. Plaintiffs argue the knife was never pointed directly at Vizcarra. (Opp'n at 13.) Vizcarra was not required to wait until Decedent had

pointed the weapon directly at him before deploying deadly force. See George, 736 F.3d at 838 ("If the person is armed . . . a furtive movement, harrowing gesture, or serious verbal threat might create an immediate threat."). However, Plaintiffs argue that Decedent was unable to comply with commands due to the effects of being tased.

Plaintiffs also argue Vizcarra's second shot was particularly egregious given Decedent was thrown backwards from the initial gunshot and had nothing in either hand. (Opp'n at 13.) Rialto police are trained to reassess the situation after each shot. The body camera footage does show Decedent rolling backwards and flailing after being shot. Nonetheless, Decedent's body then turned back towards Vizcarra, which is when Vizcarra fired off a second shot. Viewing the facts in a light most favorable to Plaintiffs, Decedent's movement towards Vizcarra could have been involuntarily flailing as a result of the first gunshot, rather than a threatening motion. "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." Garner, 471 U.S. at 396-397. Defendants further argue Vizcarra was not required to stop shooting until the threat had ended, citing Plumhoff v. Rickard, 134 S.Ct. 2012, 2022 (2014). However, a suspect, once on the ground and wounded, may no longer pose a threat and a reasonable officer would reassess the situation rather than continue shooting. See id.

Decedent continued to roll on the ground, but whether he posed a threat or was reaching for the knife is a dispute of fact to be resolved by a jury. Thus, a reasonable jury could find Decedent no longer posed a threat after the first gunshot, and the second shot and thus the totality of deadly force used was excessive.

The severity of the crime weighs in Plaintiffs' favor. Responding Officers were dispatched to the apartment complex in response to a 911 domestic disturbance call. The Ninth Circuit has recognized that domestic violence calls are "particularly dangerous" for police officers, Mattos v. Agarano, 661 F.3d 433, 450 (9th Cir. 2011). However, the concern for officer safety is "less salient 'when the domestic dispute is seemingly over by the time the officers being [sic] their investigation.'" George, 736 F.3d at 839 (quoting Mattos, 661 F.3d at 450). When Responding Officers arrived, Plaintiff Pena had already left her apartment, while Decedent remained inside, outside of her vicinity. Once Responding Officers entered the apartment, Plaintiff Pena remained outside the doorway, with Vizcarra between her and Decedent. Viewing the facts in the light most favorable to Plaintiffs, Pena was no longer in jeopardy when Responding Officers arrived.

Next, the Court considers whether Decedent was actively resisting arrest or evading arrest by flight. Graham, 490 U.S. at 396. Neither party argues Decedent was attempting to flee before Responding Officers shot him. However, whether he was actively resisting arrest is more complicated. When Responding Officers first arrived, Decedent brought his fists up and said

"come on," before being tased. Then, Decedent did not comply with Responding Officers' orders to get back or get on his back, which Plaintiffs argue was due to the Taser's effects. At one point, Decedent momentarily places his hands behind his back, but then continues to move erratically on the ground. A jury could conclude he was unable to comply with Responding Officers commands due to the Taser effects. Up until that point, Decedent's conduct was arguably less than active resistance. A closer call may be when Decedent scooted across the ground towards Vizcarra and attempted to raise the knife, but a jury could find his bodily movements were a response to the Taser effects.

Throughout the encounter, Responding Officers yelled at Decedent to "get back" and "get on the wall." Rialto police officers are trained to give warnings, when feasible, before using a Taser or employing deadly force. Here, neither officer warned Decedent they would use the Taser, even though they had the opportunity to do so. However, the split-second timing between Decedent scooting towards Vizcarra and beginning to raise the knife likely made a warning infeasible.

Finally, the court considers the availability of less intrusive options before resorting to deadly force. Responding Officers utilized three cycles of the Taser, prior to Vizcarra firing his gun. Decedent continued to flail on the ground throughout the Taser cycles, but was still able to scoot towards Vizcarra. Once he came within five feet of Vizcarra, Vizcarra used his gun. Plaintiffs' expert opined that Vizcarra had several

other less intrusive options available, such as stepping back, using his Taser again, telling Decedent to drop the knife, warning Decedent he was going to use deadly force, and telling Brambila to discharge his Taser.[2] (Clark Decl. ¶ 10(g).) In light of this expert testimony, a reasonable jury could conclude alternative techniques were available to subdue Decedent rather than the use of deadly force.

The Ninth Circuit has noted that "[b]ecause [the question of excessive force] nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom, we have held on many occasions that summary judgment or judgment as a matter of law in excessive force cases should be granted sparingly." Santos v. Gates, 287 F.3d 846, 853 (9th Cir. 2002). Here, material questions of fact, such as the severity of the threat particularly prior to the second gunshot, the adequacy of warnings, and the potential for less intrusive means remain in dispute. In addition, Decedent may not have been actively resisting arrest due to the Taser effects. Therefore, Responding Officers are not entitled to summary judgment

[2] Defendants object on grounds that Plaintiffs' expert, Roger Clark, is unqualified and his declaration is "pure speculation." (Dkt. No. 44-1 at 8.) The Court reviewed Roger Clark's professional experience and training, which includes almost three decades in the Los Angeles County Sheriff's Department and a member of its training staff, and finds him to be an appropriately qualified expert on police procedures and practices. Defendants' objection is OVERRULED.

with respect to the reasonableness of their actions, and a reasonable jury could find they used excessive force.

2. Clearly Established Law

The Court concludes a reasonable jury could find in Plaintiffs' favor that Responding Officers acted with excessive force. Therefore, the Court considers whether the right at issue was clearly established such that a reasonable officer would have understood his actions were unlawful. The clearly established law must be "particularized" to the facts of the case. White v. Pauly, 137 S.Ct. 548, 552 (2017). Yet, even where there is no federal case analyzing a similar set of facts, a plaintiff may still demonstrate that a reasonable officer would have known the force he used was excessive. Deorle v. Rutherford, 272 F.3d 1272, 1285 (9th Cir. 2001).

If a jury determines that Decedent "no longer posed an immediate threat, any deadly force used after that time violated long-settled Fourth Amendment law." Zion v. Cty. of Orange, 874 F.3d 1072, 1076 (9th Cir. 2017). The Ninth Circuit has clearly stated "law enforcement officers may not shoot to kill unless, at a minimum, the suspect presents an immediate threat to the officer or others, or is fleeting [sic] and his escape will result in a serious threat of injury to persons." Harris v. Roderick, 126 F.3d 1189, 1201 (9th Cir. 1997). The Ninth Circuit has also held that an officer can violate the Fourth Amendment by using continued force against a suspect who has been brought to the ground. See Davis v. City of Las Vegas, 478 F.3d 1048, 1053 (9th

Cir. 2007) (holding an officer violated the Fourth Amendment by punching a handcuffed suspect in the face while he lay face-down on the ground); Drummond v. City of Anaheim, 343 F.3d 1052, 1057-58 (9th Cir. 2003) (holding officers used excessive force by sitting on a prone suspect's back, asphyxiating him). A reasonable jury could find that Decedent was shot the second time, while on his back and hands emptied, when he no longer posed an immediate threat to Responding Officers. If so, Defendants are not entitled to qualified immunity as they would have been on notice their use of deadly force was clearly unlawful.

Moreover, Plaintiffs cite numerous cases that would have put Responding Officers on notice in October 2015 that deadly force could not be used when Decedent no longer posed a threat. See, e.g., Glenn, 673 F.3d at 878-880 (holding a jury could determine the officers' use of deadly force was unreasonable where decedent was holding a pocket knife to his own neck but was not threatening anyone and had not moved until being struck by beanbag rounds, then prompting the police to open fire); George, 736 F.3d at 838-839 (holding a jury could find the deputies' use of force was excessive where they shot the decedent who held a gun in his left hand with the barrel pointed down and did not take other threatening actions). In Hayes, officers responded to a domestic disturbance call and were advised the subject inside the house was potentially suicidal and might be armed with a knife. 736 F.3d at 1227. The officers encountered the subject and requested he show them his hands. Id. The subject, about

eight feet away from the officers, took one or two steps towards them, raising his hands to shoulder level, revealing a large knife pointed tip down in his right hand. Id. at 1228. The officers immediately drew their guns and fired two shots each at the subject, while he stood about six to eight feet away. Id. The Ninth Circuit reversed the district court, holding the officers' use of force was not objectively reasonable as a matter of law as the decedent was "complying with [the officer's] order when he raised the knife and posed no clear threat at the time he was shot without a warning." Id. at 1235. While not completely analogous to the present facts, these cases support the principle that using deadly force on a non-threatening suspect in [sic] unlawful. Decedent may have initially raised a knife towards Vizcarra, but if Decedent never or no longer posed a threat, the use of deadly force violated clearly established law. Accordingly, Defendants are not entitled to qualified immunity. The Court DENIES the Motion for Plaintiffs' claim for excessive force.

B. Unlawful Seizure

1. Constitutional Violation

Plaintiff Ortiz claims Responding Officers deprived Decedent of his "right to be free from unlawful seizures." (FAC ¶ 24.) The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Under the Fourth Amendment, a seizure of a person occurs

when the officer, "by means of physical force or show of authority has in some way restrained the liberty of a citizen." United States v. Orman, 486 F.3d 1170, 1175 (9th Cir. 2007).

The use of deadly force is a "seizure" subject to Fourth Amendment inquiry. Tennessee v. Garner, 471 U.S. 1, 7 (1985). The objective reasonableness inquiry is determined by an assessment of the totality of circumstances. Graham v. Connor, 490 U.S. 386, 397 (1989). In determining the reasonableness of the seizure, the court must balance "the nature of quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." Scott v. Harris, 550 U.S. 372, 383 (2007).

Pursuant to the analysis above regarding the excessive force claim, genuine disputes of material facts remain as to the reasonableness of Responding Officers' use of deadly force. A reasonable jury could conclude Vizcarra's use of deadly force constituted an unreasonable seizure.

2. Clearly Established Law

As noted above, Responding Officers are not entitled to qualified immunity, particularly if under the totality of circumstances a jury finds Decedent was not actively evading arrest, received inadequate warnings, and did not pose an immediate threat to Responding Officers. Accordingly, the Court DENIES the Motion for this claim.

C. Wrongful Death

Plaintiffs' third cause of action is a separate § 1983 claim for wrongful death alleging violations of Decedent's Fourth and Fourteenth Amendment rights. (FAC ¶ 31.) To the extent Plaintiffs bring a state law wrongful death claim, this is not permitted under § 1983. A valid § 1983 claim must allege a violation of a right secured by the Constitution and federal laws. Wyatt, 504 U.S. at 162. Wrongful death actions brought under § 1983 are construed and analyzed as excessive force claims under the Fourth Amendment or substantive due process claims under the Fourteenth Amendment. See, e.g., Arce v. Blackwell, 294 Fed. App'x 259 (9th Cir. 2008) (analyzing the § 1983 wrongful death claim under the Fourth Amendment); Smith v. City of Fontana, 818 F.2d 1411, 1416-17 (9th Cir. 1987) (analyzing the survivor action under the Fourteenth Amendment).

Plaintiffs' second and fourth claims are for excessive force under the Fourth Amendment and violation of the familial relationship under the Fourteenth Amendment. Therefore, Plaintiffs' third cause of action is duplicative of these other claims, and cannot be maintained as a separate, federal cause of action. See Estate of Lopez ex rel. Lopez v. Torres, 105 F. Supp. 3d 1148, 1159 (S.D. Cal. 2015) (holding plaintiffs' § 1983 claim for wrongful death could only proceed as an excessive force claim under the Fourth Amendment, not as an independent cause of action). Accordingly, the Court GRANTS the Motion as to Plaintiffs' third cause of action.

D. Familial Relationship

1. Constitutional Violation

Plaintiffs' fourth cause of action asserts a violation of the Fourteenth Amendment's substantive due process for the state interference with their relationships with Decedent, their husband and son, respectively. (FAC ¶¶ 33, 34.) In Kelson v. City of Springfield, 767 F.2d 651, 655 (9th Cir. 1985), the Ninth Circuit held "a parent has a constitutionally protected liberty interest in the companionship and society of his or her child." A violation of the right to family integrity is subject to remedy under § 1983. Id. The Ninth Circuit has extended that right to the widow of a decedent. Smith v. City of Fontana, 818 F.2d 1411, 1417 (9th Cir. 1987), overruled on other grounds by Hodgers-Durgin v. De La Vina, 199 F.3d 1037 (9th Cir. 1999). In Smith, the court recognized the spouse and children of a man killed by police officers could state a substantive due process claim under § 1983. Id.

To amount to a violation of substantive due process, however, the harmful conduct must "shock [] the conscience" or "offend the community's sense of fair play and decency." Rosenbaum v. Washoe Cty., 663 F.3d 1071, 1079 (9th Cir. 2011) (quoting Rochin v. California, 342 U.S. 165, 172-73 (1952)). Where the officer had time for actual deliberation, a plaintiff must show the officer "acted with deliberate indifference." Porter v. Osborn, 546 F.3d 1131, 1137-138 (9th Cir. 2008). Otherwise, if the officer "faced an evolving set of circumstances that took place over a short time period

necessitation [sic] 'fast action,'" a plaintiff must make a higher showing that the officer "acted with a purpose to harm." Id.

Courts have applied the higher "purpose to harm" standard in situations concerning fast-paced circumstances and "split-second" decision-making. See, e.g., Id. at 1139 (applying the purpose to harm standard to a five minute encounter between police officers and the decedent after the officers were dispatched to investigate a suspicious car); Onossian v. Block, 175 F.3d 1169, 1171 (9th Cir. 1999) (applying the purpose to harm standard when bystanders were injured in a high speed chase); Moreland v. Las Vegas Metro. Police Dep't, 159 F.3d 365, 372 (9th Cir. 1998) (applying the purpose to harm standard when police officers responded to a gun fight in a crowded parking lot).

On the opposite end of the spectrum, courts have applied the deliberate indifference standard to cases where officers have extended time to correct their actions. See, e.g., Whitley v. Albers, 475 U.S. 312, 320 (1986) (applying deliberate indifference standard to custodial prison conditions); Lee v. City of Los Angeles, 250 F.3d 668, 684 (9th Cir. 2001) (applying deliberate indifference standard to a wrongful incarceration); Estate of Lopez ex rel. Lopez v. Torres, 105 F. Supp. 3d 1148, 1161 (S.D. Cal. 2015) (applying deliberate indifference standard because roughly five hours elapsed between initial call to the police and when an officer shot the decedent).

Here, fewer than two minutes elapsed between the time Responding Officers entered the apartment and Vizcarra shooting Decedent. This fast-paced situation necessitates Plaintiffs make the higher showing that Responding Officers acted with purposes to harm. Under the purpose to harm standard, the officers must have acted with the purpose to "cause harm unrelated to the legitimate object of arrest." Porter, 546 F.3d at 1140. Conduct that is meant only to "teach [a suspect] a lesson" or "get even" or where the officer "intended to harm, terrorize or kill" the suspect would not be shielded from liability. Id. at 1140-141. Conversely, where officers are responding to an emergency, their conduct is likely shielded. Id. at 1141. In Zion, 874 F.3d at 1077, the court applied the purpose to harm standard and found the officer the officer [sic] did not violate the Fourteenth Amendment by firing two volleys of nine gunshots each at the suspect, the second volley when the suspect lay on the ground, because they came in rapid succession, without time for reflection and served the legitimate purpose of stopping a dangerous suspect.

Plaintiffs argue Vizcarra's intent to harm Decedent was apparent because Decedent was seated on the ground with a knife held downwards, then shot again while on his back with empty hands. (Opp'n at 17.) However, the time between Decedent starting to raise the knife and the second shot was less than three seconds. Vizcarra was forced to make split-second decisions to respond to Decedent's movements. No intent to harm separate from a legitimate law enforcement

objective to protect himself and others is evidenced by the record. Moreover, split-second judgments need not be scrutinized as closely for how officers decide to best minimize the risk to their own safety and the safety of others. Wilkinson v. Torres, 610 F.3d 546, 554 (9th Cir. 2010). Since the Court finds there is no constitutional violation, the Court need not determine whether Responding Officers are entitled to qualified immunity. Accordingly, the Court GRANTS the Motion as to this claim.

E. Municipal Liability

Under Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690-91 (1978), municipalities cannot be sued under a theory of respondeat superior for injuries inflicted by its employees or agents. Rather, municipalities are subject to damages under § 1983 in three situations: when the plaintiff was injured pursuant to an expressly adopted official policy, a long-standing practice or custom, or the decision of a final policymaker. Ellins v. City of Sierra Madre, 710 F.3d 1049, 1066 (9th Cir. 2013) (citing Delia v. City of Rialto, 621 F.3d 1069, 1081-82 (9th Cir. 2010)). "In limited circumstances," the failure to train municipal employees can serve as a policy underlying a Monell claim. Bd. of the Cty. Comm'rs v. Brown, 520 U.S. 397, 407 (1997).

Plaintiff Ortiz claims Rialto has a custom, policy, and/or practice in using excessive force. (FAC ¶ 45.) To allege Monell liability based on "custom" or "practice," liability "may not be predicated on isolated or sporadic

incidents; it must be founded upon practices of sufficient duration, frequency and consistency that the conduct has become a traditional method of carrying out policy." Trevino v. Gates, 99 F.3d 911, 918 (9th Cir. 1996).

Plaintiffs have failed to provide any evidence of additional instances in which Rialto police used excessive force. One (arguable) instance of excessive force is insufficient to sustain Monell liability. Id.

Ortiz also asserts a failure to train claim for Rialto's training in the use of Tasers and deadly force and that Rialto failed to adequately discipline Responding Officers. (FAC ¶ 45.) "Only where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its [officers] can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under §1983." City of Canton v. Harris, 489 U.S. 378, 399 (1989). A plaintiff alleging a failure to train claim must show: (1) she was deprived of a constitutional right, (2) the [City] had a training policy that amounts to deliberate indifference to the constitutional rights of the persons with whom its [officers] are likely to come into contact, and (3) her constitutional injury would have been avoided had the [City] properly trained those [officers]." Blankenhorn v. City of Orange, 485 F.3d 483, 484 (9th Cir. 2007).

The undisputed facts establish Rialto police officers are trained they may go hands-on with a suspect during a Taser cycle and they should not hold a Taser

and gun at the same time. Plaintiffs argue Brambila violated these training policies by not going hands-on with Decedent during the Taser cycles and by holding his Taser and gun simultaneously, and because Vizcarra claimed they were trained to avoid going hands-on during the Taser cycle. (Opp'n at 21.) Even so, Brambila's violation of proper Taser procedures, and/or Vizcarra's claim of the training he received, is insufficient to establish Rialto had a custom or policy of training police officers incorrectly. See Canton, 489 U.S. at 390 ("That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city."); Meehan v. Los Angeles Cty., 856 F.2d 102, 104 (9th Cir. 1988) (two incidents of unconstitutional assaults by officers insufficient to establish a custom). Moreover, Plaintiffs have failed to provide evidence that Rialto made a "deliberate" or "conscious" choice in allegedly failing to train police officers that they can go hands-on with a suspect during a Taser cycle. Canton, 489 U.S. at 389. Accordingly, the Court GRANTS the Motion as to Plaintiff's Monell claim.

V. STATE LAW CLAIMS

Plaintiffs allege six causes of action pursuant to California law. The Court considers each in turn.

A. California Code of Civil Procedure § 377

Plaintiffs assert a wrongful death claim under California Code of Civil Procedure § 377 against Defendants. The elements of a wrongful death claim are:

(1) a wrongful act or neglect on the part of one or more persons, (2) the resulting death of another person, and (3) pecuniary losses suffered by the heirs." Quiroz v. Seventh Ave. Ctr., 140 Cal. App. 4th 1256, 1264 (2006). As Plaintiffs' claim is premised on Defendants' negligence, to support their claim for wrongful death against Defendants, Plaintiffs must establish the standard elements of negligence. Bremer v. Cty. of Contra Costa, 2015 WL 5158488, at *5 (N.D. Cal. Sep. 2, 2015) (citing Hayes v. Cty. of San Diego, 736 F.3d 1223, 1231 (9th Cir. 2013)).

A cause of action for negligence requires a plaintiff show: (1) the defendant owed a duty of care, (2) the defendant breached that duty, and (3) the breach was the proximate or legal cause of plaintiff's injury. Sheley v. Harrop, 9 Cal. App. 5th 1147, 1174 (2017). The California Supreme Court has encouraged courts to determine whether a duty of care exists before considering immunity. Williams v. State of Cal., 34 Cal. 3d 18, 22-23 (1983).

Officers have a duty to act reasonably when using deadly force. Hayes, 57 Cal. 4th at 629. The reasonableness of an officer's conduct is determined in light of the totality of circumstances. Id. In California, state negligence law, when considering the use of deadly force, "is broader than federal Fourth Amendment law." Id. at 639. Law enforcement personnel have a "degree of discretion" in choosing how to address a particular situation. Id. at 632. Thus, an officer's conduct need only "fall[] within the range of conduct that is reasonable under the circumstances" to avoid liability for

negligence. Id. Summary judgment is appropriate when, viewing the facts most favorably to the plaintiff, "no reasonable juror could find negligence." Id.

The Court has already determined Responding Officers were not entitled to summary judgment on the reasonableness of their conduct, as a reasonable jury could determine excessive force was used on Decedent. As California's negligence law is "broader" than federal Fourth Amendment law, summary judgment is inappropriate here, where a reasonable jury could find Responding Officers acted negligently. Accordingly, the Court DENIES the Motion for Plaintiffs' wrongful death claim.

B. Battery (Wrongful Death)

Plaintiff Ortiz asserts Responding Officers conduct constituted battery upon Decedent. (FAC ¶ 58.) Under California law, officers are explicitly permitted to use reasonable force to effect an arrest, prevent escape, or overcome the resistance of a person being arrested. Cal. Penal Code § 835(a). Thus, to prevail on a claim of battery against a police officer, the plaintiff bears the burden of providing [sic] the officer used unreasonable force. Munoz v. City of Union City, 120 Cal. App. 4th 1077, 1102 (2004). Battery claims under California law are analyzed under the same reasonableness standard of the Fourth Amendment. Brown v. Ransweiler, 171 Cal. App. 4th 516, 527 (2009).

As noted above, the Court finds genuine issues of material fact as to the reasonableness of Responding

Officers' use of force against Decedent. Accordingly, Defendants are not entitled to summary judgment. The Court DENIES the Motion as to this claim.

C. California Civil Code § 52.1

Plaintiff Ortiz alleges Defendants violated Decedent's civil rights guaranteed under federal laws, the California Constitution, and California laws, in violation of California Civil Code 52.1(b). (FAC ¶ 65.) California Civil Code Section 52.1, the Bane Act, authorizes a claim for relief "against anyone who interferes, or tries to do so, by threats, intimidation, or coercion, with an individual's exercise or enjoyment of rights secured by federal or state law." Sahymus v. Tulare Cty., 2015 WL 3466942, at *6 (E.D. Cal. June 1, 2015) (quoting Jones v. Kmart Corp., 17 Cal. 4th 329, 331 (1998)). The Ninth Circuit has agreed the elements of an excessive force claim under § 1983 establish the elements of a Bane Act claim. Chaudhry v. City of Los Angeles, 751 F.3d 1096, 1106 (9th Cir. 2014.)

Plaintiffs have established genuine issues of material fact as to the reasonableness of Responding Officers' use of deadly force against Decedent. Thus, a reasonable jury could conclude excessive force was used and find in Plaintiff's favor for the Bane Act claim. The Court DENIES the Motion as to this claim.

D. California Civil Code § 51.7

Plaintiff Ortiz also asserts Responding Officers violated Decedent's rights under California Civil Code § 51.7 because of his race. (FAC ¶ 72.) California Civil Code Section 51.7 guarantees the "right to be free from any violence, or intimidation by threat of violence" committed against their person or property because of their political affiliation, position in a labor dispute, sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status, or the perception of these characteristics. Cal. Civ. Code §§ 51.7, 51(b). To show a violation of § 51.7, a plaintiff must establish (1) the defendant threatened or committed violent acts against the plaintiff, (2) the defendant was motivated by his perception of plaintiff's protected characteristic, (3) the plaintiff was harmed, and (4) the defendant's conduct was a substantial factor in causing the plaintiff's harm. I.H. by & through Hunter v. Oakland School for Arts, 234 F. Supp. 3d 987, 995 (N.D. Cal. 2017).

Plaintiffs do not even argue this claim in their Opposition, and have failed to present any evidence to establish either Brambila or Vizcarra was motivated by his perception of Decedent's protected characteristic. Consequently, the Court GRANTS the Motion for Plaintiff's claim under California Civil Code § 51.7.

E. Intentional Infliction of Emotional Distress (IIED)

Plaintiffs' tenth claim for relief is for intentional infliction of emotional distress against Responding Officers. (FAC ¶ 76.) To support a claim for IIED, a plaintiff must show: (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress, (2) the plaintiff's suffering severe or extreme emotional distress, and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. Potter v. Firestone Tire & Rubber Co., 6 Cal. 4th 965, 1001 (1993). Conduct is "outrageous" if it is "so extreme as to exceed all bounds of that usually tolerated in a civilized community." Id. Whether a defendant's conduct rises to the level of extreme and outrageous is ordinarily a question for a jury, therefore a court may grant summary judgment only if no reasonable jury could find the conduct to have been so extreme and outrageous as to warrant recovery. Quyen Kim Dang v. City of Garden Grove, 2011 WL 3419609, at *12 (C.D. Cal. Aug. 2, 2011).

Plaintiffs fail to oppose the Motion for their IIED claim. Although the Court found, genuine issues of material fact remain regarding the reasonableness of Responding Officers' use of force, the Court also concluded there was no evidence Responding Officers acted with the intent to harm Decedent outside of a legitimate law enforcement objective. Moreover, there is no evidence Responding Officers acted with reckless disregard to causing emotional distress. Therefore, the

Motion is GRANTED with respect to Plaintiffs' IIED claim.

F. Negligent Infliction of Emotional Distress

Plaintiff Ortiz asserts Responding Officers negligently inflicted emotional distress upon her when they used excessive force on Decedent. (FAC ¶ 78.) To recover for negligent infliction of emotional distress as a bystander, a plaintiff must prove she "(1) is closely related to the injury victim; (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim; and (3) as a result suffers serious emotional distress." Ra v. Super. Ct., 154 Cal. App. 4th 142, 148 (2007).

The undisputed facts establish Ortiz, Decedent's surviving spouse, was just behind the threshold of the door during part of the encounter, before going downstairs. She heard one or two of the gunshots, and later saw his body being taken away. In light of these facts, a reasonable jury could conclude Plaintiffs have proven the elements of this claim. Accordingly, the Court DENIES the Motion as to this claim.

G. Municipal Liability for Plaintiffs' State Law Claims

Pursuant to California Government Code § 815.2, 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." Cal. Gov't § 815.2. This provision allows for vicarious liability of a public entity for the unlawful conduct of its police officers. Blankenhorn, 485 F.3d at 488. Therefore, Plaintiffs' California law claims that remain may also be pursued against Rialto.

VI. CONCLUSION

Based on the foregoing, the Court GRANTS in part and DENIES in part Defendants' Motion for summary judgment. The Court GRANTS the Motion as to the following causes of action:

(1) § 1983 Wrongful Death

(2) § 1983 Fourteenth Amendment Due Process

(3) Monell liability

(4) California Civil Code §51.7

(5) Intentional Infliction of Emotional Distress.

The Court DENIES the Motion as to these claims:

(1) § 1983 Fourth Amendment Excessive Force

(2) § 1983 Fourth Amendment Unlawful Seizure

(3) Wrongful Death under California Code of Civil Procedure § 377

(4) Battery

(5) California Civil Code § 52.1

(6) Negligent Infliction of Emotional Distress.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MONICA ORTIZ, individually and as co-successor-in-interest to Decedent Christian Pena; NORMA PENA, individually, Plaintiffs-Appellees, v. CESAR VIZCARRA, individually, and in his official capacity as an officer for the City of Rialto Police Department; JORGE BRAMBILA, individually, and in his official capacity as an officer for the City of Rialto Police Department, Defendants-Appellants, and CITY OF RIALTO, Police Department; DOES, 1-10, inclusive, individually, and in their capacities as law enforcement agents and/ or personnel for the City of Rialto Police Department, Defendants.	No. 18-55107 D.C. No. 5:16-cv-01384-JGB-KS Central District of California, Riverside ORDER (Filed Aug. 12, 2019)

Before: FERNANDEZ, WARDLAW, and BYBEE, Circuit Judges.

Judges Fernandez, Wardlaw, and Bybee vote to deny the petition for panel rehearing. Judges Wardlaw and Bybee vote to deny the petition for rehearing en banc, and Judge Fernandez so recommends.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and rehearing en banc is therefore **DENIED**.

EXHIBIT 1 – FRAME #6

Pena lunges at Officer Vizcarra with knife rising in left hand.