IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF CALIFORNIA

MARIA TORRES and MELCHOR TORRES, individually and as Administrators of the Estate of EVERARDO TORRES, **Plaintiffs,** **v.** **CITY OF MADERA, MARCY NORIEGA, individually and as a member of the Madera Police Department, and DOES 1 through 50, inclusive,** **Defendants.** **AND RELATED CROSS-ACTIONS**	**CV F 02-6385 AWI LJO** **CONSOLIDATED WITH CV F 03-5999** **MEMORANDUM OPINION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** (Documents #52 & #53)

This action arises from an incident in which Officer Marcy Noriega shot and killed Everardo Torres ("Everardo"). Everado's estate and family ("Plaintiffs") have sued Officer Noriega and the City of Madera ("Defendants") under 42 U.S.C. § 1983 and state law. In a consolidated case, the City of Madera and Officer Noriega have sued Taser International under a products liability theory. Pending before the court is Defendants' motion for summary

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judgment, which has been taken under submission. Also pending before the court is Taser International's motion for summary judgment. Taser International's motion for summary judgment remains pending and will be addressed in a later memorandum opinion.

PROCEDURAL HISTORY

On January 6, 2003, Plaintiffs filed their first amended complaint. The first cause of action is brought under 42 U.S.C. § 1983 and alleges violations of Everardo's Fourth Amendment right and Plaintiffs' rights to the companionship of their son and brother. The second cause of action alleges wrongful death. The third cause of action alleges assault and battery. The fourth cause of action alleges false arrest and imprisonment. The fifth cause of action alleges negligence. The sixth cause of action alleges negligent infliction of emotional distress.

On January 28, 2005, Defendants filed a motion for summary adjudication of issues. Defendants contend that the accidental police shooting which occurred in this case cannot give rise to a Fourth Amendment claim or a Fourteenth Amendment claim. Defendants also contend that Officer Noriega is entitled to qualified immunity. Because Defendants contend Officer Noriega's conduct cannot give rise to a constitutional violation, Defendants contend the City of Madera is also entitled to judgment on the federal claims. Finally, Defendants contend that the undisputed facts fail to establish an assault and battery under California law.

On February 14, 2005, Plaintiffs filed an opposition to Defendants' motion. Plaintiffs contend that the fact Officer Noriega alleges she did not intend to shoot Everardo does not absolve her of liability for using excessive force. Plaintiffs argue the shooting was not accidental; rather, at best, Officer Noriega used more force than she intended to seize Everardo. Plaintiffs contend that their Fourteenth Amendment claim must be analyzed pursuant to Fourth Amendment standards. Plaintiffs contend that Officer Noriega is not entitled to qualified immunity because a jury could find that the use of her gun, even if mistaken, was objectively unreasonable under the circumstances.

On February 16, 2005, Defendants filed a reply.

On March 7, 2005, the court held a hearing. At the hearing, Plaintiffs stated that they would not be proceeding with a Section 1983 cause of action based on the Fourteenth Amendment or a Section 1983 cause of action against the City of Madera. After hearing the parties' oral arguments, the court took Defendants' motion under submission.

FACTS[1]

On October 27, 2002, Everardo Torres was fatally shot by Officer Marcy Noriega with her Glock semiautomatic weapon.

Everardo Torres was arrested at the scene. While Everardo was handcuffed in the backseat of the police car, he asked the police officers to loosen his handcuffs and they refused. Erica Mejia, who was also in the backseat, kept knocking on the window, asking a male Madera police officer to loosen Everardo's handcuffs, but he would not.

Just prior to the shooting, Erica Mejia was removed from the car. Everardo remained handcuffed in the backseat of the police car. Everardo then started yelling and kicking the window.[2]

Officer Noriega opened the door to the patrol car with her left hand and shot Everardo with her Glock. Defendants offer as an undisputed fact Officer Noriega's deposition testimony in which she states that she reached for what she believed was her Taser M26 mounted in a thigh holster directly below her duty belt. Officer Noriega stated that she did not intend to shoot Everardo with her gun or even seriously injure him. Plaintiffs dispute these facts and offer evidence that Officer Noriega reached for her gun with her right hand, unsnapped her holster, took her Glock out, aimed it, put her left hand under the gun, and pulled the trigger, shooting

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[1] The facts have been taken from Defendants' proposed undisputed facts, Plaintiffs' responses, and Plaintiffs' proposed disputed facts. These facts are deemed undisputed for the purposes of this motion only.

[2] The evidence submitted by both parties confirms these facts and they will be deemed undisputed. The parties offer conflicting evidence about whether Everardo was yelling about his handcuffs being too tight or yelling that he wanted to get out of the "fucking car."

Everardo.

Defendants offer as an undisputed fact that Officer Noriega's shooting of Everardo with her gun was an accident. Plaintiffs dispute this fact and point to Officer Noriega's admission during her deposition that she intended to shoot a weapon.

Immediately after the shot, Officer Noriega said, "Oh my God, Oh, my God, I shot him." And "My gun went off" and began to cry. Plaintiffs offer evidence that Officer Noriega did not express any concern for Everardo's well being.

Immediately after the shooting, other officers began administering first aid to Everardo.

LEGAL STANDARD

Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); Poller v. Columbia Broadcast System, 368 U.S. 464, 467 (1962); Jung v. FMC Corp., 755 F.2d 708, 710 (9th Cir. 1985); Loehr v. Ventura County Community College Dist., 743 F.2d 1310, 1313 (9th Cir. 1984).

> Under summary judgment practice, the moving party
> [A]lways bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.'" Id. Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Id. at 322. "[A] complete failure of proof concerning an essential element of the

nonmoving party's case necessarily renders all other facts immaterial." Id. In such a circumstance, summary judgment should be granted, "so long as whatever is before the district court demonstrates that the standard for entry of summary judgment, as set forth in Rule 56(c), is satisfied." Id. at 323.

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); First Nat'l Bank of Arizona v. Cities Serv. Co., 391 U.S. 253, 288-89 (1968); Ruffin v. County of Los Angeles, 607 F.2d 1276, 1280 (9th Cir. 1979), cert. denied, 455 U.S. 951 (1980). In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the mere allegations or denials of its pleadings, but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. Rule 56(e); Matsushita, 475 U.S. at 586 n.11; First Nat'l Bank, 391 U.S. at 289; Strong v. France, 474 F.2d 747, 749 (9th Cir. 1973). The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party, Anderson, 477 U.S. 248-49; Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436 (9th Cir. 1987).

In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." First Nat'l Bank, 391 U.S. at 290; T.W. Elec. Serv., 809 F.2d at 631. Thus, the "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory committee's note on 1963 amendments); International Union of Bricklayers v. Martin

Jaska, Inc., 752 F.2d 1401, 1405 (9th Cir. 1985).

In resolving the summary judgment motion, the court examines the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. Rule 56(c); Poller, 368 U.S. at 468; SEC v. Seaboard Corp., 677 F.2d 1301, 1305-06 (9th Cir. 1982). The evidence of the opposing party is to be believed, Anderson, 477 U.S. at 255, and all reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party, Matsushita, 475 U.S. at 587 (citing United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)(per curiam); Abramson v. University of Hawaii, 594 F.2d 202, 208 (9th Cir. 1979). Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. Richards v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), *aff'd*, 810 F.2d 898, 902 (9th Cir. 1987). Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 587 (citation omitted).

DISCUSSION

A. Civil Rights Cause of Action

The preferred approach to reviewing a claim under 42 U.S.C. § 1983 is first to identify precisely which constitutional right, if any, has been violated, and then determine if the defendants are entitled to qualified immunity. County of Sacramento v. Lewis, 523 U.S. 833, 841 n. 5 (1998); Moreland v. Las Vegas Metro. Police Dep't, 159 F.3d 365, 371 n. 4 (9th Cir.1998). Preliminarily, the court notes that in the parties' briefing there was some confusion about the Section 1983 cause of action before the court. The complaint refers to a violation of Everardo's Fourth Amendment rights and a violation of Plaintiffs' Fourteenth Amendment rights. At the hearing, Plaintiffs clarified that they are proceeding only with a Fourth Amendment claim and they are not proceeding with a Fourteenth Amendment claim. Thus, the

court will only address Plaintiff's civil rights cause of action brought under the Fourth Amendment.

"Fourth Amendment rights are personal rights which . . . may not be vicariously asserted." Alderman v. United States, 394 U.S. 165, 174 (1969). Section 1983 does not create a vicarious cause of action. Claybrook v. Birchwell, 199 F.3d 350 (6th Cir.2000); Estate of Johnson v. Village of Libertyville, 819 F.2d 174, 177-78 (7th Cir.1987). Only the person whose Fourth Amendment rights were violated can sue to vindicate those rights. Smith v. City of Fontana, 818 F.2d 1411, 1417 (9th Cir.1987). The plaintiff must allege injury directly. Warth v. Seldin, 422 U.S. 490, 501 (1975). In Section 1983 actions "the survivors of an individual killed as a result of an officer's excessive use of force may assert a Fourth Amendment claim on that individual's behalf if the relevant state's law authorizes a survival action." Moreland v. Las Vegas Metropolitan Police Dept., 159 F.3d 365, 369 (9th Cir. 2001) (citing 42 U.S.C. § 1988(a) and Smith, 818 F.2d at 1416-17). "The party seeking to bring a survival action bears the burden of demonstrating that a particular state's law authorizes a survival action and that the plaintiff meets that state's requirements for bringing a survival action." Moreland, 159 F.3d at 369; Byrd, 137 F.3d at 1131. California Code of Civil Procedure 377.60 authorizes causes of action to be brought by a decedent's personal representative or any of a defined list of persons that includes a decedent's spouse, children, or heirs.

As the representatives of Everardo's estate, Maria and Melchor Torres have standing to bring a Section 1983 claim for a violation of Everardo's Fourth Amendment rights. However, the remaining Plaintiffs have failed to allege how they have standing to assert a Fourth Amendment cause of action. Thus, the court finds the Section 1983 cause of action before the court is a Fourth Amendment claim brought by Everardo's estate.

B. Fourth Amendment

Defendants contend that they are entitled to summary judgment on Plaintiffs' Fourth Amendment claim. The Fourth Amendment guarantees a citizen's right to be free from

"unreasonable searches and seizures." U.S. CONST. amend. IV. The use of deadly force is a "seizure" within the meaning of the Fourth Amendment. Tennessee v. Garner, 471 U.S. 1, 7 (1985). "Whenever an officer restrains the freedom of a person to walk away, he has seized that person" within the meaning of the Fourth Amendment. Brower v. County of Inyo, 489 U.S. 593, 596 (1989). "It [is] enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result." Id. at 599.

However, a seizure alone is not enough for Section 1983 liability; the seizure must also be unreasonable. Brower, 489 U.S. at 599. Whether police officers used excessive force is judged by an "objective reasonableness" standard. Saucier v. Katz, 533 U.S. 194, 201-202 (2001); Graham v. Connor, 490 U.S. 386, 395-97 (1989). The conduct must be evaluated from the point of view of reasonable officers on the scene, in light of the facts and circumstances confronting them, allowing for the necessity of split second decisions, and without regard to the officers' underlying intent or motivation. Graham, 490 U.S. at 395-97. Reasonableness must be judged solely from the officers' point of view at the time and place of the seizure, not with 20/20 hindsight. Id. 490 U.S. at 396. The question is: Was the conduct reasonable at the moment of seizure? Scott v. Henrich, 39 F.3d 912 (9th Cir.1994). In determining whether a police officer responded with an objectively reasonable amount of force, the fact that "police officers are often forced to make split-second judgments . . . in circumstances that are tense, uncertain, and rapidly evolving" must be taken into account. Saucier, 533 U.S. at 205. The conclusion that conduct was reasonable depends on: (1) the severity of the underlying offense; (2) whether the suspect posed an immediate threat to the safety of the officers or others; and (3) whether the suspect actively resisted arrest. Saucier, 533 U.S. at 205; Graham, 490 U.S. at 396. Use of deadly force is objectively reasonable if there is probable cause to believe the suspect poses a significant threat of death or serious physical injury to the officer or others. Garner, 471 U.S. at 11- 12.

Defendants contend that the shooting at issue in this action was an accident. While Officer Noriega's conduct may have been negligent, Defendants contend that an accidental

shooting cannot form the basis of a Fourth Amendment claim. Plaintiffs contend that the shooting was not accidental because the act of Officer Noriega firing her weapon was an intentional act. In this case, the undisputed facts reveal that Officer Noriega intended to seize Everardo. Officer Noriega clearly intended to use some amount of force when seizing Everardo. Defendants contend that Officer Noriega only intended to seize Everardo with her taser, not her Glock. Plaintiffs contend that this distinction does not foreclose Plaintiffs' Fourth Amendment claim. Thus, the issue is what intent is necessary to show a Fourth Amendment seizure.

Two Supreme Court cases set forth the standard for an officer's intent to seize. In Brower v. County of Inyo, 439 U.S. 593 (1989), the decedent was killed when the stolen car he had been driving crashed into a police roadblock. Id. at 594. His heirs sued, arguing that in establishing the roadblock, the decedent had been unreasonably seized, violating his Fourth Amendment rights. Id. The Supreme Court found that the complaint stated a claim for a seizure because the officers intended to seize the decedent by setting up the roadblock to stop the decedent, even if they did not intend for him to die. Id. at 597.

> Nor do we think it possible, in determining whether there has been a seizure in a case such as this, to distinguish between a roadblock that is designed to give the oncoming driver the option of a voluntary stop (e.g., one at the end of a long straightaway), and a roadblock that is designed precisely to produce a collision (e.g., one located just around a bend). In determining whether the means that terminates the freedom of movement is the very means that the government intended we cannot draw too fine a line, or we will be driven to saying that one is not seized who has been stopped by the accidental discharge of a gun with which he was meant only to be bludgeoned, or by a bullet in the heart that was meant only for the leg. We think it enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result. It was enough here, therefore, that, according to the allegations of the complaint, Brower was meant to be stopped by the physical obstacle of the roadblock--and that he was so stopped.

Brower, 489 U.S. at 598-99.

The Supreme Court's reasoning in County of Sacramento v. Lewis, 523 U.S. 833 (1998), was similar. In Lewis, a police officer attempted to stop a motorcycle carrying Lewis as a passenger. Id. at 836. Instead of pulling over in response to the warning lights and commands,

the driver of the motorcycle sped away and a high speed chase ensued. Id. at 836-87. The chase ended when the motorcycle tipped over, and the officer hit Lewis, killing him. Id. at 887. Lewis' parents and estate sued for a deprivation of Lewis's Fourteenth Amendment rights. Id. The Supreme Court first determined whether Lewis' estate could proceed on a Fourteenth Amendment claim because no other specific constitutional provision, such as the Fourth Amendment, covered the claim. Id. at 843-45. In regard to whether a Fourth Amendment claim was available, the Supreme Court stated:

> We held in California v. Hodari D., 499 U.S. 621, 626, 111 S.Ct. 1547, 1550-1551, 113 L.Ed.2d 690 (1991), that a police pursuit in attempting to seize a person does not amount to a "seizure" within the meaning of the Fourth Amendment. And in Brower v. County of Inyo, 489 U.S. 593, 596-597, 109 S.Ct. 1378, 1381, 103 L.Ed.2d 628 (1989), we explained that "a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally desired termination of an individual's freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of movement through means intentionally applied." We illustrated the point by saying that no Fourth Amendment seizure would take place where a "pursuing police car sought to stop the suspect only by the show of authority represented by flashing lights and continuing pursuit," but accidentally stopped the suspect by crashing into him. Id., at 597, 109 S.Ct., at 1381-1382. That is exactly this case.

Id. at 843-44.

Taking these cases together, they set forth the legal principle that a seizure occurs if an officer terminates "freedom of movement through means intentionally applied." Lewis, 523 U.S. at 443. In other words, a seizure occurs if officers stop a person "by the very instrumentality set in motion or put in place in order to achieve" the seizure. Brower, 489 U.S. at 599. Brower stands for the proposition that if an officer intends to seize an individual through a particular means or instrumentality and ends up seizing him with more force than intended, a Fourth Amendment seizure has still occurred. Lewis stands for the proposition that if an officer intends to seize an individual through one means but ends up seizing him through another means, no Fourth Amendment seizure occurs. Applying these principles to the case before this court, the court can only find a Fourth Amendment seizure if Officer Noriega intended to seize Everardo

through the means she intentionally applied.

The dispute between the parties can be narrowed to the definition of the "means" Officer Noriega intended to apply. Defendants contend that Officer Noriega intended to seize Everardo with her taser, not her Glock. Because she did not intend to seize Everardo with the Glock, Defendants argue Officer Noriega did not stop Everardo's freedom of movement "through means intentionally applied." In their brief, Plaintiffs take a broader definition of the "means" Officer Noriega intended to apply. Plaintiffs contend that because Officer Noriega intended to stop Everardo with some kind of weapon, a seizure occurred. Plaintiffs argue that the court should not recognize a distinction between a bullet in the heart that was meant to be a taser dart wound any more than it can distinguish between the accidental discharge of a gun with which a person was meant only to be bludgeoned or a bullet in the heart meant for the leg.

While at first glace it does seem this case is similar to the situation in which an officer intends to wound a suspect and ends up killing him, the primary problem is that Plaintiffs have defined the means or instrumentality Officer Noriega intended too broadly. No party has cited and the court has been unable to find any other case in which an officer meant to seize an individual through the use of one weapon, such as a taser, and ended up using another weapon, such as a Glock. However, the plain meaning of the words "instrumentality" or "means" imply a particular item, such as the taser or gun, and not general conduct, such as the act of "shooting something." In Lewis, the court could have defined the instrumentality or means broadly and found that the officer meant to stop the suspect through the general use of his car -- the lights and siren -- and did stop him through the general use of his car -- running over the suspect. However, the Supreme Court distinguished between the different functions of the car and defined the instrumentality or means the officer intended to use to seize the suspect very narrowly. Given the lack of any case supporting a broad reading of the terms "instrumentality" or "means," the court finds the means or instrumentality at issue is the intent to seize Everardo with the taser versus the Glock and not the general intent to seize Everardo by shooting "something."

While not directly on point, those cases in which courts have found accidental shootings of suspects were not seizures support this finding. For example, in Glasco v. Gallard, 768 F.Supp. 176 (E.D. Va. 1991), the officer responded to a robbery. While still in his patrol car, the officer asked the plaintiff what was in his pocket, and when the plaintiff made a response which the deputy could not understand, the officer began to exit his patrol car and pulled out his gun. Id. at 177. As the officer stepped out of the car, it rolled forward, and when he tried to put his foot on the brake and put the gears into park, the officer's firearm accidentally discharged. Id. The court concluded that such a "wholly accidental shooting is not a 'seizure' within the meaning of the Fourth Amendment." Id. at 180. Similarly, in Matthews v. City of Atlanta, 699 F.Supp. 1552 (N.D.Ga.1988), a police officer was in the process of arresting the decedent when his gun accidentally discharged. Id. at 1555. In Troublefield v. City of Harrisburg, 789 F.Supp. 160, 162 (M.D.Pa.1992), *aff'd* 980 F.2d 724 (3d Cir.1992), the plaintiff was accidently shot after he was handcuffed when the officer began to re-holster his gun. Id. at 162. In these accidental shooting cases, courts have generally concluded that "the plaintiffs could not maintain Fourth Amendment claims against the officers because the officers lacked intent to seize the victims by firing the guns." Clark v. Buchko, 936 F.Supp. 212, 219 (D.N.J. 1996). In each of these cases the officers did intend to seize the suspects through some method, but the officers ended up seizing the suspects by shooting them. In each case, the courts found the lack of intent to seize with a gun meant no Fourth Amendment claim was available. These findings lend support for the conclusion that for a seizure to occur through the use of a gun the officer must have intended to seize through the means or the instrumentality of the gun itself, and an intent to seize by shooting something else is insufficient. Thus, the court finds that a Fourth Amendment seizure occurred in this case only if Officer Noriega intended to seize Everardo through the use of her Glock.

Because the parties focused their arguments on the above legal standard, the parties spent little time in their briefing discussing whether there is a disputed issue of fact on whether Officer Noriega intended to seize Everardo through the use of her Glock. In their motion for summary

judgment, Defendants present evidence that Officer Noriega intended to shoot Everardo with the taser, not the gun. Defendants present evidence that Officer Noriega's shooting of the Glock was accidental. Thus, Defendants have presented evidence that Officer Noriega did not mean to seize Everardo through the means or instrumentality she applied. As such, the burden turns to Plaintiffs to provide evidence that Officer Noriega did intend to seize Officer Noriega with the Glock.

In their response to Defendants' undisputed facts, Plaintiffs state that they dispute Defendants' proposed undisputed fact that Officer Noriega intended to use her taser and the proposed undisputed fact that the shooting was an accident. However, because Plaintiffs spend their brief arguing under a different legal standard (i.e. that intent to shoot "something" is enough and the gun did not go off by accident), Plaintiffs do not explain how or even whether they dispute that fact that Officer Noriega did not intend to seize Everardo with her Glock.

Plaintiffs have argued that the shooting was an intentional act and the Glock did not go off by accident. Officer Noriega's actions in shooting were intentional. The evidence shows Officer Noriega reached for the gun with her right hand, unsnapped her holster, took the Glock out, aimed it, put her left hand under the gun, and pulled the trigger. The Glock clearly did not go off without any action by Officer Noriega. However, evidence that Officer Noriega deliberately shot the Glock does not create a disputed issue of fact on what means or instrumentality Officer Noriega intended to use to seize Everardo. At the hearing, Plaintiffs' admitted that Officer Noriega did not intend to use the Glock, intended to shoot the taser, and the shooting was an accident. Thus, the undisputed facts reveal that Officer Noriega did not intend to seize Everardo with the Glock. Because the court finds that what instrumentality or means Officer Noriega intended to use to seize Everardo is crucial to Plaintiffs' Fourth Amendment claim, the court finds that evidence Officer Noriega intended to fire or deliberately shot the Glock does not save Plaintiffs' Fourth Amendment claim. Accordingly, Defendant Noriega is entitled to summary judgment on Plaintiffs' Section 1983 cause of action based on the Fourth

Amendment.[3]

C. Fourteenth Amendment

Defendants also move for summary judgment on Plaintiffs' Fourteenth Amendment claim. Plaintiffs may individually assert a Fourteenth Amendment claim based on the deprivation of their liberty interest arising out of the familial relationship with their son and brother. See Guess v. Byrd, 137 F.3d 1126, 1134 (9th Cir.1998). At the hearing, Plaintiffs stated that they are not going to proceed with this cause of action. Thus, Defendants are entitled to summary judgment on Plaintiffs' Section 1983 cause of action based on the Fourteenth Amendment.

D. Qualified Immunity

Defendants also contend Officer Noriega is entitled to qualified immunity. The first step in a qualified immunity analysis is, "taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" Saucier, 533 U.S. at 201; Jackson v. City of Bremerton, 268 F.3d 646, 650 (9th Cir.2001) "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." Saucier, 533 U.S. at 201; Haynie v. County of Los Angeles, 339 F.3d 1071, 1078 (9th Cir.2003). If the officer's conduct violated a constitutional right, the court must turn to the next step: whether "it would be clear to a reasonable officer that [t]his conduct was unlawful in the situation he confronted." Saucier, 533 U.S. at 202; Wilkins v. City of Oakland, 350 F.3d 949, 954 (9th Cir.2003). The court must

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[3] Plaintiff's additional case authority, submitted on April 4, 2005, does not change this result. In the unpublished opinion by the Fourth Circuit in Henry v. Purnell, 2005 U.S. App. LEXIS 22 (4th Cir. 2005), the Fourth Circuit reviewed whether an officer who claimed he intended to shoot a suspect with his taser was entitled to qualified immunity on an excessive force claim when he grabbed the wrong weapon and shot the suspect with his gun. The Fourth Circuit dismissed the appeal because the District Court had found the issue of whether the shooting was accidental was disputed. In this case, Plaintiffs have not provided any argument or evidence disputing what weapon Officer Noriega intended to use. At oral argument, Plaintiffs conceded this issue. The lack of a dispute on whether the shooting was an accident distinguishes this case from Henry. In fact, the Fourth Circuit in Henry appears agree with this court that "an accidental shooting would not give rise to a constitutional claim."

decide whether the contours of the right are sufficiently clear that a reasonable official would understand that what he is doing violates that right. Id. (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)). Because Officer Noriega did not violate Everardo's Fourth Amendment Rights, the qualified immunity analysis ends, and Officer Noriega is entitled to summary judgment.

E. Municipal Liability

Defendants request summary judgment on the constitutional claims against the City of Madera. To state a claim for municipal liability, a plaintiff must show a constitutional deprivation that was the product of a policy or custom of the local government unit. See City of Canton, Ohio, v. Harris, 489 U.S. 378, 385 (1989); Monnell v. Dep't of Social Servs., 436 U.S. 658, 690 (1978). At the hearing, Plaintiffs stated that they are dropping their Monnell claim.

A city or county cannot be liable for damages based on the actions of one of its employees unless the employee inflicted constitutional harm. City of Los Angeles v. Heller, 475 U.S. 796, 799 (1986); Scott v. Henrich, 39 F.3d 912, 916 (9th Cir. 1994); Forrester v. City of San Diego, 25 F.3d 804, 808 (9th Cir. 1994). This does not mean that the liability of municipalities or counties turns on the liability of individual employees; rather, "it is contingent on a violation of constitutional rights." Scott, 39 F.3d at 916. Where the conduct of individual employees is found reasonable and proper, the municipality or county cannot generally be held liable because no constitutional violation occurred. See Scott, 39 F.3d at 916; Forrester, 25 F.3d at 808. Here, the liability of the City of Madera turns on whether there is a disputed issue of fact on whether Officer Noriega violated Everardo's Fourth Amendment rights. Because the court finds the undisputed facts show Officer Noriega did not intend to seize Plaintiff with the Glock, and as such, she did not violate Everardo's Fourth Amendment rights and because Plaintiffs have stated they wish to drop this theory of recovery, Defendants are entitled to summary judgment on the Section 1983 cause of action against the City of Madera.

G. Battery

Defendants contend that they are entitled to summary judgment on Plaintiffs' third claim for assault and battery by a peace officer. Defendants argue that use of excessive force in a Section 1983 claim and an assault and battery claim under state law are judged under the same standards. Defendants argue that because summary judgment is appropriate on Plaintiffs' Section 1983 cause of action, they are also entitled to summary judgment on Plaintiffs' assault and battery cause of action. Plaintiffs' contend that the test for battery by a peace officer differs from a Fourth Amendment claim because the issue in a battery claim is whether the amount of force used by Officer Noriega to quiet Everardo would have appeared reasonable to another police officer under the same or similar circumstances.

Plaintiffs' third cause of action is for assault and battery by a peace officer. The relevant jury instruction reads as follows:

> [Name of plaintiff] claims that [name of defendant] harmed [him/her] by using unreasonable force to [arrest [him/her]/prevent [his/her] escape/overcome [his/her] resistance/[insert other applicable action]]. To establish this claim, [name of plaintiff] must prove all of the following:
> 1. That [name of defendant] intentionally touched [name of plaintiff] [or caused [name of plaintiff] to be touched];
> 2. That [name of defendant] used unreasonable force to [arrest/prevent the escape of/overcome the resistance of/insert other applicable action] [name of plaintiff];
> 3. That [name of plaintiff] did not consent to the use of that force;
> 4. That [name of plaintiff] was harmed; and
> 5. That [name of defendant]'s use of unreasonable force was a substantial factor in causing [name of plaintiff]'s harm.
> A [insert type of peace officer] may use reasonable force to arrest or detain a person when he or she has reasonable cause to believe that that person has committed a crime. Even if the [insert type of peace officer] is mistaken, a person being arrested or detained has a duty not to use force to resist a [insert type of peace officer] unless [he/she] is using unreasonable force.
> In deciding whether [name of defendant] used unreasonable force, you must determine the amount of force that would have appeared reasonable to a [insert type of peace officer] in [name of defendant]'s position under the same or similar circumstances. You should consider, among other factors, the following:
> (a) The seriousness of the crime at issue;
> (b) Whether [name of plaintiff] reasonably appeared to pose an immediate threat to the safety of [name of defendant] or others; and
> (c) Whether [name of plaintiff] was actively resisting arrest or attempting to evade arrest.
> [A [insert type of peace officer] who makes or attempts to make an arrest is not required to retreat or cease from his or her efforts because of the resistance or threatened resistance of the person being arrested.]

CACI 1305.

The California courts have found that assault and battery by a peace officer requires a showing that the force used was unreasonable just as a claim under Section 1983 for excessive force requires a showing of unreasonable force. "To avoid jury confusion and to ease judicial administration, it makes sense to require plaintiff to prove unreasonable force on both claims." Edson v. City of Anaheim, 63 Cal.App.4th 1269, 1274 (1998).

> [I]t appears unsound to distinguish between section 1983 and state law claims arising from the same alleged misconduct. Section 1983creates a species of tort liability (*Heck v. Humphrey, supra*, 512 U.S. at p. 483 [114 S.Ct. at p. 2370]) and is described as "the federal counterpart of state battery or wrongful death actions. [Citation.]" (*Edson v. City of Anaheim* (1998) 63 Cal.App.4th 1269, 1274 [74 Cal.Rptr.2d 614].) To make a prima facie case for either battery by a police officer or violation of section 1983, the plaintiff must demonstrate the unreasonableness of the force used. (*Edson v. City of Anaheim*, *supra*, at pp. 1272-1273.) "The federal practice [of requiring proof of unreasonableness in plaintiff's affirmative case] is all the more significant because plaintiffs sometimes join federal and state claims against police defendants, either in federal or state court. [Citations.] To avoid jury confusion and to ease judicial administration, it makes sense to require plaintiff to prove unreasonable force on both claims." (*Id.* at p. 1274; *see also Saman v. Robbins* (9th Cir. 1999) 173 F.3d 1150, 1156-1157 [section 1983 and state law battery claims require same evidentiary showing].)

Susag v. City of Lake Forest, 94 Cal.App.4th 1401, 1412-13 (2002).

In this case, whether Defendants are entitled to summary judgment on Plaintiffs' Fourth Amendment claim turns on what force Officer Noriega intended to use to seize Plaintiff. No party has briefed the issue of the reasonableness of Officer Noriega's force. In fact, it appears that even Defendants agree that the force Officer Noriega actually used, as opposed to the force she intended to use, was unreasonable. Because the court cannot find there is no disputed issue of material fact that Officer Noriega's use of the Glock was reasonable, the court cannot grant summary judgment on the assault and battery claim on the ground that Officer Noriega's use of force was reasonable.

The only similarity between a Fourth Amendment claim under Section 1983 and an assault and battery by a peace officer claim cited by Defendants is the requirement that both look to the reasonableness of the officer's use of force. At issue in the summary judgment motion on

Plaintiffs' Fourth Amendment claim is the means or instrumentality Officer Noriega intended to apply, not the reasonableness of the force she actually used. No party has briefed whether there are differences this requirement between a Fourth Amendment claim and an assault and battery claim. Those cases cited by Defendants do not stand for the proposition that an assault and battery by a peace officer claim also requires the officer to have touched the individual by the means or instrumentality set in motion to achieve that result. Thus, the court cannot grant summary judgment on the assault and battery by a peace officer claim merely because summary judgment is appropriate on the Fourth Amendment claim.

ORDER

Accordingly, for the reasons stated in the above memorandum opinion, the court ORDERS that:

1. Defendants' motion for summary adjudication is GRANTED in part and DENIED in part;
2. Summary judgment is GRANTED on Plaintiffs' first cause of action alleging violations of Everardo's and Plaintiffs' civil right pursuant to 42 U.S.C. § 1983; and
3. Summary judgment is DENIED on Plaintiffs' third cause of action alleging assault and battery by a peace officer.

IT IS SO ORDERED.

Dated: April 8, 2005 **/s/ Anthony W. Ishii**
0m8i78 UNITED STATES DISTRICT JUDGE