UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Jackie B. LeBlanc,
Plaintiff,
v.
City of Los Angeles, et al.,
Defendants

04-cv-8250 SVW (VBKx)
2006 U.S. Dist. Lexis 96768

August 16, 2006, Decided
August 17, 2006, Entered

Stephen V. Wilson
United States District Judge

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [73]

I. INTRODUCTION

Plaintiff Jackie B. LeBlanc ("Jackie LeBlanc" or "Plaintiff") is the widow of Phillip Wayne LeBlanc ("LeBlanc"), who died on April 1, 2004, after being briefly detained by officers of the Los Angeles Police Department ("LAPD"). Plaintiff filed this wrongful death action against the City of Los Angeles ("City"); the LAPD; Sergeant Sean Colomey, the commanding police officer in the April 1 incident; and William Skett ("Skett"), the police officer who fired two Taser charges against LeBlanc (collectively, "the City Defendants"). Taser International, Inc. ("Taser Inc."), which manufactures Taser weapons, has also been named as a defendant. The Court has bifurcated the proceeding against Taser Inc. those against the City Defendants.

The matter presently before the Court is the City Defendants' Motion for Summary Judgment. For reasons discussed below, the motion is GRANTED IN PART and DENIED IN PART.

II. FACTS

On April 1, 2004, at approximately 7:30 p.m., Michael Calloway ("Calloway"), a private security guard, saw the decedent LeBlanc engage in unusual behavior on a public street in Los Angeles. LeBlanc was yelling, waving his arms, and chasing cars in medium to heavy traffic. (Calloway Dep. at 17.) At one point, Calloway observed LeBlanc attempting to pull a car door open. (Id. at 27.) Calloway then stopped his vehicle in the middle of the street and stepped out to see if LeBlanc was in a medical emergency or being chased. (Id. at 23; Turnipseed Dep. at 13.) In addition, Calloway wanted to get LeBlanc off the road so he would not be hit by a car. (Calloway Dep. at 33.) Calloway approached LeBlanc and suggested, "let's get out of the street." (Id. at 32.) LeBlanc replied, "they're after me, they're over there, they're behind me, help me."

Calloway said, "okay, I am going to help you, but let's first get out of the street." LeBlanc responded, "okay." (Id.) The two men then walked to the sidewalk. While they were walking, LeBlanc continued to scream for help, complaining that "they're after me." (Id. at 32-33.) Calloway asked LeBlanc who he was referring to. LeBlanc simply reiterated that "they're after me." (Id.) LeBlanc did not resist Calloway's effort to steer him to the sidewalk. (Id. at 32.)

After reaching the sidewalk, LeBlanc wandered back onto the road. He was then brought back to the sidewalk by Calloway. It is not clear how many times LeBlanc left the sidewalk. At one point, Calloway reached for his cell phone to call for help, but then realized that he left his cell phone in his vehicle. Calloway told LeBlanc, "stay here, I am going to get some help." Calloway then attempted to retrieve the phone from his car, but then LeBlanc wandered back onto the road again. Calloway had to abandon his attempt to get the phone and return to LeBlanc's side. To get LeBlanc back onto the sidewalk, Calloway put his hand on LeBlanc's back in a friendly manner and walked him over to the sidewalk. (Id. at 35.)

Calloway formed the opinion that LeBlanc was either under the influence of a substance or mentally ill. (Id. at 37.) Calloway then decided to handcuff LeBlanc to prevent him from wandering back into traffic while Calloway called paramedics. (Id. at 34.) Calloway then told LeBlanc, "what I need you to do is place your hand behind your back. I am going to get you some help." (Id. at 34.) LeBlanc responded by putting his hands behind his back. (Id. at 37.) At this point, LeBlanc continued to call out for help, yelling "they're gonna get me." (Id.) Calloway told LeBlanc, "first I'm going to get you some help, but first I have to get these handcuffs on you." LeBlanc said, "okay." Calloway placed one handcuff ring on LeBlanc's right wrist. However, LeBlanc then wandered back onto the road, pulling along Calloway, who was holding onto the other ring of the handcuff. Calloway was unable to cuff LeBlanc's left wrist; he went around in circles about two or three times while LeBlanc was moving. At one point, LeBlanc pushed Calloway with his left elbow; Calloway believes that LeBlanc did not intend to strike him, but was instead trying to get away from his imaginary pursuers. (Id. at 40.) Calloway coached LeBlanc out of traffic by saying, "c'mon, let's get back to the sidewalk." (Id. at 40.) Having decided that he could not handcuff both of LeBlanc's wrists, Calloway then secured the open ring of the handcuff on LeBlanc to another handcuff, which was in turn fastened to a link in a chain-linked fence by the sidewalk. Thus, LeBlanc's right hand was handcuffed to the fence. During this time, LeBlanc continued to yell and pull away, apparently in fear of his imaginary pursuers. (Id. at 42.) After securing LeBlanc to the fence, Calloway proceeded to retrieve his phone and called 911. Calloway told the 911 operator that LeBlanc was possibly on PCP and wanted to kill himself. (911 Call Transcript, Brown Decl. Ex. 2.)

Two LAPD officers, Scott Stevens ("Stevens") and Timothy Pearce ("Pearce"), arrived at the scene while Calloway was on the 911 call. Stevens observed LeBlanc tugging on the fence with his cuffed hand. After speaking with Calloway, Stevens walked toward LeBlanc. LeBlanc said, "let me go. let me go. They're trying to get me. They're trying to get me." (Stevens Depo. at 23-25.) Stevens responded: "Sir, calm down a little bit. I'm a police officer. I'm here to help you. "(Id. at 26.) LeBlanc did not respond directly, and instead began to pull harder and harder on the fence. (Id.) At times, he screamed and growled; other times, he repeated "let me go. Let me go." Stevens told LeBlanc, "Sir, calm down and I can get you off the fence. I'm here to help you."

(Id.) Stevens then approached LeBlanc. As Stevens approached, LeBlanc swung his left arm at him, grazing Stevens' shirt. (Id.) Stevens backed up.

Stevens observed that LeBlanc was glassy eyed and sweating profusely. There was also a small trickle of blood from LeBlanc's right wrist going to his elbow. LeBlanc spoke continuously, but did not appear to be speaking to anyone in particular. (Id. at 27.) Based on his observation of LeBlanc's behavior and appearance, Stevens formed the view that LeBlanc was on PCP. (Id. at 29.)

LeBlanc screamed a couple more times: "let me go, let me go, they're trying to get me." After that, his speech became unintelligible growling. Stevens again attempted to calm him by saying "Sir, I can help you if I can get you off the fence." LeBlanc swung his left arm at Stevens again, and missed. (Id. at 31.)

At around 7:42 p.m., Pearce and Stevens requested the presence of a supervisor. (Colomey Dep. at 34.) Sergeant Sean Colomey ("Colomey") arrived and took command as the senior officer on the scene. Colomey immediately requested additional units and fire department support. Eight additional officers arrived immediately. (LAPD Critical Incident Report at 7.) Fire department personnel soon arrived as well. (Id. at 8.)

Sergeant Colomey attempted to speak with LeBlanc to build rapport. Each time Colomey attempted to engage in conversation, LeBlanc would reach out with his left hand, unsuccessfully attempting to grab or hit Colomey. (Colomey Dep. at 67.) LeBlanc did not make any verbal threats to the officers, or much coherent speech at all. LeBlanc's speech had become unintelligible; he made growling or grunting sounds, and yelled sounds like "ahh." (Id. at 42.) Colomey observed that LeBlanc was sweating profusely, in . . . spite of wearing just a tank top and jeans in a cool evening. (Id. at 68; Incident Property Report, Brown Decl. Ex. 25.) LeBlanc appeared to be bleeding, and seemed oblivious to the pain he probably experienced from repeatedly pulling the fence with the handcuffed left hand. 1 (Id. at 98.) Like Stevens, Colomey formed the belief that LeBlanc was under the influence of PCP. (Id. at 68.) LeBlanc did not appear to be, and was not, armed.

Colomey decided to devise a plan to take LeBlanc off the fence and secure him to a gurney so that paramedics could take him to a hospital for detoxification. (Id. at 90.) Colomey assigned Stevens to talk with LeBlanc and continue to attempt to establish a rapport. (Id. at 88.) Colomey then established a containment team to secure LeBlanc. Colomey considered a number of force options. He rejected using OC gas or pepper spray because he believed it would have been very difficult to spray LeBlanc, who was moving about the fence within a range limited by the handcuff on his right wrist. (Id.) Colomey was also concerned that neither of those options would have been sufficient to subdue LeBlanc, who appeared to be large and strong. 2 (Id.) Colomey considered but then rejected the option of a bean bag shot, which had to be fired from thirty feet away and might not stop LeBlanc's movement. (Id. at 89.)

Colomey decided to deploy the Taser M-26 weapon, which a LAPD training bulletin has described as a "less-lethal, energy conducted weapon." (LAPD Training Bulletin Volume XXXIV Issue 1, Brown Decl. Ex. 19). When the trigger is pressed, the Taser deploys two probes

which connect to the body of the target, either to the clothes or to the skin. The probes will release a current of electricity which temporarily overrides the target's central nervous system and cause temporary muscular paralysis. The electric current follows a direct path between the two probes. Each discharge of electricity lasts up to five seconds. During discharge, the probes are connected by wire to the Taser device. If the target is still resistant or non-compliant after the first discharge, further discharges can be released by pressing the trigger.

Colomey's plan called for an initial Taser charge to be deployed against LeBlanc. After LeBlanc was immobilized, a contact team of five or six officers would grab onto LeBlanc's limbs and torso, unfasten the handcuff on his right hand, then handcuff his two hands together behind his back and apply a hobble restraint to his ankles. With LeBlanc thus secured, the officers would lay LeBlanc on a gurney to allow paramedics to take him to a hospital.

The plan was implemented only minutes after Colomey and other reinforcements arrived at the scene. At the outset, Colomey verbally warned LeBlanc that a Taser discharge would be deployed and that it would cause him pain if he did not comply with police instructions. (Id. at 128.) Officer William Skett ("Skett") then launched a Taser discharge against LeBlanc. Taser probes struck LeBlanc in the back and released a 5-second charge while LeBlanc's right hand was handcuffed to the fence. LeBlanc's body stiffened, and he slid down to the ground, while his right hand was still raised because it was handcuffed to the fence. Five officers swarmed LeBlanc, unfastening the handcuff from his right hand and placing his body on the ground, with his stomach facing down. Officer Dominick Iasparro ("Iasparro") held on to LeBlanc's legs, Officer Brett Clark) was on his back, and three other officers held his shoulders. Brett Clark, who weighed over 220 pounds, sat on LeBlanc's back. LeBlanc then moved in a push-up motion, apparently overcoming the collective pressure exerted on his body by five officers. Colomey estimated the collective weight of the officers to be 800-1000 pounds. Colomey then ordered Skett to use Taser one more time. At this point, the Taser probes were still attached to LeBlanc's body and connected by wire to the Taser weapon. Skett pressed the trigger again. Brett Clark and Iasparro screamed, indicating that they felt the impact of the electric current. Skett stopped the Taser discharge immediately. The second discharge lasted three seconds. (Skett Dep. at 34.)

During or after the second Taser discharge, LeBlanc attempted another pushup but immediately dropped back down into a prone position, with his stomach facing down. The officers applied restraints to LeBlanc's wrists and ankles. After the restraints were applied, Stevens noticed that LeBlanc did not appear to be breathing. The paramedics moved in and determined that LeBlanc was in full cardiac arrest. 3 They administered Cardio Pulmonary Resuscitation ("CPR"). (LAPD Critical Incident Report at 10.) LeBlanc was lifted onto a gurney and taken by ambulance to the Martin Luther King/Drew Medical Center. Transport of LeBlanc began at 8:01 p.m., about twenty minutes after Colomey first received Stevens and Pearce's request for assistance. (Emergency Medical Service Report, Brown Decl. Ex. 4.) LeBlanc was pronounced dead at 10:18 p.m. (RJN Ex. 1.)

The coroner's report identified the cause of death as excited delirium caused by cocaine intoxication. (Id.) However, the cause of death is vigorously disputed by the parties. Plaintiff alleges that the Taser discharges, rather than cocaine, caused LeBlanc's demise.

C. Procedural History

Plaintiff filed the initial complaint in Los Angeles Superior Court on August 31, 2004. The City and the LAPD were served on September 3, 2004. The case was timely removed to this Court on October 4, 2005. On November 8, 2004, Plaintiff filed the first amended complaint. On December 14, 2004, Plaintiff filed the second amended complaint ("SAC"). The named Defendants were the City; the LAPD; Sergeant Colomey; Calloway; Skett; Clark; Iasparro; Pearce; LAPD chief William Bratton ("Bratton"); Taser International, Inc. ("Taser Inc."); and the following additional LAPD officers: Michael Miracle ("Miracle"), Patrick Flaherty ("Flaherty"), Gerardo Vejar ("Vejar"), Robert Fontes ("Fontes"), and Darryl Scales ("Scales"). Plaintiff asserted the following causes of action: (1) wrongful death against the City, the LAPD, the City, Bratton, and all police officer Defendants; (2) violation of the Fourth, Fifth, and Fourteenth Amendments to the U.S. Constitution, actionable under 42 U.S.C. § 1983, against the City, the LAPD, Bratton, and all police officer Defendants; (3) neglect to prevent civil rights violation, 42 U.S.C. § 1986, against the City, the LAPD, Bratton, and all police officer Defendants; (4) civil conspiracy against all police officer Defendants; (5) civil rights violation, Cal. Civ. Code § 52.1, against all Defendants; (6) negligence against all Defendants; and (7) strict product liability against Taser Inc.

On December 15, 2004, the Court dismissed Defendant Calloway. On February 22, 2005, the Court severed the action with regard to Taser Inc. On March 21, 2005, the Court dismissed Bratton as well as all police officer Defendants other than Colomey and Skett. Thus, at this moment, there are five remaining Defendants in the bifurcated action. One the one hand are the City Defendants: the City, the LAPD, Colomey, and Skett. On the other side is Taser Inc.

On April 28, 2004, the City Defendants filed a motion for summary judgment as well as motions in limine to exclude the expert testimony of Plaintiff experts Dr. Gary Ordog ("Ordog") and Roger Clark. On May 9, 2005, Plaintiff filed her opposition. Attached to the opposition were declarations from two newly identified expert witnesses, Dr. Michael Morse and Dr. Dennis Hooper. On May 16, 2005, the City Defendants replied, and objected to the declarations of Dr. Morse and Dr. Hooper as untimely filed. On May 18, 2005, the Court accepted the declarations of Dr. Morse and Dr. Hooper, and gave the City Defendants additional time to depose them. On June 16, 2005, Plaintiff filed a supplemental opposition to the motion by the City Defendants. On June 23, 2005, the City Defendants replied to the supplemental opposition.

III. EVIDENTIARY OBJECTIONS

A. Expert Testimony

Plaintiff's four expert witnesses opine as follows: that LeBlanc's death was caused by cardiac arrest triggered by the Taser discharge; that the amount of cocaine present in LeBlanc's body was insufficient to cause death; that LeBlanc was already vulnerable to cardiac arrest because of his cocaine intoxication; that the Taser electrical discharge was amplified by the cuffing of LeBlanc to a metal fence; that a Taser discharge against LeBlanc constituted a use of deadly force; and that LAPD officers' use of force violated police standards and procedures.

The first expert witness for Plaintiff, Gary Ordog, M.D., is a Board-certified emergency medicine specialist and medical toxicologist. He received his M.D. from the University of British Columbia, and has extensive experience treating trauma patients, including those who suffered Taser injuries. Dr. Ordog opines that the amount of cocaine and alcohol in LeBlanc at the time of death was non-lethal, and that his death was caused by cardiac arrest resulting from Taser discharges. Dr. Ordog further states that the handcuffing of LeBlanc to the metal fence probably increased the electrical load on his body. Finally, Dr. Ordog believes that LAPD officers violated Taser protocol in deploying the device against an individual who was already restrained.

Dennis Hooper, M.D., Ph.D., is a medical doctor certified in anatomical and clinical pathology. He received a M.D. from the University of Nevada, Reno, and a Ph.D. in microbiology from the University of California, Davis. Dr. Hooper plans to testify that the level of cocaine found in LeBlanc's blood was not of lethal dose, and that the Taser discharges were the "major contributing cause of death." (Brown Decl. Ex. 17.)

Michael Morse, Ph.D., is a professor of electrical engineering at the University of San Diego. He holds a Ph.D. in bioengineering, with a minor in electrical engineering, from Clemson University. He has published in the area of electrical injury and electrical shock, and has received a patent for a device that provides electrical stimulation to human tissue. He opines that LeBlanc's state of agitation placed him at an elevated level of susceptibility to electrical injury. He further claims that the use of Taser in those circumstances should be deemed a use of deadly force.

Gary Clark, the fourth and last expert witness for Plaintiff, is a twenty-seven year veteran of the Los Angeles County Sheriff's Department ("LACSD"). Before retiring from active service in 1993, his career included six years at the rank of deputy sheriff, six years as a sergeant, and fifteen years as a lieutenant. He holds a California Peace Officer Standard Training ("POST") advanced certificate, and is a graduate of the POST Command College. He has extensive experience testifying as an expert on police procedure and police tactics in both state and federal court. Clark opines that LAPD officers did not follow standard police protocol and procedure because they acted with unnecessary haste in using force without giving sufficient time for the situation to de-escalate, and because they did not take into account LeBlanc's heightened vulnerability in executing the tactical plan.

The City Defendants' only expert witness is Solomon Riley, Jr., M.D., a deputy medical examiner of the Los Angeles County Department of the Coroner. Dr. Riley performed an autopsy on LeBlanc and authored the autopsy report. In the declaration, Dr. Riley opined that the cause of death was excited delirium due to cocaine intoxication, and that the Taser discharges did not contribute to LeBlanc's death. Although City Defendants have not specifically identified Dr. Riley as an expert witness - his declaration claims that he has personal knowledge of the subject of his testimony - his testimony as to cause of death constitutes expert testimony applying "scientific, technical, or other specialized knowledge" within the meaning of Federal Rule of Evidence 702. 4

The City Defendants have filed motions in limine to exclude certain portions of the expert testimony of Roger Clark and Dr. Ordog. The City Defendants have not objected to the

testimony of Dr. Morse and Dr. Hooper on Daubert grounds. Neither has Plaintiff objected to the testimony of Dr. Riley.

B. Legal Standard

Federal Rule of Evidence 702 governs the admissibility of expert testimony in federal court. 5 Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993); Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999). Under Daubert, a federal district court applying Rule 702 is charged with the gate-keeping role of ensuring that scientific evidence is both relevant and reliable. 509 U.S. at 589-95. Daubert set forth a non-exclusive list of factors to guide the reliability inquiry: (1) whether the scientific theory or technique can or has been tested; (2) whether the scientific theory or technique has been subjected to peer review and publication; (3) in the case of a particular scientific technique, the known or potential rate of error; and (4) whether the theory or technique has gained general acceptance in the scientific community. Id. at 593-95. In Kumho Tire, the Supreme Court further held that gate-keeping obligation extends not just to scientific testimony, but also to technical or other specialized knowledge, including testimony based on an expert's own experience. 526 U.S. at 141.

The Supreme Court has repeated emphasized that the Rule 702 inquiry is "flexible." Daubert, 509 U.S. at 594; Kumho Tire, 526 U.S. at 150. "Not only must the trial court be given broad discretion to decide whether to admit expert testimony, it must have the same kind of latitude in deciding how to test an expert's reliability." United States v. Hankey, 203 F.3d 1160, 1168 (9th Cir. 2000) (citation omitted). Thus, a district court's decision to admit or exclude testimony may be reversed only for abuse of discretion. Kumho Tire, 526 U.S. at 142 (citation omitted).

A district court may, but is not required to, hold a pre-trial hearing to determine admissibility of expert testimony. United States v. Alatorre, 222 F.3d 1098, 1099 (9th Cir. 2000). As an alternative to a pre-trial hearing, admissibility determination may be made during trial. Id. The question of admissibility may be raised by the court sua sponte. See Kirstein v. Parks Corp., 159 F.3d 1065, 1067 (7th Cir. 1998) ("We have not required that the Daubert inquiry take any specific form and have, in fact, upheld a judge's sua sponte consideration of the admissibility of expert testimony.")

C. Dr. Ordog's Testimony

The City Defendants seek to exclude three portions of Dr. Ordog's proposed testimony: (1) that Taser discharges, rather than cocaine intoxication, caused LeBlanc's death; (2) that the Taser device's electric load was increased by the fact that LeBlanc was chained to a metal fence; and (3) that LAPD officers violated the Taser use protocol. The City Defendants object both to Dr. Ordog's qualifications and methodology.

With regard to qualifications, the City Defendants point out that Dr. Ordog is trained in toxicology rather than pathology, has no autopsy experience, and has not performed any tests to support his findings. However, these deficiencies go only to the weight, not the admissibility, of Dr. Ordog's opinion. Dr. Ordog has extensive experience in emergency medicine, including

seventeen years at King/Drew Medical Center. In over two decades of medical practice, he has treated numerous patients and provided the cause of death for, in his own estimation, tens of thousands. (Ordog Dep. at 90.) In addition to several articles on gunshot wounds, he has also published a study of Taser injuries. Thus, Dr. Ordog certainly has the requisite experience to render a medical opinion on the cause of death, even if he is not a pathology specialist. See Gaydar v. Sociedad Instituto Gineco-Quirurgico y Plaintificacion Familiar, 345 F.3d 15, 25 (1st Cir. 2003) (it would be reversible error to exclude a physician's expert testimony, in a case involving alleged malpractice during an abortion, for the sole reason that his specialty was something other than gynecology or obstetrics); see also Holbrook v. Lykes Bros. S.S. Co., 80 F.3d 777, 782 (3d Cir. 1996) (finding reversible error where the trial court excluded a physician's testimony because he was not trained in the most directly relevant specialty).

Moreover, Dr. Ordog's methodology appears to be accepted by the mainstream of the medical community. He formed his opinion by applying differential diagnosis to the coroner's report. Differential diagnosis "is a standard scientific technique of identifying the cause of a medical problem by eliminating the likely causes until the most probable one is isolated." Clausen v. M/V New Carissa, 339 F.3d 1049, 1057 (9th Cir. 2003.) The Ninth Circuit has recognized differential diagnosis as a reliable methodology under the Daubert standard. Id. at 1058. During his deposition, Dr. Ordog explained that the coroner's report showed no signs of physical cause of death, and that the amount of cocaine described in the report was not lethal. He relied on a widely used text - Disposition of Toxic Drugs and Chemicals in Man by Randall Baselt, which lists the lethal levels of cocaine and other drugs - to rule out cocaine intoxication as the cause of death. (Ordog Dep. at 103.) The absence of other probable causes, combined with the temporal relationship between the second Taser discharge and LeBlanc's cardiac arrest, led him to identify Taser as the cause of death. (Ordog Dep. at 23-24.) There is no reason to believe that this conclusion is speculative rather than based on Dr. Ordog's experience and accepted medical science.

The City Defendants emphasize that Dr. Ordog did not directly examine LeBlanc. However, that objection goes only to the weight, not the admissibility, of his testimony. The City Defendants further argue that Dr. Ordog lacks sufficient specific knowledge regarding Taser technology to opine that Taser caused death. However, this contention ignores the fact that Dr. Ordog has published a study of Taser injuries in the 1980s and has also treated Taser injuries in the past. Again, the argument goes to the weight rather than the admissibility of testimony. In the normal course of medical practice, doctors routinely diagnose and treat injuries caused by machines or chemicals in which they lack specific expertise. It would be absurd to consider a medical diagnosis unreliable or speculative simply because the physician is not also an expert in chemistry or electrical engineering.

However, the Court finds inadmissible Dr. Ordog's testimony that the handcuffing of LeBlanc to the fence increased the electrical load from Taser. In his deposition, Dr. Ordog attributed this opinion to the general principle that the seriousness of injury from electrical current is likely to be greater when the subject is electrically grounded, such as someone standing in water or waking barefoot without insulation. However, Dr. Ordog has not identified any scientific literature which explains or validates this theory. That is sufficient ground for exclusion. The Court notes that contrary to the City Defendants' contention, Dr. Ordog is not required to

produce literature or conduct experiments specifically on the subject of using the Taser on someone chained to a metal fence. The application of general scientific principles to the case at hand is properly the domain of the expert. Sullivan v. U.S. Dep't of Navy, 365 F.3d 827, 834 (9th Cir. 2004) ("the district court abused its discretion by requiring the text to state the precise type of harm explained by the specialized testimony of a medical expert.") It should be enough for Dr. Ordog to point to literature on the grounding property of metal and the impact of electric currents on a grounded subject, without specifically identifying literature on Taser and chain-linked fences. But because he has not done so, his testimony does not pass muster under Daubert.

The Court also excludes Dr. Ordog's testimony as to police procedure and Taser protocol. Dr. Ordog has admitted that he is not an expert in police procedures, yet he has offered to testify that LAPD officers violated Taser use protocol. Although he indicated in the deposition that he has worked with Taser injuries in the past, it is not clear how he became knowledgeable about police procedure. In the deposition, he identified a LAPD training bulletin as the basis for his opinion. However, the training bulletin speaks for itself. The fact finder can read the training bulletin; it is unclear how an opinion from Dr. Ordog, who is no police procedure expert, will assist the fact finder in understanding the document.

D. Roger Clark's Testimony

Roger Clark, Plaintiff's police procedure expert, will testify that LAPD officers violated POST training procedures and guidelines. The City Defendants object to five aspects of his opinion: (1) references to Taser as the "death weapon"; (2) references to LeBlanc as "impaired, delusional and emotionally distraught"; (3) description of Taser as "an electrical weapon that sends a powerful jolt of electrical current though the living tissue of the target" and as a weapon capable of inflicting both serious injury and death; (4) that "an early intercession by a competent officer would have saved Mr. LeBlanc's life"; (5) any opinions he offers, including those related to psychology or psychiatry.

First, the City Defendants are correct that Roger Clark should not be permitted to describe Taser as the "death weapon." The term connotes that Taser was the cause of death, yet Roger Clark is not a medical expert qualified to render a cause-of-death opinion. In addition, such language can be highly prejudicial to the City Defendants.

Second, on the other hand, the Court will permit Roger Clark to describe LeBlanc as delusional, impaired, distraught, or any other adjective that a lay person would use to describe a person in LeBlanc's state at the time of the incident. The City Defendants argue that Roger Clark is not a medical expert qualified to determine LeBlanc's mental state, but the argument misses the point. A key element of Roger Clark's testimony is that LAPD officers violated police protocols for dealing with delusional and distraught individuals. It is irrelevant whether LeBlanc was delusional in the medical sense; the point is that LAPD officers should have followed certain guidelines in dealing with an individual who appeared delusional to them. Because it is undisputed that the officers considered LeBlanc to be delusional, Roger Clark is entitled to describe LeBlanc accordingly. At the minimum, Roger Clark may describe LeBlanc as someone who appeared to be delusional within the meaning of police procedures.

Third, whether the Taser weapon may cause a serious injury or death is beyond Roger Clark's expertise. In his deposition, he was unable to identify any police training manual or material that discusses Taser's potential to cause serious injury or death, other than that some materials characterize the weapon as "less lethal." Moreover, he has not personally observed a Taser-related death in his police career, and has personally handled the M-26 model only a few times himself. Therefore, the Court finds this testimony inadmissible. In any event, Plaintiff has an electrical engineering expert who offers testimony as to Taser's lethal capability.

Fourth, the City Defendants object to Roger Clark's testimony that "an early intercession by a competent officer would have saved Mr. LeBlanc's life." This statement appears to be a medical opinion regarding LeBlanc's physical state during the incident. Roger Clark lacks the qualifications to render a medical opinion. The statement is inadmissible.

Lastly, the City Defendants object to what they argue are medical opinions in Roger Clark's deposition, including his assessment that LeBlanc did not have the "superhuman strength" described by Colomey, 6 and that the officers should not have placed their body weight on LeBlanc's back due to the danger of asphyxiation. Colomey had justified his decision to use Taser on the ground that LeBlanc exhibited "superhuman strength." Roger Clark disputes this. Read in context, Roger Clark's deposition statements relate that, based on his experience and relevant police guidelines, the numerically superior LAPD officers could have overpowered a lone individual without resorting to the Taser weapon, notwithstanding Colomey's claim that LeBlanc demonstrated "superhuman strength." That testimony is based on the expert's experience and training, and is admissible. As for the danger of asphyxiation, that risk is specifically discussed in the police training materials relied on by Roger Clark. As a police procedure expert, Roger Clark should be permitted to testify that the officers' conduct violated the relevant guideline's warnings about asphyxiation.

IV. THE SUMMARY JUDGMENT MOTION

A. Legal Standard Rule 56(c) requires summary judgment for the moving party when the evidence, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Tarin v. County of Los Angeles, 123 F.3d 1259, 1263 (9th Cir. 1997).

The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). That burden may be met by "'showing' -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." Id. at 325. Once the moving party has met its initial burden, Rule 56(e) requires the nonmoving party to go beyond the pleadings and identify specific facts that show a genuine issue for trial. See id. at 323-34; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). "A scintilla of evidence or evidence that is merely colorable or not significantly probative does not present a genuine issue of material fact." Addisu v. Fred Meyer, 198 F.3d 1130, 1134 (9th Cir. 2000).

Only genuine disputes -- where the evidence is such that a reasonable jury could return a verdict for the nonmoving party --over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. See Liberty Lobby, 477 U.S. at 248; see also Arpin v. Santa Clara Valley Transp. Agency, 261 F.3d 912, 919 (9th Cir. 2001) (the nonmoving party must offer specific evidence from which a reasonable jury could return a verdict in its favor).

B. Excessive Force

Plaintiff's excessive force claim cites the Fourth, Fifth, Sixth, and Fourteenth Amendments to the Constitution. However, there is no factual basis for alleging a Sixth Amendment violation; Plaintiff does not allege that LeBlanc was denied a fair trial or the right to confront witnesses. In addition, Supreme Court has held that an excessive force claim is properly analyzed under the Fourth Amendment, not the Due Process Clause of the Fifth and Fourteenth Amendments. Graham v. Connor, 490 U.S. 386, 388, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). Accordingly, the Court construes Plaintiff's excessive claim as arising under the Fourth Amendment.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV. Plaintiff claims that the City Defendants used unreasonable and excessive force to effectuate LeBlanc's arrest. In particular, Plaintiff challenges the use of the Taser device on LeBlanc, on the ground LeBlanc was at an elevated level of vulnerability to electrical injury due to his cocaine intoxication, and that LeBlanc was already handcuffed to the fence and posed no threat to the officers. The pleading also alleges that the imposition of the officers' body weight on LeBlanc's back was also excessive. The City Defendants deny that a constitutional violation occurred, and contend that they are in any event entitled to qualified immunity.

In Saucier v. Katz, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001), the Supreme Court established a two-step inquiry for assessing whether qualified immunity applies to an excessive force claim arising in the context of an arrest. First, a court should determine whether, "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" Id. at 201. "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." Id. But if a violation can be made out from the submissions, then the court must proceed to the next step, which is to determine whether the breached constitutional right was "clearly established." The "clearly established" inquiry must be "undertaken in light of the specific context of the case, not as a broad general proposition . . . ." Id. If the right was not clearly established, then qualified immunity applies.

Thus, as a threshold matter, this Court must consider whether Plaintiff's Fourth Amendment right was violated on the basis of the submitted evidence, viewed in light most favorable to Plaintiff. Whether a particular use of force is reasonable is determined under the objective reasonableness standard of Graham v. Connor, 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). Whether the use of force is objectively reasonable is assessed by balancing "the quality and nature of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." Id. at 396 (citation omitted). The Court's inquiry

is guided by the following factors: (1) the quantum of force used to effectuate the arrest; (2) whether the suspect posed a threat to the safety of the officers or others; (3) the severity of the crime at issue; (4) whether the individual resisted arrest or attempted to flee; and (5) the availability of alternative methods of capturing or subduing the suspect. Smith v. City of Hemet, 394 F.3d 689, 702-03 (9th Cir. 2005) (en banc). With respect to deadly force, its use is reasonable only if necessary to prevent flight and the officer has probable cause to believe that the suspect poses a significant threat of death or serious bodily harm to others. Id. at 704 (citing Tennessee v. Garner, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985)). In all circumstances, "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Graham, 490 U.S. at 396 (quoting Terry v. Ohio, 392 U.S. 1, 20-22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1988))

Because the excessive force cases usually turn on a jury's credibility determinations, summary judgment should be granted sparingly. City of Hemet, 394 F.3d at 701.

1. Was There a Constitutional Violation?

The first issue to consider is the "type and amount of force inflicted." Drummond ex. rel Drummond v. City of Anaheim, 343 F.3d 1052, 1056 (9th Cir. 2003). Even though he was already handcuffed to a fence, LeBlanc was Tasered twice, swarmed, and was pinned to the ground by the collective weight of five officers. Officer Clark, who weighed over 220 pounds, assumed a "top position" - which essentially meant sitting on LeBlanc's back. Plaintiff's medical experts, Dr. Ordog and Dr. Hooper, opine that Taser discharges constituted a major contributing cause to LeBlanc's death. Moreover, Plaintiff's electrical engineering expert, Dr. Morse, opines that Taser is a highly dangerous and potentially lethal weapon. Dr. Morse further testifies that the use of Taser on LeBlanc, who was at an elevated level of vulnerability to electrical injury due to cocaine intoxication, should be deemed a use of "deadly force."

The Ninth Circuit decided in 2005, after the instant action had commenced, that a use of force is considered deadly if it "creates a substantial risk of causing death or serious bodily injury." City of Hemet, 394 F.3d at 706. City of Hemet overruled the stricter standard established earlier in Vera Cruz v. City of Escondido, 139 F.3d 659, 663 (9th Cir. 1997), which held that force is deadly only if it was "reasonably likely to kill." Even though City of Hemet was decided after the events that led to the instant suit, City of Hemet's definition for deadly force governs the Court's inquiry on whether a constitutional violation occurred. See Nelson v. Giurbino, 395 F. Supp. 2d 946, 954 (S.D. Cal. 2005) (retroactively applying Ninth Circuit holding to determine whether a constitutional violation occurred for purposes of the first step of the qualified immunity inquiry); see also United States v. Booker, 543 U.S. 220, 268, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005) (applying holding on constitutional rights retroactively to all cases on direct review).

Because City of Hemet remains a fairly recent decision, there has been no published opinions in the Circuit applying it to "less-lethal" weapons such as Taser. Dr. Morse's declaration recognizes that, theoretically at least, the low-energy electric impulses generated by Taser is unlikely to impact the heart in most circumstances. However, Dr. Morse emphasizes that LeBlanc was "in an agitated state that placed him at elevated risk of electrical injury." (Morse Decl. at 7.) His

testimony is consistent with a LAPD training bulletin issued in 1999, which discussed the risk of sudden death for vulnerable suspects during struggles with officers, and provided a "suspect/situational profile if an 'at-risk' suspect for sudden death." The bulletin identified obesity, mental illness, and drug/alcohol intoxication as pre-existing conditions that may render a suspect more susceptible to sudden death. Specifically,

> Drug and acute alcohol intoxication cause a reduction in the respiratory function. Particular attention must be paid to suspects under the influence of cocaine. Cocaine-induced excited delirium (this mental disorder is a result of excessive use of cocaine) may make a suspect more susceptible to sudden death by effecting an increase of the heart rate to a critical level.

(Brown Decl. Ex. 17.) Readers were further warned about violent struggles in which pressure is applied to the back of a suspect in a prone position, because "'at risk' suspects are extremely vulnerable to sudden death following this violent struggle due to the added effects of their pre-existing conditions." (Id.)

It is undisputed that LeBlanc appeared, to the lay observer, to be obese and either mentally ill or under narcotic influence. Considering LeBlanc's vulnerability, and the medical experts' testimony that Taser discharges caused LeBlanc to enter into cardiac arrest, it would not be unreasonable for a jury to find the applied force to be deadly. 7 See Drummond, 343 F.3d at 1056 (finding that force applied by two officers, who pressed their body weight on the handcuffed plaintiff's neck and torso even as he begged for air, was capable of causing death or serious injury). 8 In any event, even if the force used was not deadly, it was clearly severe considering the pain and the health risks involved.

The second factor the Court must consider - the threat posed by the suspect - is the single most important factor in an excessive force inquiry. City of Hemet, 394 F.3d at 702. LeBlanc was already handcuffed to the fence by the time LAPD officers used Taser against him. Before he was handcuffed, he showed no signs of aggression, and was instead trying to flee from imaginary pursuers. After he was handcuffed, he attempted to hit and grab the officers with his free left hand. Although it is important not to downplay the seriousness of attempting to hit a police officer, the fact is that the officers easily evaded his grasp simply by standing beyond the range of movement permitted by his handcuff. Further, the officers admitted they observed no weapons in LeBlanc's possession, and that no weapons were found after his arrest. Although the City Defendants now contend that the officers could not determine whether he had a weapon in his possession, Plaintiff's police procedure expert opine that the officers' tactical formation showed that they were not concerned about the possibility of LeBlanc being armed. Interpreting the facts in light most favorable to Plaintiff, a reasonable jury could easily find that, objectively, LeBlanc was not a serious threat to the officers or to others.

The third factor is the severity of the crime at issue. According to Sergeant Colomey, his primary objective was to get LeBlanc off the fence so he may be taken to a hospital for medical treatment. His deposition, along with the deposition of other officers on the scene, evidenced very little concern for whatever crime, if any, LeBlanc was suspected of committing. To the extent that he might have been a suspect, it would have been for being under the influence of a

controlled substance. While that crime is not trivial, there were no signs that LeBlanc was a particularly dangerous criminal. Moreover, by the time the officers arrived, he was already handcuffed to the fence. Under these circumstances, a reasonable jury could find that the nature of the crime at issue provided no basis for the force applied. See City of Hemet, 394 F.3d at 702-03 (domestic abuse was not sufficient basis for police to use the pepper spray and unleash a canine attack, where the plaintiff was alone and not abusing his spouse when the police arrived, even though the police dog's teeth were capped.)

The City Defendants also maintain that the LeBlanc could have been charged with attempted carjacking, on the ground that he was chasing cars and attempted to open a car door when Calloway arrived. But this is no indication in the record that the alleged carjacking attempt motivated the officers' use of force; instead, Sergeant Colomey's only goal was to contain LeBlanc to prevent him from roaming the city in his agitated state, and to get him to a hospital for medical attention. The carjacking argument appears to be one made solely for litigation. A reasonable jury could find that LeBlanc's suspected crimes did not warrant the force applied.

The fourth factor is whether the suspect resisted arrest or attempted to flee. As the City Defendants point out, it is undisputed that LeBlanc did not comply with the officers' instructions, and that he attempted to grab or hit at least two of the officers present. However, LeBlanc was already handcuffed to the fence when the officers arrived. Chained to the fence and surrounded by more than ten officers, his ability to resist or flee was minimal, if not illusory. A civilian witness testified that the fence seemed secure, in contrast to Sergeant Colomey's concern that LeBlanc might break free from the fence. (Turnipseed Dep. at 55.) Viewed in light most favorable to Plaintiff, a reasonable jury could find that LeBlanc's resistance could have been overcome and the risk of him escaping was minimal.

The fifth factor is the availability of less intrusive means of apprehending the suspect. Plaintiff's police procedure expert Roger Clark opine that in his experience and according to police training standards, Sergeant Colomey acted with unnecessary haste in ordering the use of Taser only minutes after arriving on the scene. According to Roger Clark, police training materials counsel a period of decompression when officers deal with delirious suspects such as LeBlanc. His anxiety might have heightened by the arrival of police cars and the associated lighting and noise, and that giving him time to compress could help him calm down, especially since the effect of narcotic intoxication tends to decline over time. Roger Clark will further testify that in situations such as these, the officers could have easily overpowered and restrained LeBlanc without resorting to either Taser or placing full body weight on his back after he was swarmed. A jury could reasonably rely on such expert testimony to conclude that lesser force should have been used. See City of Hemet, 394 F.3d at 703 (a reasonable jury could rely on expert testimony regarding police procedure to find that unreasonable force was used).

Viewing the above factors in the totality of the circumstances, it appears that a reasonable jury can find that the officers used unreasonable force in using Taser on LeBlanc and pinning his back to the ground. If the jury finds that deadly force was used, then there was certainly a constitutional violation, because deadly force may be used only if the suspect himself poses a threat of death or serious bodily harm to others. Id. at 704. There is no indication in the record that LeBlanc posed such a threat. In any event, even if the use of Taser was not deadly, it was

still unreasonable given the testimony of Plaintiff's experts. A jury can still reasonably find the use of Taser to be non-lethal yet excessive, considering that LeBlanc was vulnerable, already handcuffed to the fence, was not a suspect for a serious crime, and that less intrusive means were available to effect his arrest.

2. Was the Officers' Conduct Clearly Unconstitutional at the Time of the Incident?

Even if the officers violated the Fourth Amendment under Plaintiff's account of the facts, they are entitled to qualified immunity if the unconstitutionality of their conduct was not clearly established at the time of the incident. "Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted." Brosseau v. Haugen, 543 U.S. 194, 125 S. Ct. 596, 599, 160 L. Ed. 2d 583 (2004) (citation omitted). "Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct." Id.

As the Supreme Court has taught, "[i]t is important to emphasize that this inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition." Id. In Brosseau, the Supreme Court reversed a Ninth Circuit decision that denied qualified immunity to a police officer who shot a fleeing suspect. Specifically, the officer was confronted with the decision of "whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight." Id. at 600. The Ninth Circuit relied on the general tests set forth in Graham and Garner to find that the defendant police officer had fair warning that her conduct was unconstitutional. The Supreme Court, however, held that the court should have considered the case law specific to the factual situation at issue, and further found that no precedent clearly established that the officer's particular conduct clearly violated the Constitution. Id. at 599-600.

In the instant case, it is important to point out that under governing Ninth Circuit law at the time of the incident, force was deadly only if it was "reasonably likely to kill." Vera Cruz, 139 F.3d at 663. Although this definition of deadly force was later overruled by City of Hemet, the Court must apply the law operative at the time of the incident to assess whether the constitutional violation was clear at that time. Brosseau, 125 S. Ct. at 599. Accordingly, Plaintiff can establish unconstitutional use of deadly force only if she can show such a violation under the stricter Vera Cruz standard. The Court further emphasizes that the crucial issue is not whether police officers generally may use force against agitated individuals, but whether Taser specifically could be used. Unlike weapons that rely on blunt force - such as guns, batons, knives, or beanbag shots - Taser is an energy-based weapon whose inner workings and physiological impact are not obvious. Thus, there can be no fair notice regarding the constitutionality of Taser use unless the notice is provided by sources that specifically address Taser.

Plaintiff has not cited any authority holding that the use of Taser to apprehend a resisting yet trapped and unarmed suspect constituted a Fourth Amendment violation. Instead, Plaintiff relies on Drummond, 343 F.3d 1052, and Deorle v. Rutherford, 272 F.3d 1272 (9th Cir. 2001). Both cases are easily distinguishable. In Deorle, the plaintiff was a mentally disturbed individual who was shot and seriously wounded by a beanbag round fired from a police shotgun. Police had

responded to a call made by the plaintiff's wife, who reported that the plaintiff was behaving erratically and suicidal. After the officers arrived, the plaintiff marched toward one of the officers at a steady pace with a can of lighter fluid in his hand, while shouting expletives. A beanbag round was fired without warning striking one of the plaintiff's eyes. Shooting a beanbag round from a shotgun, however, is far different from launching a Taser charge against a narcotically intoxicated individual. The key difference is the nature of the force applied. A beanbag round can inflict physical injuries regardless of who the target is; in contrast, the injurious potential of Taser appears to be highly dependent on the state of the target's health. Deorle does not give the officers in this case fair warning that their conduct was unconstitutional.

In Drummond, police was called to help protect a mentally disturbed, hallucinating individual who was in danger of hurting himself by darting into traffic. The officers decided to arrest the individual for his own safety. To do so, the officers knocked him to the ground, handcuffed him, and then sat on him, even though he offered no resistance. Witnesses verified that the plaintiff clearly had trouble breathing and repeatedly begged for air, but the officers continued to sit on him. He weighed 160 pounds, while one of the officers weighed over 200 pounds. The resultant lack of oxygen in the plaintiff's heart caused cardiopulmonary arrest, forcing him into a permanently vegetative state. Like Deorle, this case offers no guidance on to the City Defendants on whether their use of Taser was constitutionally permissible.

Besides judicial opinions, another possible source of notice might be police training materials. In Drummond, the Ninth Circuit held that police training materials may give police officers sufficient notice that their conduct was proscribed. 343 F.3d at 1061-62. However, even under Drummond's flexible approach, it does not appear that the officers had sufficient notice. Plaintiff points to a LAPD's bulletin on "sudden death" show that obese and narcotically intoxicated individuals are highly vulnerable, but the document does not discuss the potential impact Taser may have on these at-risk individuals. (Brown Decl. Ex. 17.) Plaintiff also cites the LAPD's Taser training bulletin. (Brown Decl. Ex. 18.) However, that bulletin does not warn officers against using Taser on narcotically intoxicated individuals. It counsels that Taser should not be used against an individual who has a pacemaker, or is pregnant or near a body or water. The Taser training bulletin says nothing about individuals who are obese, intoxicated by narcotics, or mentally ill.

Plaintiff points to two more publications. The first is a letter to the editor in the Journal of Forensic Science, in which a former deputy medical examiner of Los Angeles County discussed his experience examining Taser-related deaths. The second is a report published by Amnesty International that warns about the dangers of Taser and discusses a series of Taser-caused deaths. Not only do these documents lack legal force, they also cannot be deemed to give police officers reasonable notice of the constitutional standards governing their conduct. While it is reasonable to expect officers to absorb and follow the police department's guidelines and training bulletins, there is no reason to expect officers to read the Journal or Forensic Science or Amnesty International reports.

In sum, the record does not show that the officers were on notice that the use of Taser on an narcotically intoxicated individual was reasonably likely to cause death. More generally, nor does the record support any inference that the use of Taser in the circumstances presented here

constitutes excessive force within the meaning of the Fourth Amendment. The one remaining issue warranting discussion is the imposition of the officers' body weight on LeBlanc. It is true that the City Defendants had fair warning under Drummond that taking a top position over a prone suspect may constitute a constitutional violation. But there is no evidence that either of the two police officer Defendants - Colomey, the commanding officer on the scene, and Skett, who fired the Taser charges - sat on or otherwise had any physical contact with LeBlanc. Neither is there evidence that they instructed anyone else to sit on LeBlanc's back. The officer who did sit on LeBlanc's back, Brett Clark, has already been dismissed as a party by stipulation of the parties.

The Court concludes that Colomey and Skett are entitled to qualified immunity because the unconstitutionality of Taser use on the instant facts was not clearly established at the time of the incident

C. Municipal Liability

Even if the police officers are entitled to qualified immunity, the City and the LAPD may still be liable for causing a constitutional violation. Trevino v. Gates, 99 F.3d 911, 918 (9th Cir. 1996). A plaintiff alleging municipal liability for a civil rights violation must satisfy one of three circumstances:

> First, the plaintiff may prove that a city employee committed the alleged constitutional violation pursuant to a formal government policy or a longstanding practice or custom which constitutes the standard operating procedure of the local government entity. Second, the plaintiff may establish that the individual who committed the constitutional tort was an official with final policy-making authority and that the challenged action itself thus constituted an act of official government policy. . . . Third, the plaintiff may prove that an official with final policy-making authority ratified a subordinate's unconstitutional decision or action and the basis for it.

Gillette v. Delmore, 979 F.2d 1342, 1346-47 (9th Cir. 1992). In addition, municipal liability will be found where training of employees is so adequate as to constitute a policy of deliberate indifference to citizens' constitutional rights. City of Canton v. Harris, 489 U.S. 378, 389-90, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989). After establishing one of these circumstances, a plaintiff must further prove that the policy was both the cause in fact and the proximate cause of the constitutional deprivation. Trevino, 99 F.3d at 918.

Plaintiff advances two bases of municipal liability: failure to train and failure to supervise. "A municipality's failure to train an employee who has caused a constitutional violation can be the basis for § 1983 liability where the failure to train amounts to deliberate indifference to the rights of persons with whom the employee comes into contact." Long v. County of Los Angeles, 442 F.3d 1178, 1186 (9th Cir. 2006). A plaintiff "might succeed in proving a failure-to-train claim without showing a pattern of constitutional violations where 'a violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations.'" Id. (quoting Board of County Commissioners v. Brown, 520 U.S. 397, 409, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997)). "[A] county's lack of affirmative

policies or procedures to guide employees can amount to deliberate indifference, even when the county has other general policies in place." Id. Here, the LAPD training materials in the record provide no guidance on how and whether Taser should be used when dealing with narcotically intoxicated individuals, even though LAPD officers probably confront such individuals on a routine basis. Given the testimony of Plaintiff's experts that Taser is highly dangerous when used against such individuals, a reasonable jury can find that the LAPD's failure to instruct officers on Taser use against intoxicated individuals amounts to a deliberate indifference to likely constitutional violations in such circumstances. This is particularly so in light of Colomey's deposition testimony that he was not reprimanded for this incident, and would handle the situation in exactly the same way if confronted with it again. (Colomey Dep. 102-04.)

Plaintiff also alleges that the LAPD failed to supervise or audit Taser use by LAPD officers. Each Taser unit contains a digital microprocessor that records every discharge, and the recorded data can be downloaded for audit and examination. After the LeBlanc incident, the Taser unit used against him was sent by the LAPD to Taser Inc. for audit and analysis. However, Taser Inc. could not recover an audit trail for the discharges on LeBlanc, because the device's internal clock battery died and prevented the chip from recording the charges. Taser Inc.'s analysis showed that the last recorded discharge occurred two months before the LeBlanc incident. Plaintiff argues that the fact that the LAPD had to send the unit to Taser Inc. for analysis rather than download the data on its own, and the fact that the unit was not properly maintained, demonstrates a custom of deliberate indifference to the abusive use of Taser in the field. In Plaintiff's view, if the LAPD properly maintains Taser clock batteries, the present of an audit trail would deter its officers from using the weapon in abusive ways.

The absence of an audit trail on a single weapon is not, by itself, sufficient to establish a failure to supervise. If the challenged municipal practice is not a formal policy, Plaintiff must show the existence of a custom that is "so persistent and widespread that it constitutes a permanent and well-settled city policy." Trevino, 99 F.3d at 918 (citation omitted). That said, the lack of an audit trail on the specific Taser unit at issue can still support an inference of deliberate indifference on Plaintiff's failure-to-train theory.

Summary judgment is denied on the issue of municipal liability.

D. Equal Protection. Conspiracy, and Neglect to Prevent Conspiracy

Plaintiff alleges that the use of force was motivated by LeBlanc's Hispanic origin, and by the LAPD's custom of targeting Hispanic individuals for the use of excessive force. Plaintiff further alleges that the City Defendants conspired to deprive him of his rights under the Equal Protection Clause, and neglected to prevent the conspiracy.

42 U.S.C. § 1985 authorizes private actions against conspiracies to deprive any person of the equal protection of the laws. 9 42 U.S.C. § 1986 further imposes liability on any person who is aware of a conspiracy prohibited by section 1985, yet fails to prevent the consummation of the conspiracy in spite of power to do so. 10

As the Ninth Circuit has explained,

> [t]o bring a cause of action successfully under § 1985(3) a plaintiff must allege and prove four elements: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of this conspiracy; (4) whereby a person is injured in his person or property or deprived of any right or any privilege of a Citizen of the United States.

Sever v. Alaska Pulp Corp., 978 F.2d 1529, 1536 (9th Cir. 1992). The second element requires that "in addition to identifying a legally protected right, a plaintiff must demonstrate a deprivation of that right motivated by 'some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action.'" Id. (quoting Griffin v. Breckenridge, 403 U.S. 88, 102, 91 S. Ct. 1790, 29 L. Ed. 2d 338 (1971)).

There is no evidence in the record to support a finding of racial or class-based animus, or any policy based on such animus. The only evidence of conspiracy Plaintiff pointed to was the fact that the police officers huddled before unleashing Taser on LeBlanc. Yet there is no evidence that Plaintiff's race or ethnic origin was discussed in the huddle. Accordingly, summary judgment will be granted on Plaintiff's equal protection and section 1985 claims. Summary judgment will also be granted on the section 1986 claim, because it is premised on a section 1985 violation. Dooley v. Reiss, 736 F.2d 1392 1396 (9th Cir. 1984).

D. Equal Protection, Conspiracy, and Neglect to Prevent Conspiracy

Plaintiff alleges that the use of force was motivated by LeBlanc's Hispanic origin, and by the LAPD's custom of targeting Hispanic individuals for the use of excessive force. (SAC P 34.) Plaintiff further alleges that the City Defendants conspired to deprive him of his rights under the Equal Protection Clause, and neglected to prevent the conspiracy.

"If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws . . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators." 42 U.S.C. § 1985. In addition, "[e]very person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured . . . ." 42 U.S.C. § 1986.

"To bring a cause of action successfully under § 1985(3), a plaintiff must allege and prove four elements: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of this conspiracy; (4) whereby a person is injured in his person or property or deprived of any right or any privilege of a Citizen of the United States." Sever v. Alaska Pulp Corp., 978 F.2d 1529, 1536 (9 Cir. 1992). The second element requires that "in addition to identifying a legally protected right, a plaintiff must demonstrate a deprivation of that right motivated by 'some racial, or perhaps otherwise class-

based, invidiously discriminatory animus behind the conspirators' action.'" Id. (quoting Griffin v. Breckenridge, 403 U.S. 88, 102, 91 S. Ct. 1790, 29 L. Ed. 2d 338 (1971)).

There is absolutely no evidence in the record to support a finding of racial or class-based animus, or any policy based on such animus. In Plaintiff's Opposition brief, the only evidence of conspiracy Plaintiff pointed to was the fact that the police officers huddled before unleashing Taser on LeBlanc. Yet there is no evidence that Plaintiff's race or ethnic origin was discussed in the huddle. Accordingly, summary judgment is granted on Plaintiff's equal protection and section 1985 claims. Summary judgment is also granted on the section 1986 claim, because it is premised on a section 1985 violation. Dooley v. Reiss, 736 F.2d 1392, 1396 (9th Cir. 1984).

E. State Law Claims

Plaintiff has pled three state law claims: (1) wrongful death by assault and battery; (2) negligence; and (3) violation of California Civil Code Section 52.1. The City Defendants do not claim that they are entitled to official immunity from the state law claims. Instead they argue that these claims fail on the merits.

1. Wrongful Death by Assault and Battery

In California, a battery claim against a police officer performing official duties is analyzed under the reasonableness standard of the Fourth Amendment. "[A] prima facie battery by a police officer is not established unless and until the plaintiff proves unreasonable force was used." Edson v. City of Anaheim, 63 Cal. App. 4th 1269, 1273, 74 Cal. Rptr. 2d 614 (Cal. Ct. App. 1998); see also Saman v. Robbins, 173 F.3d 1150, 1157 fn. 6 (9th Cir. 1999) (holding that a battery claim must fail where defendants prevailed on summary judgment for Fourth Amendment excessive force claim).

As discussed above in the Fourth Amendment context, a jury can reasonably find that excessive force was used against LeBlanc. The City Defendants maintain the wrongful death claim must be dismissed because Taser was not the cause of death; however, as discussed above Plaintiff's medical expert will testify to the contrary, and a triable issue remains as to the cause of death.

Accordingly, summary judgment is denied with respect to the wrongful death claim.

2. Negligence

In their moving papers, the City Defendants offer two grounds for dismissing the negligence claim. The first is that the negligence and wrongful death claims merge; since the City Defendants did not cause LeBlanc's death, the merged claim should be dismissed. As discussed above, triable issues remain as to the cause of death, so the claim cannot be dismissed on this ground. The second argument is that the police officers owe no duty of care to a suspect. However, the City Defendants have cited no legal authority to support this proposition. Summary judgment is denied with respect to the negligence claim.

3. California Civil Code Section 52.1

California's Bane Act provides: "Any individual whose exercise or enjoyment of rights secured by the Constitution or laws of the United States, or of rights secured by the Constitution or laws of this state, has been interfered with, or attempted to be interfered with . . . may institute and prosecute in his or her own name and on his or her own behalf a civil action for damages . . . ." Cal. Civ. Code § 52.1(b). This statutory remedy "is limited to plaintiffs who themselves have been the subject of violence or threats." Bay Area Rapid Transit Dist. v. Superior Court, 38 Cal. App. 4th 141, 144, 44 Cal. Rptr. 2d 887 (1995). In Bay Area Rapid Transit, the California Court of Appeals held that the parents of a teenager shot dead by police lacked standing to bring a section 52.1 action on behalf of the decedent. As the court explained, "[t]he Bane Act is simply not a wrongful death provision. It clearly provides for a personal cause of action for the victim of a hate crime." Id.

Accordingly, Plaintiff, who is LeBlanc's widow, does not standing to bring a section 52.1(b) action on LeBlanc's behalf. Summary judgment is granted for the City Defendants on this claim.

V. CONCLUSION

For the foregoing reasons, the Court GRANTS summary judgment, on grounds of qualified immunity, with respect to the federal civil rights claims against Colomey and Skett. The Court also GRANTS summary judgment on the equal protection, civil conspiracy, and Bane Act claims. The Court DENIES summary judgment on Plaintiff's municipal liability claim against the City and the LAPD. The Court further DENIES summary judgment with respect to the wrongful death and negligence claims.

It Is So Ordered.
Dated: 8/16/06

Stephen V. Wilson
United States District Judge

Notes:

1 According to a witness, LeBlanc was able to bend or stretch the fence, which had a light construction. (Turnipseed Dep. at 55.) However, each time he stretched it, the fence would go back to form, as if he was pulling on rubber. (Id.) The fence did not appeared to be damaged by LeBlanc's tugging and pulling.

2 The autopsy report determined LeBlanc to be about 5 feet, 6 inches in height and 259 pounds in weight. (Defendants RJN Ex. 1.) LeBlanc was thirty-six years old when he died.

3 The term "cardiac arrest" was used in the LAPD's Critical Incident Report. However, the Emergency Medical Service Report stated that the problem was respiratory arrest.

4 The Court notes that the coroner's report is itself admissible as a public record under Federal Rule of Evidence 803(8). See Blake v. Pellegrino, 329 F.3d 43, 47 n.3 (1st Cir. 2003) (finding that the portion of a death certificate stating the cause of death is admissible under the Federal Rules of Evidence.)

5 Rule 702 provides: If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. Fed. R. Evid. 702.

6 Sergeant Colomey described LeBlanc as having "superhuman strength" in the way he pulled the fence and, after the first Taser discharge, attempted a push-up in spite of the weight of five officers on his back.

7 Taser's potential to cause serious injury has been recognized in other states. Although the Ninth Circuit has held that using Taser on a healthy inmate did not constitute cruel and unusual punishment, Michenfelder v. Sumner, 860 F.2d 328 (9th Cir. 1988), the court noted that Taser had been classified as deadly force in the Georgia penal system. McCranie v. State, 172 Ga. App. 188, 322 S.E. 2d 360, 361 n.1 (Ga. App. 1984) ("Apparently, at the time of the incident at issue, Taser guns were not considered by prison officials to constitute deadly force. They have, however, since been classified as such at the [Georgia State] prison."). The Michenfelder court further noted that Taser had been banned by the state of New York due to concern over its impact on individuals with heart problems. The court cited People v. Sullivan, 116 A.D.2d 101, 500 N.Y.S. 2d 644, 647 (1986) (stating "although [Taser] was introduced in 1971, there has been great concern about the impact on people with heart problems and its use has been outlawed in this State.")

8 In Drummond, the court expressly declined to decide whether the force was deadly under the Vera Cruz' "reasonably likely to kill" standard. Drummond was decided before the Ninth Circuit adopted "substantial risk of death or serious bodily injury" as the definition of deadly force in City of Hemet. If Drummond is decided today, the result might well be different. The Drummond plaintiff fell into a coma as a result of the incident.

9 If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws . . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators. 42 U.S.C. § 1985.

10 Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured ... 42 U.S.C. § 1986.