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CITY OF SALINAS and SALINAS POLICE DEPARTMENT;
10 SALINAS POLICE CHIEF DANIEL ORTEGA, MICHAEL DOMINICI, CRAIG
FAIRBANKS, JAMES GODWIN, LEK LIVINGSTON, VALENTIN PAREDEZ, JUAN RUIZ,
11 and TIM SIMPSON

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN JOSE DIVISION

15 _____)
16 BETTY LOU HESTON, individually, and)
ROBERT H. HESTON, individually and as the)
17 personal representatives of ROBERT C.)
HESTON, deceased,)

18)
19 Plaintiffs,)
20 vs.)

21 CITY OF SALINAS and SALINAS POLICE)
DEPARTMENT, SALINAS POLICE CHIEF)
22 DANIEL ORTEGA, SALINAS POLICE)
OFFICERS MICHAEL DOMINICI, CRAIG)
23 FAIRBANKS, JAMES GODWIN, LEK)
LIVINGSTON, VALENTIN PAREDEZ,)
24 JUAN RUIZ AND TIM SIMPSON, TASER)
INTERNATIONAL, INC., and DOES 1 to 10,)

25)
26 Defendants.)
27)
28)

Case No. C-05-03658 JW (RS)

DEFENDANTS' POINTS AND
AUTHORITIES IN REPLY TO
PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT, OR, IN THE
ALTERNATIVE, SUMMARY
ADJUDICATION

Date: April 23, 2007

Time: 9:00 a.m.

Courtroom 8, 4th Floor

The Honorable James Ware

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I.

REMAINING DEFENDANTS AND CLAIMS

After the Plaintiffs' Notice of Non-Opposition to Summary Judgment/Adjudication of Certain Parties/Issues, the remaining individual defendants are Police Chief DANIEL ORTEGA, MICHAEL DOMINICI, JAMES GODWIN, LEK LIVINGSTON, and JUAN RUIZ¹. The remaining causes of action are for (First) wrongful death (42 U.S.C. § 1983); (Second) survival action (42 U.S.C. § 1983); (Third) deprivation of the rights of Plaintiffs to familial relations with the decedent (42 U.S.C. § 1983); (Fifth) assault and battery; and (6) negligence. Plaintiffs' *Monell* claims, which are not specifically alleged as a cause of action, are narrowed to two claims, i.e. that the City was deliberately indifferent to unreasonable force by Salinas Police Officers in their use of Tasers because the City did not use Taser data downloads (Opposition Brief 25:18-19), and that the City ratified repeated prolonged use of Tasers (Opposition Brief 27:5-9).

II.

UNDISPUTED FACTS

Plaintiffs' Opposition Brief establishes facts that are undisputed and, further, Plaintiffs do not offer admissible evidence to establish any real dispute about the facts.

A. Facts Regarding the Attempt to Control Heston.

Statement of Facts ¶ 1.² Robert C. Heston died February 20, 2005, at the age of 40, three weeks after being released from prison. The Salinas Police Department was aware that Heston had a history of violence toward his parents and the police.

SF ¶ 2-3. On February 19, 2005, Robert H. Heston called for the police because he wanted his son out of the house while he was under the influence of drugs, and was concerned about his prior violence. Responding officers were informed that a subject at that address had a

¹ Plaintiffs' claims against JUAN RUIZ are for unreasonable force. In their Opposition Brief Plaintiffs do not allege supervisory liability against Sergeant Ruiz.

² Defendants will refer to their Opening Brief, Statement of Facts paragraph numbers (**SF ¶**) rather than re-citing all references to the evidence.

1 history of violence. Officers who responded to the first call noted that Robert C. Heston was
2 incoherent, nervous, fidgety, irrational, agitated, paranoid and acting erratic. Because there was
3 no crime and they were unable to contact Heston's parole officer, and Heston's friend said they
4 were upsetting him, the police officers left.

5 SF ¶¶ 4-9. Robert H. Heston called police back when his son pushed him down, and
6 several officers starting responding. Officers were informed as they responded that there were
7 sounds of violence inside, the father was being assaulted, and neighbors were calling about a
8 violent struggle and things being smashed as a man was seen breaking into the house. At
9 2:22:55 p.m. Sergeant Dominici and Officer Fairbanks arrived and saw a large amount of debris
10 in the front yard, driveway and street and other items being thrown out the front door. Dominici
11 saw Robert C. Heston ranting, shouting, breaking and smashing things, completely out of
12 control, and grab and drag his father across the floor out of Dominici's view. Dominici and
13 Fairbanks did not know the physical condition of the older man or how badly he was injured.
14 Dominici started toward the front door and was assaulted by Heston who threw a rod-like object
15 directly at Dominici, striking him in the chest.

16 All of the facts (SF ¶¶ 10-14) regarding deployment of Tasers by Dominici (Taser
17 Deployment No.1) and Fairbanks (Taser Deployment No, 2) are undisputed and Plaintiffs have
18 confirmed that they make no claims for those two unsuccessful Taser deployments.

19 SF ¶¶ 13-14 are also undisputed. As Robert C. Heston rampaged inside his home, Ruiz
20 arrived and briefly saw the father inside just as Heston assaulted Ruiz by throwing a grandfather
21 clock weight and another object at him. Dominici quickly briefed Ruiz and Ruiz tried to engage
22 Heston by talking to him in a calm voice, and on seeing his conduct, Ruiz was fearful that
23 officers would eventually have to shoot him.

24 At this point in the factual reconstruction, Plaintiffs gloss over the details in their brief
25 (Opposition Brief 20:20-22) making it appear that there were six officers at the scene when Ruiz
26 and Livingston deployed their Tasers. Plaintiffs do not actually dispute the facts, but merely
27 misstate them to try to recreate a new event that did not occur. The true facts are established by
28 testimony of all of the parties and communications logs.

1 SF ¶¶ 15-17 about Taser deployments of Ruiz and Livingston are undisputed. Ruiz
2 deployed his Taser and Heston turned and went back inside the house. Ruiz' Taser was arcing at
3 the end which Ruiz knew to mean that his Taser was not being effective, as was also observed by
4 Dominici. Neighbors witnessed Taser deployments that were fired from outside the house, and
5 saw Heston continue to fight back, and observed him to be out of control and violent.

6 SF ¶¶ 18-21. Livingston deployed his Taser almost simultaneously and Livingston and
7 Ruiz followed with their Tasers cycling. Heston was still on his feet, so Livingston cycled again,
8 but Heston was still walking in a stiff manner and not going down. Godwin could see that
9 Livingston's Taser was not having any effect, and Livingston pulled his trigger several times, but
10 his Taser was not effective. Godwin followed Ruiz and Livingston in and Dominici followed
11 Godwin.

12 In their Opposition Brief, Plaintiffs argue without offering any admissible evidence that
13 the Tasers of Ruiz and Livingston were simultaneously delivering electric current to Heston.
14 However, the admissible evidence in SF ¶ 22 from the officers, the neighbors, and Plaintiffs'
15 expert Clark establishes that Heston continued to move and continued to stand for at least
16 19 seconds from the moment that Livingston deployed his Taser. Every officer at the scene at
17 that point has testified that they had not seen anyone continue to stand and move if Tasers were
18 effective. Plaintiffs blatantly ignore the undisputed facts that Ruiz was not using his Taser when
19 Heston went down. Ruiz yelled that his Taser was not working and Godwin could hear a Taser
20 arcing, meaning it was not connected and delivering electricity to Heston. Plaintiffs' expert,
21 Roger Clark, has determined that Godwin actually deployed his Taser 19 seconds after
22 Livingston deployed his Taser, and Heston did not fall until after Godwin deployed. Therefore,
23 Heston remained standing and moving for 19 or more seconds after Ruiz and Livingston
24 deployed their Tasers.

25 Contrary to Plaintiffs' unsubstantiated assertion at their Opposition Brief 10:15-18,
26 Officers Fairbanks and Paredez did not immediately enter the home and see Heston on the floor,
27 and the testimony cited by Plaintiffs (Fairbanks 67:6-9; Paredez 57:3-13) does not say any such
28

1 thing. As shown on SF ¶23, the facts are undisputed that Fairbanks and Paredéz were the fifth
2 and sixth officers into the building, and only after clearance of debris from the doorway.

3 Plaintiffs agree that Heston eventually went down, then make the completely
4 unsubstantiated assertions that Heston fell into a position common to persons who have been
5 subjected to a Taser, with three to five pairs of wires stuck in him. (Opposition Brief 11:3-5).
6 Plaintiffs' argument again consists of self-serving creation of otherwise non-existent facts and
7 opinion. The undisputed evidence is that Tasers were not effective. There is no certainty
8 whether Heston pulled out probes (as he did previously) or they fell out (as they did previously),
9 or if wires broke. What is certain is that no one testified there were three to five pairs of wires
10 stuck in him. The only testimony about any wire was from Paredéz who was momentarily
11 shocked by one wire or one pair. **Paredéz Dec. ¶ 15.**

12 Plaintiffs do not dispute any of the facts in SF ¶¶ 24-26. When Fairbanks finally got
13 inside he did not hear any Taser cycling, but does not know if one might have been. It seemed
14 there was a Taser effect, but there is no way to know whether a person is resisting releasing his
15 arms or a person is being affected by a Taser. Fairbanks waited for a lull when Tasers were not
16 operating because he did not think he could get Heston's arm out while the Tasers were
17 operating. Paredéz felt that Heston had locked his arms and would not release them even when
18 there were no Tasers cycling. There were periods up to three to five seconds when Ruiz heard
19 no Tasers cycling, but officers could not get Heston's arms out. Godwin is sure that after his
20 first cycle there were no Tasers cycling, but they could not release his arms, and it appeared that
21 Heston was voluntarily resisting. Therefore, after attempting to cycle additional times without
22 effect, Godwin pulled the cartridge off the end of his Taser, disconnecting the wires from the
23 device.

24 SF ¶¶ 27-28. Livingston cycled his Taser again because he could hear the other officers
25 commanding Heston to release his arms and it appeared Heston was still resisting. Livingston
26 knows that he cycled multiple times though he does not remember holding the trigger down.
27 Therefore, in the 30 to 50 seconds that Heston was on the floor, the officers who were trying to
28 physically control Heston could not get him under control, and each officer in the room was

1 independently convinced that neither Livingston's nor Godwin's Taser was working. Simpson
2 told officers to use another Taser to get Heston to release his arms.

3 Plaintiffs' brief repeatedly and falsely claims that the Tasers of Ruiz, Livingston and
4 Godwin were continuously delivering electricity to Heston while he was on the floor. Their brief
5 ignores the undisputed facts in SF ¶¶ 29-30 that Ruiz and Godwin have testified without dispute
6 from anyone that they had removed their Taser cartridges thereby disconnecting any wires. Ruiz
7 did not have wires on his Taser when Heston was on the floor, as demonstrated by the fact that
8 he was getting ready to perform a drive stun (without a cartridge) just before Godwin started to
9 put another cartridge on his Taser. It is undisputed that, after he replaced a cartridge, Godwin
10 cycled his Taser one time with the second cartridge.

11 SF ¶ 34. It is undisputed that the elapsed time from the first police arrival at the street
12 until Heston was handcuffed was approximately 2 minutes and 10 seconds.

13 **B. Facts Regarding City Policy, Custom, Practice.**

14 Plaintiffs now pursue only two claims about City liability: (1) deliberate indifference to
15 unreasonable force by Salinas Police Officers in their use of Tasers because the City did not use
16 Taser data downloads (Opposition Brief 25:18-19); and (2) the City ratified "repeated prolonged
17 use of Tasers" (Opposition Brief 27:5-9). All other *Monell* claims were withdrawn and will not
18 be discussed further.

19 **1. Salinas Police Department Policies for Tasers and Use of Force.**

20 Plaintiffs argue that the failure to regularly perform data downloads constituted deliberate
21 indifference to injuries caused by officers' excessive use. But, Plaintiffs offer no evidence that
22 there was prior unreasonable use, or that data downloads would have shown excessive use,
23 because every prior download printout that Plaintiffs have establishes there was no excessive
24 use. In addition, the Salinas Police Department very closely monitored use of force by any
25 means, and specifically use of Tasers. On those subjects, the following facts are undisputed.

26 The facts established in SF ¶¶ 36-38 are undisputed. Police Department Policy 3.10
27 requires that Taser devices must be used in conformance with the policy, and only issued to
28 officers who completed Department-approved training. Department Policy 3.10.05 requires that

1 officers who decide to deploy a Taser must notify a supervisor. Persons on whom a Taser was
2 used must be examined by medical personnel. Supervisors were and are required to complete a
3 detailed use of force report including photographs and booking expended probes into evidence.
4 Use of Tasers must be in conformance with the use of force policy (Policy 3.01) and the Salinas
5 Police Department prohibits use of unreasonable force. Officers who use force were and are
6 required to report to a supervisor, and a written report must be prepared by the supervisor. Patrol
7 division commanders and the chief of police review all use of force for compliance with
8 Department policies and procedures, and to provide information to the chief of police regarding
9 officer conduct. Use of force reports are maintained by Internal Affairs, including compiling the
10 data by the date, time, shift, officers involved, type of force used, type of weapons used if any,
11 and any injuries to suspects or officers.

12 Plaintiffs ignore the undisputed facts establishing that there was close monitoring of
13 Taser use. The facts in SF ¶¶ 39-40 are undisputed. The chief of police reviews all use of force
14 statistics and specifically monitored the use of Tasers after their issuance in mid-2003, and found
15 that, after the issuance of Tasers, use of force incidents decreased as compared to total arrests,
16 injuries to suspects and officers decreased, and use of other methods such as dogs, chemical
17 agents and physical force decreased. The most recent report was reviewed by Chief of Police
18 Ortega ten days prior to the incident, and, based on the totality of the circumstances and
19 information known to him as a result of close monitoring and supervision of the uses of Tasers,
20 Chief Ortega permitted the continued use of Tasers as a means of overcoming violent and
21 resistive subjects while reducing threats to suspects and officers. The Chief of Police never
22 received any scientific information from any source that Tasers would cause death, cause a
23 person to stop breathing or cause a person's heart to stop beating.

24 **2. Officer Training for Tasers was not Deficient and the Salinas Police**
25 **Department Was Not Indifferent to Training.**

26 Plaintiffs offer no evidence to establish a dispute that Salinas Police Department training
27 was deficient in any way, but certainly not so egregious as to be "the moving force behind the
28

1 constitutional violation". *City of Canton v. Harris* 489 U.S. 378, 388 (1989).³ Plaintiffs once
2 again try to create facts since they have nothing to establish any material dispute. Plaintiffs
3 argue that the officers cannot obtain qualified immunity since their actions were banned by their
4 own department, citing Taser International Taser Training materials, Version 13 (Opposition
5 Brief 13:1 and 25:22-25). That is simply false. The Heston incident occurred February 19,
6 2005, and Version 13 was not published until over a year later, in May 2006. **Guilbault Dec.**
7 **¶ 3.** Plaintiffs make such desperate claims even though their own expert, Burwell, knows that
8 the training material relevant to February 19, 2005 was Version 8. See Declaration of Vincent P.
9 Hurley, ¶ 19; **Burwell Dep. 102:16-103:12; 122:15-123:16.** (Training Version 8 was published
10 before 2005, so he only used Version 8 in forming his opinions.)

11 Plaintiffs do not dispute the facts in **SF ¶ 44** about Salinas training. Salinas police Taser
12 instructors attend multiple training courses including the instructor's course, update instructor's
13 course, and an armorer's course. Taser instructors and officers were not provided any
14 information that a Taser would or could stop a person's heart, affect a pacemaker, cause
15 respiratory distress or cause long-term physical injury. (And there is still no such medical
16 information). There was never a warning issued by Taser, and Salinas officers were not trained
17 that multiple Taser deployments or multiple cycling would create a health risk. The first time
18 that Taser International ever published a bulletin relating to "long-term tasing" was five months
19 after the Heston event. Nor do Plaintiffs not dispute the facts that there was no medical or other
20 training information available on February 19, 2005, alleging that Tasers carried such risks, they
21 offer evidence in support from their expert, Roger Clark. See Clark Declaration ¶ 31. (No
22 training existed that multiple deployment or use would be lethal).

23 Ignoring the facts in **SF ¶ 45**, Plaintiffs argue that the length of individual training is
24 evidence of training deficiency, but offer no evidence such as a standard, a publication or
25 anything else to establish how long the training should be. Plaintiffs' expert, Burwell claims to
26 be a former Taser instructor, and his total training to be an instructor was only eight hours.

27
28 ³ See Defendants' Opening Brief, Pages 34-38.

1 See Declaration of Vincent P. Hurley, ¶¶ 12-14; **Burwell Dep. 93:15-94:23**. Salinas used a
2 Taser certification course outline prepared by the Salinas instructors. For groups, the course lasts
3 four hours, but for individual training the course can be completed in less than four hours.
4 Salinas police officers were and are also trained regarding excited delirium, sudden custody
5 death syndrome, cocaine psychosis, positional asphyxia, and the ineffectiveness of pain
6 compliance techniques when trying to subdue persons in such conditions.

7 **III.**

8 **POINTS AND AUTHORITIES**

9 **A. Plaintiffs Have Not Come Forward with Admissible Facts to Support their**
10 **Claims.**

11 Plaintiffs make unsubstantiated claims based on unsupported facts and rely on the expert
12 testimony of Ernest Burwell who is not qualified to render opinions about the Taser device,
13 police supervision or police practices. See Declaration of Vincent P. Hurley with Burwell
14 deposition testimony. Plaintiffs offer Roger Clark to say there is supervisory liability, but he
15 never establishes where supervision was deficient because Plaintiffs never offer admissible facts
16 to establish a question of fact regarding what occurred. Plaintiffs' counsel creates facts and
17 keeps referring to the event as "torture", completely ignoring the sequence of events and trying
18 to create a picture of an event that never occurred.

19 Federal Rules of Civil Procedure, Rule 56(e) requires that a party opposing a summary
20 judgment motion may not rest upon the mere allegations or denials of the adverse party's
21 pleading. The opposing party's response must set forth specific facts showing that there is a
22 genuine issue for trial. If the opposing party does not set forth such admissible facts, summary
23 judgment should be granted.

24 **B. Defendants Object to the Declaration of Burwell.**

25 1. Ernest Burwell is not qualified as an expert in the subjects offered in his
26 deposition. He offers opinions about the science of Tasers, but provides no evidence that he has
27 the requisite education or training in electronic control devices, and he only had a total of eight
28 hours of training about Tasers six years ago. See Declaration of Vincent P. Hurley, ¶¶ 11-12;

1 **Burwell Dep. 93:18-94:3; 94:14-23; 99:9-25; 100:10-22.** Burwell was never trained about
2 downloading Taser data, and, though he took on the task for his personal interest, he has never
3 seen Taser download data used for investigating unreported use or excessive use. See
4 Declaration of Vincent P. Hurley, ¶¶ 14-15; **Burwell Dep. 104:4-11; 104:15-25; 107:15-17;**
5 **107:18-108:11.** Burwell offers criticism of Sergeant Dominici's supervision of the two minute
6 event, but Burwell has never been a supervisor and never attended any supervisor school.
7 See Declaration of Vincent P. Hurley, ¶¶ 1-10; **Burwell Dep. 90:20-91:5;** with Burwell
8 deposition testimony regarding his experience. Burwell offers no treatise, procedure manual,
9 police standards manual, scientific journal, or anything else to support his opinions. In fact,
10 there were no policies when he left LASO regarding specifically reporting Taser use. See
11 Declaration of Vincent P. Hurley, ¶¶ 17-19; **Burwell Dep. 117:17-24; 114:9-25; 113:21-11:8;**
12 **115:1-20.**

13 Burwell does not have the knowledge, skill, experience, training or education to testify in
14 the form of opinion, and he has not provided any data, principles or methods he used to support
15 his opinions as required for admissibility in Federal Rules of Evidence, Rule 702. Affidavits in
16 support of an opposition to summary judgment must set forth admissible evidence, and the
17 affiant must establish that he or she is competent to testify to the matters stated in the affidavits.
18 If the expert relies on documents, sworn or certified copies of documents referred to in affidavits
19 must be attached. Fed. R. Civ. Proc., Rule 56(e). Burwell recites the history and operation of
20 Taser International, Inc., the Taser device, and misstates the operation of the Taser device.
21 Given that his total exposure to information about Taser is an eight hour course six years ago,
22 Burwell is blatantly fabricating his expertise and his testimony about Taser should be stricken.
23 Likewise, since he has never been a supervisor, never supervised a critical incident, never
24 attended a supervisor school, and worked alone as a dog handler for the last 14 years of his
25 career before he was relieved of duty and involuntarily retired, Burwell's testimony about police
26 supervision should be stricken as inadmissible.

27 Plaintiffs rely on *Smith v. Hemet*, 394 F.3d 689, 703 (9th. Cir. 2005) to support their offer
28 of Burwell's expert testimony. In fact, *Smith v. Hemet* does not support the type of opinion

1 rendered by Ernest Burwell. In *Smith v. Hemet*, the Plaintiffs' expert reviewed the Hemet
2 policies and California Peace Officer's Standards and Training (POST) applicable to the training
3 of police dogs and dog handlers, and rendered his opinions relying on those documents. The
4 *Smith* court ruled that a rational jury could rely on the evidence of the Hemet policies and the
5 POST manuals. *Id.* at 703. Burwell has not offered any opinion based on any policy or training
6 manual. He is merely asserting his unsupported opinions without foundation in any fact, treatise,
7 training document, professional standard, or academic enterprise. Likewise, *Larez* does not
8 support admission of Burwell's testimony. In *Larez*, the Plaintiff was permitted to call a
9 professor in the Department of Justice, Law & Society at American University to testify
10 regarding appropriate internal affairs investigations procedures in a case in which the defendant
11 police department had completed an internal affairs investigation. (Which is not relevant here.)
12 The expert in *Larez* testified about a two year comparative study he had conducted on
13 departmental complaints. *Larez v. City of Los Angeles*, 946 F.2d 630, 635 (9th Cir. 1991).
14 Certainly two year studies by learned university professors in well-known universities are
15 different than a former dog handler who cites no support for his bald opinions.

16 **C. The Decisions Relied Upon by Plaintiffs Support Summary Judgment in**
17 **Favor of Defendants.**

18 Plaintiffs rely on those cases already discussed by Defendants in their Opening Brief -
19 the relevant line of Ninth Circuit cases following *Graham v. Connor*, 490 U.S. 386 (1989) and
20 *Saucier v. Katz*, 533 U.S. 194 (2001); i.e., *Drummond v. City of Anaheim*, 343 F.3d 1052
21 (9th Cir. 2003), *Smith v. Hemet*, 394 F.3d 689 (9th Cir. 2005), and *Deorle v. Rutherford*, 272
22 F.3d 1272 (9th Cir. 2001). But Plaintiffs simply ignore *Blanford v. Sacramento County*, 406
23 F.3d 1110 (9th Cir. 2005) discussed in Defendants' Opening Brief at 24-25. (In a two minute
24 confrontation with a man carrying a sword around a residence which was later determined to be
25 his parents' home, shooting guns at him in three separate volleys was not unreasonable force.)
26 Plaintiffs further ignore *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994) discussed in the
27 Opening Brief at 25. (Not unreasonable for officers to take up weapons and move against a
28 suspect in a building who has demonstrated a real threat and is acting "crazy".) Additionally,

1 Plaintiffs did not respond to the points made in Defendants' brief which show that the facts in
2 this case were vastly different than those set forth in *Drummond*, *Smith*, and *Deorle*. Here the
3 total event took no more than two minutes and ten seconds, whereas the cases on which
4 Plaintiffs rely dragged out for long periods of time, and, in each of those cases, no third person
5 was under attack and/or in danger. On the other hand, in this case Salinas officers were
6 confronted with a recent prison parolee addicted to methamphetamine, with a known violent
7 history, who had just dragged his father out of their sight, and was blocking their entrance into
8 the home. Robert C. Heston was not a confused mental patient trying to go to a hospital
9 (*Drummond*), or a schizophrenic man standing in front of his house in pajamas (*Smith*), or a
10 drunken but cooperative mental patient who walked around the neighborhood for 45 minutes
11 while surrounded by dozens of officers (*Deorle*). Heston was a violent man in the act of
12 assaulting his own father and the police, who, though down on the floor, was a continuing threat
13 while the officers could not get him restrained.

14 *Drummond* held that there was no qualified immunity for officers to sit on a mentally-ill
15 person and hog tie him in a position leading to death by asphyxia. The *Drummond* court cited
16 from *Liston v. County of Riverside*, 120 F.3d 965, 976 (9th Cir. 1997), stating "the essence of the
17 Graham objective reasonableness analysis is that the force which is applied must be balanced
18 against the need for that force: It is the need for force which is heart of the Graham factors". *Id.*
19 at 1057, quoting *Liston*. In fact, the *Liston* court was quoting from *Alexander v. City & County*
20 *of San Francisco*, 29 F.3d 1355 (9th Cir. 1994). For purpose of its decision, the *Drummond*
21 court left out the final sentence of the *Liston* quote:

22 "Of course, we are required to remember always that that 'reasonableness of a
23 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.'"

24 *Liston*, *supra* at 976, citing *Graham v. Connor*, *supra* 396, note 10. The *Liston* court went on to
25 point out that, though the reasonableness of force may be a question for the jury in some cases,
26 officers are still entitled to summary judgment "... if the District Court concludes, after
27 resolving all factual disputes in favor of the Plaintiff, that the officers' use of force was
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1 objectively reasonable under the circumstances.” *Liston, supra* at 976; citing *Scott v. Henrich,*
2 *supra* 915.

3 The officers arriving sequentially at the Heston house needed to use force to get Robert
4 C. Heston under control, both to alleviate the threat to them and so that they could get him under
5 control and determine the father’s condition. The officers knew that officers could not sit on
6 someone causing positional asphyxia, and they were trying to handcuff him the entire time
7 Heston was on the floor. Looking at their conduct as they saw the violent events rapidly
8 evolving (not through 20-20 hindsight), the officers did not use unreasonable force.

9 Plaintiffs would rely on *Boyd v. Benton County*, 374 F.3d 773 (9th Cir. 2004), already
10 discussed in Defendants’ Opening Brief at page 29. *Boyd* does not support Plaintiffs’ position.
11 The holding of *Boyd* is that officers who may commit violations of constitutional rights are
12 entitled to qualified immunity when they do not have “fair notice that the force employed was
13 unlawful and whether any mistake to the contrary would have been unreasonable”. *Id.* at 781;
14 citing *Drummond, supra* at 1060.

15 **D. Defendants are Entitled to Statutory Immunity for the State Claims.**

16 Plaintiffs argue that there is no immunity for the California tort causes of action pursuant
17 to California Government Code section 820.2 and 820.4. Plaintiffs are simply incorrect on their
18 discussion of *Johnson v. State of California*, 69 Cal.2d 782, 793-794. In fact, *Johnson* held that
19 government officials are immune for discretionary acts. The Supreme Court again explained the
20 decision in *Thompson v. County of Alameda*.

21 “*In Johnson v. State of California*, ... we characterized the determination of
22 whether or not to release an offender as a discretionary decision cloaked with
23 immunity under section 820.2 when made by the appropriate authorities. We
24 explained, ‘the decision to parole thus comprises the resolution of policy
25 consideration, entrusted by statute to a coordinate branch of government, that
26 compels immunity from judicial reexamination’ . . . in the present case, Plaintiffs
27 fail to allege that the releasing agent was not empowered to make the
28 determination to release James. It follows that the decision to release James is
immune from tort liability until section 820.2.”

Thompson v. County of Alameda, 27 Cal.3d 741, 747 (1980).

1 IV.

2 CONCLUSION

3 Based on the Notice of Non-Opposition, Plaintiffs agree to summary judgment in favor of
4 Defendants Fairbanks, Paredez, Simpson, and agree to summary judgment on their Fourth Cause
5 of Action based on California Civil Code section 52.1.

6 Summary judgment should be granted in favor of Defendants Dominici, Godwin,
7 Livingston, and Ruiz on Plaintiffs' First, Second and Third Causes of Action on the ground that
8 they did not use unreasonable force. In the alternative, qualified immunity should be granted to
9 the same Defendants because, if their force could be considered a constitutional violation, the
10 law on February 19, 2005, was not clear regarding the use or effect of electronic control devices.
11 No reasonable officer would have been on notice that the conduct of Defendant officers was a
12 violation of any constitutional right.

13 Summary judgment should be granted to the same Defendants on Plaintiffs' Fifth and
14 Sixth Causes of Action for battery, assault and negligence on the grounds that, first, Defendants
15 did not use unreasonable force, and second, Defendants are immune from liability for assault,
16 battery and negligence when their conduct was reasonable.

17 Summary judgment should be granted in favor of Sergeant Michael Dominici on the
18 grounds that his supervision did not permit a constitutional violation by others.

19 Summary judgment should be granted in favor of City of Salinas and its Police Chief,
20 Daniel Ortega for the following reasons:

21 The City of Salinas and Chief Ortega are not liable for constitutional violations if the
22 officers did not commit such violations.

23 The City did not have in place any policy, custom or practice that resulted in conduct of
24 police officers which constituted a violation of constitutional rights.

25 There was no deliberate indifference by the City of Salinas or Chief Ortega to the
26 violation of constitutional rights of Robert C. Heston or other persons.

