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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

LaKISHA NEAL-LOMAX; LaKISHA
NEAL-LOMAX as parent and guardian of
JOSHUA WILLIAM LOMAX; LaKISHA
NEAL-LOMAX as parent and guardian of
ALIAYA TIERRAEE LOMAX;
JUANITA CARR as parent and guardian of
INIQUE ALAZYA LOMAX, and JOYCE
CHARLESTON, individually and as
Special Administrator of the Estate of
WILLIAM D. LOMAX, JR.,

Plaintiffs,

v.

LAS VEGAS METROPOLITAN POLICE
DEPARTMENT; OFFICER REGGIE
RADER; TASER INTERNATIONAL,
INC., an Arizona corporation; and TASER
INTERNATIONAL, INC., a Delaware
foreign corporation,

Defendants.

2:05-CV-01464-PMP-RJJ

ORDER

Presently before the Court is Defendant Taser International, Inc.'s Motion for Summary Judgment (Doc. #248), argued on June 9, 2008. Plaintiffs filed a Supplement (Doc. #347) on June 11, 2008. Defendant Taser International, Inc. filed an Opposition (Doc. #348) to Plaintiffs' Supplement on June 16, 2008. Defendants Las Vegas Metropolitan Police Department and Reggie Rader filed an Opposition (Doc. #349) to Plaintiffs' Supplement on June 18, 2008.

1 **I. BACKGROUND**

2 This case arises out of the death of William Lomax (“Lomax”) after a struggle
3 with police and security officers during which Las Vegas Metropolitan Police Department
4 (“LVMPD”) police officer Reggie Rader (“Rader”) used a Taser on Lomax. Defendant
5 Taser International, Inc. (“TI”) manufactures the Taser device Rader used on Lomax. (Def.
6 Taser Int’l, Inc.’s Global App. X, Ex. 42 at ¶ 5.)¹ The facts regarding the incident are set
7 forth in full in the Court’s Order ruling on Defendants LVMPD and Rader’s Motion for
8 Summary Judgment entered this date. The Court will not repeat the factual recitation here.

9 Plaintiffs filed a Second Amended Complaint (Doc. #125) asserting against
10 Defendant TI claims for strict products liability for negligent design (count six), strict
11 products liability for negligent manufacturing (count seven), strict products liability for
12 warning defects (count eight), and negligence (count nine). Defendant TI now moves for
13 summary judgment on all claims. Defendant TI argues no reasonable jury could find
14 Lomax was not more at fault for his death than TI, and Lomax assumed the risk of
15 consuming drugs and resisting officers. TI argues it is entitled to summary judgment on the
16 strict liability claims because Plaintiffs cannot show there was a defect in the design,
17 manufacture, or warnings of the Taser device. TI also contends it is not liable under the
18 sophisticated purchaser/bulk supplier doctrine. Additionally, TI argues no reasonable jury
19 could find in favor of Plaintiffs on the issue of causation. Finally, TI asserts Plaintiffs’
20 punitive damages claim fails as a matter of law.

21 Plaintiffs respond by abandoning their negligence and manufacturing defect
22 claims. As to the design defect claim, Plaintiffs argue the Taser is defective because it is
23 designed to be non-lethal yet it caused or contributed to Lomax’s death. Plaintiffs argue
24 TI’s warnings also were defective because TI failed to warn Lomax or LVMPD that the

25 ¹ The Court hereafter will refer to Defendant Taser International, Inc.’s exhibits submitted in
26 support of its motion for summary judgment by appendix and exhibit number.

1 Taser could cause death in certain high risk individuals such as Lomax. Plaintiffs argue a
2 reasonable jury could find in their favor on causation due to the testimony of Plaintiffs'
3 experts who have testified a Taser may contribute to death under certain circumstances.
4 Finally, Plaintiffs argue the Court should permit the question of punitive damages to remain
5 pending presentation of evidence at trial.

6 **II. LEGAL STANDARD**

7 Summary judgment is appropriate if “the pleadings, the discovery and disclosure
8 materials on file, and any affidavits show that there is no genuine issue as to any material
9 fact and that the movant is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c).
10 The substantive law defines which facts are material. Anderson v. Liberty Lobby, Inc., 477
11 U.S. 242, 248 (1986). All justifiable inferences must be viewed in the light most favorable
12 to the non-moving party. County of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148,
13 1154 (9th Cir. 2001).

14 The party moving for summary judgment bears the initial burden of showing the
15 absence of a genuine issue of material fact. Fairbank v. Wunderman Cato Johnson, 212
16 F.3d 528, 531 (9th Cir. 2000). The burden then shifts to the non-moving party to go beyond
17 the pleadings and set forth specific facts demonstrating there is a genuine issue for trial. Id.;
18 Far Out Prods., Inc. v. Oskar, 247 F.3d 986, 997 (9th Cir. 2001). The party opposing
19 summary judgment “must cite to the record in support of the allegations made in the
20 pleadings to demonstrate that a genuine controversy requiring adjudication by a trier of fact
21 exists.” Taybron v. City & County of San Francisco, 341 F.3d 957, 960 (9th Cir. 2003). A
22 district court is not required to comb the record looking for genuine issues of material fact
23 that a party does not bring to the court’s attention. Carmen v. San Francisco Unified Sch.
24 Dist., 237 F.3d 1026, 1028-31 (9th Cir. 2001).

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26 **III. DISCUSSION**

1 **A. Abandoned Claims: Counts Seven and Nine**

2 In their brief opposing summary judgment, Plaintiffs abandoned their claim for
3 strict products liability based on a manufacturing defect in count seven of the Second
4 Amended Complaint. (Pls.’ Opp’n [Doc. #312] at 27.) At the June 9, 2008 hearing on TI’s
5 motion for summary judgment, Plaintiffs abandoned their negligence claim in count nine of
6 the Second Amended Complaint. The Court therefore will grant summary judgment in TI’s
7 favor on counts seven and nine of the Second Amended Complaint.

8 **B. Strict Products Liability Claims**

9 To establish a strict products liability claim under Nevada law, a plaintiff must
10 show: “1) the product had a defect which rendered it unreasonably dangerous, 2) the defect
11 existed at the time the product left the manufacturer, and 3) the defect caused the plaintiff’s
12 injury.” Fyssakis v. Knight Equip. Corp., 826 P.2d 570, 571 (Nev. 1992). A product is
13 defective if it is unreasonably dangerous. Stackiewicz v. Nissan Motor Corp. in U.S.A.,
14 686 P.2d 925, 928 (Nev. 1984). A product is unreasonably dangerous if it fails to perform
15 “in the manner reasonably to be expected in light of [its] nature and intended function” and
16 “was more dangerous [than] would be contemplated by the ordinary user having the
17 ordinary knowledge available in the community.” Allison v. Merck & Co., Inc., 878 P.2d
18 948, 952 (Nev. 1994) (quotations omitted); Stackiewicz, 686 P.2d at 928. Evidence the
19 product in question “lacked adequate safety features or that a safer alternative design was
20 feasible at the time of manufacture will support a strict liabilities claim.” Fyssakis, 826
21 P.2d at 572.

22 Even if a product is faultlessly made, the manufacturer may be strictly liable if it
23 was “unreasonably dangerous to place the product in the hands of the consumer without
24 adequate warnings concerning its safe and proper use.” Yamaha Motor Co., U.S.A. v.
25 Arnoult, 955 P.2d 661, 665 (Nev. 1998) (quoting Oak Grove Investors v. Bell & Gossett
26 Co., 668 P.2d 1075, 1080 (Nev. 1983)). “Where the defendant has reason to anticipate that

1 danger may result from a particular use of his product, and he fails to warn adequately of
2 such a danger, the product sold without a warning is in a defective condition.” Id. (quoting
3 Oak Grove Investors, 668 P.2d at 1080). The warnings must communicate adequately any
4 dangers that may result from the products use or foreseeable misuse. Fyssakis, 826 P.2d at
5 571-72. Whether the defendant gave adequate warnings usually is a jury question. Oak
6 Grove Investors, 668 P.2d at 1080.

7 To establish causation, a plaintiff must produce medical expert testimony opining
8 to a reasonable degree of medical certainty that the allegedly defective product caused the
9 plaintiff’s injury. See Morsicato v. Sav-On Drug Stores, Inc., 111 P.3d 1112, 1116 (Nev.
10 2005); United Exposition Serv. Co. v. State Indus. Ins. Sys., 851 P.2d 423, 425 (Nev. 1993).
11 A possibility that the product caused the injury is insufficient. United Exposition Serv. Co.,
12 851 P.2d at 425. Nevada requires such expert testimony because “if the plaintiff’s medical
13 expert cannot form an opinion with sufficient certainty so as to make a medical judgment,
14 there is nothing on the record with which a jury can make a decision with sufficient
15 certainty so as to make a legal judgment.” Morsicato, 111 P.3d at 1116 (quotation omitted).

16 Defendant TI markets the Taser as a less than lethal tool that is able to safely
17 subdue individuals without causing permanent injury or death (absent other circumstances,
18 such as falling injuries or combustion). Consequently, a Taser that caused a death under the
19 factual scenario presented in this case would fail to perform in a manner reasonably
20 expected in light of its nature and intended function, and would be more dangerous than a
21 law enforcement officer using a Taser would expect. Indeed, Defendant TI continues to
22 assert in this litigation that the Taser could not have caused Lomax’s death.

23 However, Plaintiffs must raise a genuine issue of material fact that the allegedly
24 defective product caused Lomax’s death. To establish causation, Plaintiffs argue the timing
25 of events alone raises a genuine issue of material fact as to causation. Additionally,
26 Plaintiffs offer the testimony of four experts: Mark Rhodes, an electrical engineer; Dr.

1 Knoblock, the coroner who performed Lomax's autopsy; Brett H. Woodard, M.D., a
2 forensic pathologist; and Jared Strote, M.D., an emergency room physician.

3 1. Timing

4 Plaintiffs argue that because at least one witness testified Lomax went limp
5 immediately after the last Taser discharge, and several witnesses testified they found Lomax
6 not breathing within minutes after the last Taser discharge, a genuine issue of material fact
7 exists regarding causation. Defendant TI responds that other witnesses testify Lomax was
8 belligerent, struggling, and still breathing up to fifteen minutes after the last Taser
9 application. According to Defendant TI, even the witnesses upon which Plaintiffs rely
10 suggest several minutes passed from the time of the last Taser application until Lomax was
11 moved to the back of the ambulance, medical personnel began to assess him, and
12 subsequently discovered he was not breathing. Finally, Defendant argues timing alone
13 cannot support a finding of causation in this case.

14 Viewing the facts in the light most favorable to Plaintiffs, the Court will assume
15 Lomax became limp or docile after the last Taser application and that he was moved to the
16 back of the ambulance and discovered not to be breathing shortly thereafter. Nevertheless,
17 timing alone cannot support causation in this case.

18 Under Nevada law, Plaintiffs must produce medical expert testimony to establish
19 causation, particularly where the cause of death is not immediately apparent. Lomax was
20 obese, under the influence of PCP, and his heart was racing even before he began to
21 struggle with the housing security officers. (App. XIII, Ex. 46 at 63; App. XIV, Ex. 68.)
22 Additionally, the autopsy and medical records at the time of the incident revealed Lomax
23 had bronchopneumonia, interstitial fibrosis in the heart, and acidosis. (App. XIII, Ex. 47;
24 App. XIV, Ex. 67.) Medical records in Lomax's medical history indicate Lomax had a
25 slightly enlarged heart and previously suffered from hypertension. (App. XII, Ex. 51; App.
26 XV, Ex. 75.) Consequently, Lomax faced a variety of medical conditions and factors that

1 may have caused or contributed to his death.

2 Because the cause of Lomax's death is not immediately apparent, the temporal
3 proximity of the last Taser application and Lomax's death cannot, by itself, raise a genuine
4 issue of material fact as to causation. Dr. Knoblock and Plaintiffs' own expert testified
5 Lomax might have died even without the Taser discharges. (Pls.' Opp'n [Doc. #297], Ex. 1
6 at 113; App. XV, Ex. 75 at 87.) Consequently, timing alone cannot support causation in
7 this case. See Lash v. Hollis, 525 F.3d 636, 641 (8th Cir. 2008) (concluding that given the
8 multiple possible causes of liver failure of a person who was subject to Taser discharges,
9 and given the "complex and uncertain chain of causation," the plaintiffs were required to
10 present "specific and detailed expert testimony" as to causation).

11 2. Experts Mark Rhodes and Dr. Knoblock

12 Plaintiffs refer to the expert opinions of Mark Rhodes ("Rhodes"), an electrical
13 engineer, and Dr. Knoblock, who performed Lomax's autopsy. However, Plaintiffs do not
14 point to anywhere in the record where either Rhodes or Dr. Knoblock state to a reasonable
15 degree of medical certainty that the Taser caused or contributed to Lomax's death.

16 a. Rhodes

17 Rhodes has a Ph.D. in Engineering from the University of California, Los
18 Angeles, majoring in applied plasma physics and minoring in quantum electronics and
19 microwave electronics. (App. VII, Ex. 25 at 1.) Rhodes is a California licensed electrical
20 engineer with twenty years of experience as a practicing research engineer, and nine years
21 of experience as an expert witness and forensic engineer. (Id.)

22 In his initial expert report, Rhodes opined that "the multiple Taser applications
23 combined with positional asphyxia and bronchopneumonia initiated respiratory arrest after
24 which [Lomax's] heart stopped beating." (Id. at 2.) Rhodes also opined that Lomax went
25 into respiratory arrest as a result of numerous factors, including that Lomax was lying on
26 his stomach with his hands cuffed behind him, was obese and had pneumonia, and had been

1 struggling with several officers. (Id. at 3.) According to Rhodes, the multiple Taser
2 discharges to Lomax’s neck “more likely than not” acted on the phrenic nerve, which
3 controls the diaphragm, the main muscle responsible for pulling air into the lungs. (Id.)
4 Rhodes concludes the Taser “was then a substantial contributing factor to the respiratory
5 arrest.” (Id.) In his rebuttal report, Rhodes opines that “it is more likely than not that
6 multiple application[s] of a Taser to the nerve-rich neck region damaged or disrupted
7 phrenic nerve activity in Mr. Lomax. This in combination with the other factors induced
8 respiratory arrest.” (App. VII, Ex. 24 at 7.)

9 Rhodes does not opine to a reasonable degree of medical certainty that the Taser
10 caused Lomax’s death. Rhodes, as an electrical engineer, likely could not offer such an
11 opinion that would satisfy Nevada’s rule requiring expert medical testimony as to causation.
12 Even if Rhodes could so opine, he did not do so in this case. Rather, Rhodes opines the
13 Taser “more likely than not” damaged or disrupted the phrenic nerve, thereby disrupting
14 Lomax’s ability to pull in air using his diaphragm, contributing to his respiratory distress.
15 Rhodes’ opinion therefore does not raise a genuine issue of material fact as to causation.

16 b. Dr. Knoblock

17 Dr. Knoblock’s autopsy report lists the cause of death as “cardiac arrest during
18 restraining procedures. Phencyclidine intoxication and bronchopneumonia were significant
19 contributing conditions.” (App. XIII, Ex. 47.) At the coroner’s inquest, Dr. Knoblock
20 testified that PCP ingestion causes “great physiological stress” to the body, including high
21 blood pressure and hyperthermia. (Id. at 163.) According to Dr. Knoblock, the struggle,
22 the PCP, and the position in which Lomax was placed decreased his ability to breathe. (Id.
23 at 165-67.)

24 At the inquest, Dr. Knoblock testified that the Taser contributed to Lomax’s
25 death because it added to this combination of factors by “contract[ing] the skeletal muscles
26 . . . the only ability to breathe would be the skeletal muscles of the ribs to expand your

1 lungs, so for a period of time, multiple times, if you contract those muscles, he is not going
2 to be able to breathe at all, most likely, and I believe that through this entire experience he
3 finally was depleted and went into cardiac arrest.” (Id. at 167.) However, Dr. Knoblock
4 stated he could not conclude that Lomax would have lived if Rader had not used the Taser
5 on Lomax. (Id. at 167-68.) At his deposition, Dr. Knoblock testified that he has no
6 scientific or medical evidence the Taser can kill an adult, or that it causes skeletal muscles
7 to contract when used in the drive stun mode. (App. XV, Ex. 75 at 87.)

8 Although Dr. Knoblock testified at the coroner’s inquest that the Taser
9 contributed to Lomax’s death, Plaintiffs do not cite to anywhere in the record that Dr.
10 Knoblock has offered the opinion to a reasonable degree of medical certainty that the Taser
11 caused Lomax’s death. To the contrary, Plaintiffs concede Dr. Knoblock has not opined the
12 Taser caused Lomax’s death:

13 In the instant case, Dr. Knoblock conducted the autopsy of Mr. Lomax;
14 thus it is well within Dr. Knoblock’s purview to opine that Mr.
15 Lomax’s death was caused by several factors including repeated use of
16 a TASER X26. However, Dr. Knoblock has not offered that opinion;
17 rather, Dr. Knoblock stated that he could not attribute Mr. Lomax’s
18 death to the TASER X26 nor could he opine that had the TASER X26
19 not been used, Mr. Lomax would have died or survived.

20 (Pls.’ Opp’n to Taser’s Mot. to Limit Test. of Pls.’ Expert Ronald J. Knoblock, M.D., From
21 This Litigation [Doc. #302] at 3.) Because Dr. Knoblock does not offer an opinion to a
22 reasonable degree of medical certainty that the Taser caused Lomax’s death, his opinion
23 does not raise a genuine issue of material fact as to causation.

24 3. Brett H. Woodard and Jared Strote

25 Plaintiffs’ two medical experts are Brett H. Woodard (“Woodard”) and Jared
26 Strote (“Strote”). Defendant TI moves to exclude these experts’ testimony as inadmissible.

 Federal Rule of Evidence 702 permits testimony based on “scientific, technical,
or other specialized knowledge” by experts qualified by “knowledge, skill, experience,
training, or education” if the testimony is both relevant and reliable. The trial court acts as

1 a “gatekeeper” to exclude expert testimony that is not both relevant and reliable. Kumho
2 Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 147 (1999).

3 Testimony is relevant if it will “assist the trier of fact to understand the evidence
4 or to determine a fact in issue.” Fed. R. Evid. 702; see also Daubert v. Merrell Dow
5 Pharms., Inc., 43 F.3d 1311, 1315 (9th Cir. 1995) (stating testimony is relevant if it
6 “logically advances a material aspect of the proposing party’s case”). To be helpful to the
7 jury, the testimony must be ““tied to the facts”” of the particular case. Daubert v. Merrell
8 Dow Pharms., Inc., 509 U.S. 579, 591 (1993) (quoting United States v. Downing, 753 F.2d
9 1224, 1242 (3d Cir. 1985)).

10 Expert testimony is reliable if it is “based upon sufficient facts or data,” “the
11 product of reliable principles and methods,” and the expert “applies the principles and
12 methods reliably to the facts of the case.” Fed. R. Evid. 702. In Daubert, the United States
13 Supreme Court set forth a non-exhaustive list of factors that may guide a court in assessing
14 the reliability of offered testimony:

- 15 (1) whether a scientific theory or technique can be (and has been)
16 tested; (2) whether the theory or technique has been subjected to peer
17 review and publication; (3) the known or potential rate of error and the
existence and maintenance of standards controlling the techniques
operation; and (4) whether the technique is generally accepted.

18 509 U.S. at 593-94.

19 However, depending on the type of expert testimony offered, these factors may
20 not be appropriate to assess reliability. United States v. Sandoval-Mendoza, 472 F.3d 645,
21 655 (9th Cir. 2006) (citing Kumho Tire Co., Ltd., 526 U.S. at 150). The Daubert factors
22 may have little application to expert testimony based on personal knowledge or experience.
23 Id. In such circumstances, the trial court should not apply the Daubert factors in an unduly
24 restrictive manner. Id. For example, where medical expert testimony is offered, the trial
25 court should consider “what a good [physician] would in determining what is reliable
26 knowledge in the [medical] profession,” and “should admit medical expert testimony if

1 physicians would accept it as useful and reliable.” Id.

2 Additionally, the trial court should be mindful that reliability is not determined
3 based on the “correctness of the expert’s conclusions but the soundness of his
4 methodology.” Stilwell v. Smith & Nephew, Inc., 482 F.3d 1187, 1192 (9th Cir. 2007)
5 (quotation omitted). The trial court should ensure the expert “employs in the courtroom the
6 same level of intellectual rigor that characterizes the practice of an expert in the relevant
7 field.” Kumho Tire Co., Ltd., 526 U.S. at 152. A “significant fact” in making this
8 determination is “whether the expert has developed [his] opinions expressly for purposes of
9 testifying, since a scientist’s normal workplace is the lab or the field, not the courtroom or
10 the lawyer’s office.” Lust By & Through Lust v. Merrell Dow Pharm., Inc., 89 F.3d 594,
11 597 (9th Cir. 1996) (quotations omitted). An expert’s failure to subject his method to
12 peer-review and to develop an opinion outside the litigation does not necessarily render his
13 opinion inadmissible. Id. However, if these guarantees of reliability are absent, the expert
14 must explain his methodology precisely and must “point to some objective source”
15 supporting his methodology. Id.

16 Testimony must be both relevant and reliable to be admissible. Stilwell, 482
17 F.3d at 1192. Whether to admit expert testimony, as well as deciding how to determine the
18 testimony is reliable, lies within the trial court’s discretion. Kumho Tire Co., Ltd., 526 U.S.
19 at 152; United States v. Calderon-Segura, 512 F.3d 1104, 1109 (9th Cir. 2008). The party
20 offering the expert testimony bears the burden of establishing its admissibility. Lust, 89
21 F.3d at 598.

22 a. Woodard

23 Woodard is a board certified pathologist with a sub-specialty in forensic
24 pathology. (App. VII, Ex. 22 at 1.) Woodard obtained his medical degree at Tulane
25 University and did his residency at Duke University Medical Center and the North Carolina
26 Medical Examiner’s office. (Id.) Woodard reviews violent and/or unattended deaths in the

1 usual course of his business activities. (Id.)

2 Woodard has performed an autopsy and rendered an opinion on the cause and
3 manner of death in approximately a dozen cases involving electricity as a contributory
4 cause, and one other case involving an electronic control device. (Pls.' Opp'n [Doc. #297],
5 Ex. 1 ["Woodard Dep.,"] at 32-33, 51-52.) The other case involving an electronic control
6 device did not result in litigation, and consequently Woodard did not testify as an expert in
7 relation to that case. (Id.) Woodard attended an American Academy of Forensic Science
8 meeting at which Tasers were discussed, and he observed a Federal Bureau of Investigation
9 demonstration of Taser applications. (Id. at 56-64.)

10 Woodard reviewed the testimony of the security officers, Officer Rader, the
11 medical personnel, the inquest proceedings, and the medical examiner's reports. (App. VII,
12 Ex. 22 at 1.) Woodard also spent approximately four hours reviewing Defendant's experts'
13 reports. (Woodard Dep. at 21.) Woodard opines as follows:

14 To a reasonable degree of medical certainty I can state the following - I
15 concur with the conclusions expressed by the medical examiner that
16 the cause was related to multiple factors secondary to restraint
17 procedures. These factors would include restraint in a face down
18 position, body weight application by restrainer to the chest, physical
19 resistance and agitation by the deceased, obesity of the deceased,
20 bronchopneumonia, Phencyclidine abuse, and taser administration.

21 Repetitive and sustained usage of taser would result in forced
22 muscular contractions and interfere with compensatory
23 hyperventilation required for immediate physiologic correction of
24 acidosis. Additionally, repetitive tasing because of response to pain
25 would worsen agitation and resistance. Therefore, it is more likely
26 than not that taser application worsened the decedent's metabolic
derangement and was a significant contributing factor to the
deceased'[s] ultimate expiration.

(App. VII, Ex. 22 at 1-2.)

23 Defendant TI moves to strike Woodard's opinions. Defendant TI argues
24 Woodard is not qualified to express an opinion on the Taser's physiological effects because
25 he admits he is not an expert in electronic control devices generally, or the Taser
26 specifically, and Woodard made no attempt to educate himself on the Taser's effects even

1 after being retained. Additionally, TI argues Woodard did not base his opinion on sufficient
2 facts because he did not review Lomax's medical history or review the histologic slides
3 from the autopsy.

4 TI also asserts Woodard's opinions are not the results of methodology being
5 reliably applied to the facts because Woodard did nothing beyond reviewing witness
6 statements and the autopsy report. TI contends Woodard's conclusions are suspect given
7 that he cannot point to any peer reviewed scientific studies that support his conclusion, and
8 he failed to address Taser studies that contradicted his opinions. Finally, TI argues
9 Woodard's testimony is unhelpful to the jury because he cannot quantify what he means by
10 stating the Taser was a "significant" contributing factor to Lomax's death.

11 Plaintiffs respond that Woodard is qualified by his experience as a forensic
12 pathologist for many years, including his experience in determining the cause of death
13 where electric shock was involved over a dozen times. Plaintiffs contend Woodard's failure
14 to consider certain Taser studies does not disqualify him because those studies were
15 conducted by TI consultants, and thus lack independent credibility. According to Plaintiffs,
16 Woodard relied on the facts and data upon which forensic pathologists normally rely, and
17 he employed the standard by which medical examiners determine cause and manner of
18 death. Plaintiffs assert that because Woodard's expertise is gained through experience, he
19 need not have conducted scientific experiments to reach his conclusions. Finally, Plaintiffs
20 argue that if Woodard is not qualified to testify based on his lack of specific knowledge
21 regarding the Taser, then several of Defendant TI's experts likewise should not be permitted
22 to testify.²

23 Plaintiffs have not met their burden of establishing Woodard's opinions are

24
25 ² Plaintiffs' argument that if its expert is not qualified, then neither are Defendant's experts,
26 is irrelevant. Plaintiffs bear the burden of establishing their expert is qualified regardless of the
qualification of Defendant's experts.

1 admissible, and the Court, in its discretion, will exclude Woodard's opinions. While
2 Woodard is qualified by his experience, training, and education to be a forensic pathologist
3 generally, Woodard has little to no knowledge, training, experience, education, or expertise
4 related to electronic control devices generally or the Taser specifically. Woodard admitted
5 at his deposition he does not hold himself out as an expert on Taser devices or their impact
6 on human beings. (Woodard Dep. at 67, 121-22.) Woodard was unaware of any Taser
7 studies conducted on humans or animals. Woodard testified, "You can't get clearance from
8 an animal experimentation board to, you know, Taser animals to death." (Id. at 27; see also
9 id. at 91-92 (stating he was "not aware of any research where they've applied . . . Tasers to
10 animals and measured whatever").) Although Woodard testified he read TI's experts'
11 reports, Woodard was unfamiliar with studies that have applied the Taser to both animals
12 and humans as mentioned therein. (App. I, Ex. 2 at App. 1, pp. 11-14, 21-23.) Despite his
13 relative unfamiliarity with Tasers, Woodard did not educate himself on the Taser through
14 reference materials. (Woodard Dep. at 107-08 (stating that "other than anecdotal
15 newspaper articles on Taser associated deaths and my own experience, I was at a loss with
16 looking up Tasers specifically").) Woodard therefore is not qualified to opine about the
17 Taser's effects on human beings. See Lash, 525 F.3d at 641 (affirming district court's
18 exclusion of proposed expert who had no experience with Tasers, Taser injuries, or the
19 specific Taser at issue in the case).

20 Additionally, Woodard's testimony is not reliable because it is not the product of
21 reliable principles and methods. The Daubert factors for determining reliability are not
22 particularly relevant to determining the reliability of Woodard's opinions because his
23 opinions are based largely on his experience, training, and education, not on scientific
24 experiments he has performed. However, his opinions must have some objective medical or
25 scientific basis to which he may apply the facts of this case.

26 At his deposition, Woodard admitted he has no medical or scientific basis from

1 which to conclude the Taser in drive stun mode causes forced muscular contractions.
2 (Woodard Dep. at 78-79.) Woodard based his conclusion on lay witness testimony that
3 Lomax would tense his muscles during the struggle, which several witnesses attributed to
4 Taser discharges. (Id.) However, Woodard has not identified any peer reviewed study,
5 experiment, authoritative text, or other objective source suggesting the Taser in drive stun
6 mode results in forced muscular contractions that would interfere with compensatory
7 hyperventilation.

8 Additionally, Woodard could not identify any peer reviewed study, experiment,
9 authoritative text, or other objective source indicating Taser applications worsen metabolic
10 derangement. (Id. at 91-92.) Woodard admitted he is not an expert on the question of
11 whether the Taser causes acidosis. (Id. at 80.) Further, Woodard admitted he is not an
12 expert on the level of pain a person experiences while under the influence of PCP or an
13 expert on metabolic derangement resulting from the application of an electronic control
14 device. (Id. at 86-89, 92.)

15 While the Court would not require Woodard to conduct his own experiments
16 using Taser devices to support his conclusions, Woodard must have some objective basis
17 from which to derive an opinion that the Taser causes the physiological effects Woodard
18 ascribes to the Taser. Woodard points to no study, text, experiment or other source that the
19 Taser in fact causes the physical responses Woodard attributes to it. When asked
20 specifically whether he had any scientific, medical, or engineering peer-reviewed studies
21 supporting the conclusion that the Taser caused or contributed to Lomax's death, Woodard
22 indicated he had no such materials. (Id. at 117-18.) At bottom, Woodard relies upon the
23 eyewitness testimony, but he does not link the eyewitness testimony to an objective medical
24 or scientific source.

25 ///

26 Absent any medical or scientific basis to support his opinion that the Taser can

1 cause forced muscular contractions and impair compensatory hyperventilation, or that Taser
2 discharges worsen metabolic derangement, Woodard's opinions are not based on reliable
3 medical or scientific methodology. Without these explanations of the mechanism by which
4 the Taser purportedly caused Lomax's death, Woodard's primary opinion that the Taser
5 contributed to Lomax's death has no basis beyond Woodard's unsupported opinion. The
6 Court therefore will exclude Woodard's opinions in this matter.

7 b. Strote

8 Strote is a board certified, practicing emergency room physician and an assistant
9 professor at the University of Washington Medical Center. (App. VIII, Ex. 33 at 1.) Strote
10 has worked as an emergency room physician for four years. (Id.) During his residency and
11 his emergency room work, Strote has determined the cause of death over twenty times.
12 (Pls.' Opp'n [Doc. #312], Ex. 10 ["Strote Dep.,"] at 75.) He obtained a Master of Science in
13 neurobiology from Duke University, and his Medical Doctorate from Harvard University.
14 (App. VIII, Ex. 33 at 1.)

15 Strote previously published a paper reviewing thirty-seven cases of deaths
16 following Taser use. (Id.) His study obtained the autopsy reports for deaths following
17 Taser usage where the individual died within twenty-four hours after the Taser application.
18 (App. VIII, Ex. 33, Attach. 1 at 1-2.) Strote's study found a high incidence of preexisting
19 cardiac disease in these individuals and concluded that "such preexisting disease, when
20 combined with stimulant use, struggle against law enforcement, and definitive restraint
21 maneuvers (Taser or otherwise), creates a high-risk situation for restraint-related fatalities."
22 (Id. at 3.) The study's results "reinforce[] that the fatal encounters in which Tasers are used
23 involve patients already at higher risk for sudden death, requiring increased EMS provider
24 vigilance. EMS management of patients recently subjected to application of a Taser should
25 take into account the likelihood of the physiologic results of excited delirium and/or
26 extensive struggle against restraint: hyperthermia, acidosis, rhabdomyolysis, and a

1 hypersympathetic state.” (Id.) Strote’s study noted that “[b]ecause this report is a
2 descriptive case series, causal links cannot be made. The interpretation of data is limited to
3 establishing factors that may be associated with a risk of sudden death in the setting of
4 Taser use.” (Id.)

5 In reaching his opinion in this case, Strote reviewed witness statements, the
6 transcript from the coroner’s inquest, the medical and autopsy records, and scientific and
7 medical literature. (App. VIII, Ex. 33 at 1.) Strote opines, to a reasonable degree of
8 medical certainty, that Lomax went into cardiac arrest during or immediately following
9 restraint procedures. (Id. at 2.) Strote opines Lomax’s death resulted from multiple factors,
10 including obesity, PCP use, the prolonged struggle, and fibrosis in his heart muscle. (Id.)
11 Strote further opines that acidosis and a hypersympathetic state caused Lomax’s death. (Id.
12 at 3.) Strote states that the body compensates for metabolic acidosis through ventilation,
13 but that Lomax was at a decreased ability to ventilate due to his obesity and
14 bronchopneumonia, and his positioning on his stomach combined with an officer placing a
15 knee in his back. (Id.)

16 Strote opines these conditions put Lomax at a high risk of cardiac arrest from
17 metabolic derangement, a hypersympathetic state, diminished compensatory pulmonary
18 reserve, and external restrictions on his ability to maximize his pulmonary reserve. (Id.)
19 Strote asserts, “It is likely, therefore, that right before his terminal event, Mr. Lomax had
20 almost no capacity to tolerate further insults to his heart, metabolic status, or respiratory
21 status.” (Id.) According to Strote, the Taser discharges “likely furthered the metabolic
22 derangement of Mr. Lomax, increased his hypersympathetic state, and further [] decreased
23 [his] ability to compensate for these derangements.” (Id.)

24 Strote opines the Taser had two effects on Lomax. First, Strote asserts that the
25 Taser caused metabolic derangement. In support, Strote cites to a pig study that found
26 significant acidosis in pigs after repeated Taser discharges in the probe mode. (Id. at 4.)

1 Strote also opines the Taser almost certainly increased catecholamines in Lomax as a pain
2 reaction. (Id.)

3 Second, Strote asserts the Taser may have decreased Lomax's ability to ventilate
4 to compensate for metabolic derangement due to local contraction of accessory muscles.
5 (Id.) Strote notes that although a recent study found Taser applications did not decrease
6 ventilation, the study did not mimic real life restraint situations, and the study did not apply
7 Taser discharges to the neck area as Lomax experienced. (Id.) Strote states it is possible
8 that the drive stun mode applied to the neck area resulted in local contraction of accessory
9 muscles, thereby decreasing Lomax's ability to "create the necessary ventilatory drive he
10 needed to compensate for metabolic derangements." (Id.) Finally, Strote suggests Lomax
11 "may also have simply tired . . . to the point that he no longer had the strength, physically or
12 mentally, to continue to compensate for the other disorders in his system." (Id. at 5.)

13 In summary, Strote opines:

14 During the moments just prior to Mr. Lomax's terminal event, he likely
15 was in an extremely dangerous state of increased catecholamine levels
16 from multiple causes, metabolic acidosis from multiple causes, and a
17 decreased ability to compensate for the effects of these factors, also
18 from multiple causes, leading to little or no reserve to tolerate
19 additional insult. It is therefore my opinion, within a reasonable
20 degree of medical certainty, that given a) the temporal association of
21 Mr. Lomax being tased multiple times, immediately ceasing to
22 struggle, and then being found in cardiac and respiratory arrest within a
23 very short time period and b) the effects that tasing can have on acid
24 and catecholamine levels, exhaustion and potential breathing
25 impairment, it is likely that the TASER application worsened Mr.
26 Lomax's condition and decreased his ability to compensate for it,
playing a critical role in his terminal event.

(Id. at 5.)

23 Defendant TI moves to strike Strote's opinions, arguing Strote lacks the
24 necessary knowledge, training, or experience to testify about the Taser's physiological
25 effects. Defendant also argues Strote's opinions are not based on the facts of the Lomax
26 incident because he selectively chooses only witness statements that support his

1 conclusions. Defendant further argues Strote did not use reliable methodology because he
2 did not perform any experiments himself and he cannot cite to any peer-reviewed studies
3 that support his conclusions.

4 Plaintiffs respond Strote has experience determining the cause of death as part of
5 his emergency medicine work. Plaintiffs also argue Strote is qualified through his
6 experience, his prior Taser study, and his review of other experts in various fields.
7 Plaintiffs contend that if Strote is not qualified to opine about Tasers, then neither are
8 several of Defendant TI's experts. Plaintiffs contend Strote's reliance on testimony that
9 Lomax became unresponsive immediately following the last Taser discharge is supported
10 by eyewitness testimony, and therefore is based on the facts of the case. Finally, Plaintiffs
11 argue Strote's methodology is reliable, as he utilized his experience and training to analyze
12 the autopsy report, the witness statements, the inquest proceedings, and medical and
13 scientific literature to form his opinions.

14 Plaintiffs have not met their burden of establishing Strote's opinions are
15 admissible, and the Court, in its discretion, will exclude Strote's opinions. Strote's
16 testimony is not reliable because it is not the product of reliable principles and methods.
17 The Daubert factors for determining reliability are not particularly relevant to determining
18 the reliability of Strote's opinions because his opinions are based largely on his experience,
19 training, education, and review of medical and scientific literature, not on scientific
20 experiments he has performed. However, Strote's opinions must have some objective
21 medical or scientific basis to which he may apply the facts of this case.

22 At his deposition, Strote could not identify any study or experiment regarding the
23 Taser's effects on the human body when applied in the drive stun mode. (Strote Dep. at
24 112.) Strote also could not identify any objective source finding that the Taser applied in
25 the drive stun mode can kill an adult human being. (Id. at 173.) Strote admitted no medical
26 or scientific literature has established a link between a Taser application and fatal injury.

1 (App. XV, Ex. 78 at 46.)

2 Further, although Strote opines the Taser applications made Lomax more acidotic
3 and increased his hypersympathetic state, Strote could not state how much more acidotic
4 Lomax became due to Taser applications, or how much the Taser increased his
5 hypersympathetic state. (Strote Dep. at 154-56.) Moreover, Strote could not identify any
6 peer-reviewed studies or papers supporting his opinion that the Taser in drive stun mode
7 would have made Lomax more acidotic, increased his hypersympathetic state, or impacted
8 his accessory muscles. (Id. at 154-56, 164.)

9 Strote also could not cite to any peer-reviewed studies or papers supporting his
10 opinion that Taser applications in drive stun mode decrease a person's ability to keep up
11 with ventilatory compensation. (Id. at 160.) Additionally, Strote admitted he did not know
12 how much of an increase in catecholamines a person would experience from a Taser
13 application in drive stun mode, stating, "I don't have the scientific data to back it up. But
14 clinically it makes sense to me." (Id. at 191.) Finally, Strote could not state to a reasonable
15 degree of medical certainty that Lomax would have lived absent the Taser discharges. (Id.
16 at 203-04.)

17 While the Court would not require Strote to conduct his own experiments using
18 Taser devices to support his conclusions, Strote must have some objective basis from which
19 to derive an opinion that the Taser causes the physiological effects Strote ascribes to the
20 Taser. Strote lacks any objective medical source linking the eyewitness testimony and his
21 opinions as to what caused Lomax's death. Absent any medical or scientific basis to
22 support his opinion that the Taser in drive stun mode increases acidosis, increases a
23 person's hypersympathetic state, impacts the accessory muscles, or increases catecholamine
24 levels in a person on PCP, Strote's opinions are not based on reliable medical or scientific
25 methodology. See Cabrera v. Cordis Corp., 945 F. Supp. 209 (D. Nev. 1996), affirmed by
26 134 F.3d 1418 (1998). The Court therefore will exclude Strote's opinions in this matter.

1 Plaintiffs have failed to produce any admissible evidence stating to a reasonable
2 degree of medical certainty that the Taser caused or contributed to Lomax's death.
3 Plaintiffs therefore have not raised a genuine issue of material fact as to causation, and the
4 Court will grant Defendant TI's motion for summary judgment.

5 **IV. CONCLUSION**

6 IT IS THEREFORE ORDERED that Defendant Taser International, Inc.'s
7 Motion for Summary Judgment (Doc. #248) is hereby GRANTED. Judgment is hereby
8 entered in favor of Defendant Taser International, Inc. and against Plaintiffs.

9 IT IS FURTHER ORDERED that Plaintiffs' Daubert Motion to Exclude
10 Testimony of Defendants' Expert Witnesses (Doc. #260) is hereby DENIED as moot.

11 IT IS FURTHER ORDERED that Defendant Taser International, Inc.'s Motion
12 to Exclude the Testimony of Plaintiffs' Purported Expert, Mark Rhodes (Doc. #263) is
13 hereby DENIED as moot.

14 IT IS FURTHER ORDERED that Defendant Taser International, Inc.'s Motion
15 to Exclude the Testimony of Plaintiffs' Purported Expert, Brett H. Woodard, M.D. (Doc.
16 #267) is hereby GRANTED.

17 IT IS FURTHER ORDERED that Defendant Taser International, Inc.'s Motion
18 to Limit Testimony of Plaintiffs' Disclosed Expert, Dr. Knoblock (Doc. #268) is hereby
19 DENIED as moot.

20 IT IS FURTHER ORDERED that Defendant Taser International, Inc.'s Motion
21 to Limit Testimony of Plaintiffs' Retained Expert, Dr. Strote (Doc. #269) is hereby
22 GRANTED.

23 IT IS FURTHER ORDERED that Defendant Taser International, Inc.'s Motion
24 to Exclude the Testimony of Plaintiffs' Purported Expert, Jerry Bush (Doc. #270) is hereby
25 DENIED as moot.

26 IT IS FURTHER ORDERED that Defendant Taser International, Inc.'s Joinder

1 in Las Vegas Metropolitan Police Department's Motion to Exclude the Testimony of
2 Plaintiffs' Purported Expert, David M. Ingebretsen (Doc. #271) is hereby DENIED as moot.

3 IT IS FURTHER ORDERED that Defendant Taser International, Inc.'s Motion
4 and Supporting Memorandum to Exclude Tendered Expert Ron Martinelli (Doc. #272) is
5 hereby DENIED as moot.

6 IT IS FURTHER ORDERED that Defendant Taser International, Inc.'s Motion
7 to Exclude the Testimony of Plaintiffs' Purported Expert, Terence M. Clauretje, Ph.D.
8 (Doc. #273) is hereby DENIED as moot.

9
10 DATED: September 2, 2008

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13 PHILIP M. PRO
14 United States District Judge
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