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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Betty Lou Heston, et al.,

NO. C 05-03658 JW

Plaintiffs,

**ORDER GRANTING DEFENDANT
TASER’S RENEWED MOTION FOR
JUDGMENT; DENYING DEFENDANT
TASER’S ALTERNATIVE MOTION
FOR A NEW TRIAL**

v.

City of Salinas, et al.,

Defendants.

_____ /

I. INTRODUCTION

Robert C. Heston, Jr. died after electronic shock devices called “Tasers” were deployed against him by Salinas Police Officers. His mother and father and the executor of his estate initiated this civil action against the City of Salinas, the individual police officers and against TASER International (“TASER”). Plaintiffs claim that the police officers subjected Robert C. Heston to excessive force in violation of his Fourth Amendment rights and deprived Plaintiffs Betty Lou Heston and Robert H. Heston of their due process rights to familial relations in violation of the Fourteenth Amendment.¹

Plaintiffs claim that Defendant TASER (1) negligently manufactured the TASER M26 ECDs; (2) failed to provide adequate warnings that repeated applications of the electrical current in the deployment and the use of a Taser can cause cardiac arrest, especially on persons who are in an agitated or excited physical state; and (3) is strictly liable for failure to provide adequate warnings.

¹ A more complete recitation of the background of this case may be found in the Court’s December 20, 2007 Order Granting in Part and Denying in Part Defendants’ Motion for Summary Judgment. (See Docket Item No. 122.)

1 Presently before the Court are (1) Defendant TASER’s Motions for Judgment as a Matter of
2 Law² and (2) Motion for a New Trial.³ The Court conducted a hearing on September 26, 2008.
3 Based on the papers submitted to dated and oral argument, the Court GRANTS Defendant TASER’s
4 Motions for Judgment as a Matter of Law, and DENIES Defendant TASER’s Alternative Motion for
5 a New Trial.

6 **II. BACKGROUND**

7 The case was tried to a jury. Pursuant to Federal Rule of Civil Procedure 50, prior to
8 submission of the case to the jury, Defendant TASER moved for judgment as a matter of law on all
9 claims against it. The Court did not rule on the motion and submitted the case to the jury on all
10 claims against all parties. See Fed. R. Civ. P. 50(b).

11 **A. The Jury’s Verdict**

12 On June 6, 2008, the Jury returned a verdict in the form of answers to interrogatories as
13 follows:

14 WE THE JURY IN THE ABOVE-ENTITLED CASE FIND AS FOLLOWS:⁴

15 **FIRST CLAIM**
16 **DEPRIVATION OF CONSTITUTIONAL RIGHTS**
17 **BY PERSONS ACTING UNDER COLOR OF LAW**

18 **QUESTION NO. 1.**

19 Do you find that the acts or omissions of any of the Defendant Police Officers
20 listed below caused Robert C. Heston to be subjected to excessive force during his
21 arrest or detention by deployment of Taser ECDs against him?

Answer:	Defendant Lek Livingston	No
	Defendant Juan Ruiz	No
	Defendant James Godwin	No
	Defendant Michael Dominici	No

22
23
24 ² (hereafter, “Rule 50 Motion,” Docket Item No. 308.) After the Jury verdict, TASER filed
25 a “Renewed Supplemental Motion for Judgment as a Mater of Law.” (hereafter, “Renewed Rule 50
26 Motion,” Docket Item No. 335.) The Renewed Motion only deals with the punitive damage awards.

27 ³ (hereafter, “Rule 59 Motion,” Docket Item No. 336.)

28 ⁴ Bracketed internal instructions which appear on the verdict form are omitted.

1 QUESTION NO. 2.

2 With respect to each Defendant Police Officer for whom you answered “yes”
3 in the previous question, do you find that the acts or omissions of the particular
4 Defendant or Defendants caused Robert C. Heston to suffer damages prior to his
5 death from the use of excessive force?

6 *[The jury was instructed to skip this question if a previous question was answered, “No.”*
7 *Consistently with the instruction, the jury did not answer this question.]*

8 QUESTION NO. 3.

9 With respect to each Defendant Police Officer for whom you answered “yes”
10 in Question No. 1, do you find that the acts or omissions of the particular Defendant
11 or Defendants caused Plaintiffs Betty Lou Heston and Robert H. Heston, the parents
12 of Robert C. Heston, to suffer damages because the excessive force was a substantial
13 factor in causing the death of Robert C. Heston?

14 *[The jury was instructed to skip this question if a previous question was answered, “No.”*
15 *Consistently with the instruction, the jury did not answer this question.]*

16 **SECOND CLAIM**
17 **FAILURE ON THE PART OF**
18 **CITY OF SALINAS POLICE DEPARTMENT**
19 **TO ADEQUATELY TRAIN OR SUPERVISE**

20 QUESTION NO. 4.

21 Do you find that before detention or arrest of Robert C. Heston, the policies or
22 practices of the Defendant City of Salinas Police Department did not adequately train
23 Salinas Police Officers to handle the usual and recurring situations with which they
24 must deal with respect to the deployment of Taser ECDs?

25 *[The jury was instructed to skip this question if a previous question was answered, “No.”*
26 *Consistently with the instruction, the jury did not answer this question.]*

27 QUESTION NO. 5.

28 Do you find that before detention or arrest of Robert C. Heston, the policies or
practices of the Defendant City of Salinas Police Department did not adequately
supervise Salinas Police Officers to handle the usual and recurring situations with
which they must deal with respect to the deployment of Taser ECDs?

[The jury was instructed to skip this question if a previous question was answered, “No.”
Consistently with the instruction, the jury did not answer this question.]

QUESTION NO. 6.

Do you find that Defendant City of Salinas Police Department was
deliberately indifferent to the obvious consequences of its failure to train or supervise
its police officers adequately with respect to the deployment of Taser ECDs?

[The jury was instructed to skip this question if a previous question was answered, “No.”
Consistently with the instruction, the jury did not answer this question.]

1 QUESTION NO. 7.

2 Do you find that the failure of the Defendant City of Salinas Police
3 Department to provide adequate training or supervision with respect to the
4 deployment of Taser ECDs was the moving force that caused Robert C. Heston to
5 suffer damages prior to his death from the use of excessive force?

6 *[The jury was instructed to skip this question if a previous question was answered, "No."
7 Consistently with the instruction, the jury did not answer this question.]*

8 QUESTION NO. 8.

9 Do you find that the failure of the Defendant City of Salinas Police
10 Department to provide adequate training or supervision with respect to the
11 deployment of Taser ECDs was the moving force that caused Plaintiffs Betty Lou
12 Heston and Robert H. Heston, the parents of Robert C. Heston, to suffer damages
13 because the excessive force was a substantial factor in causing the death of Robert C.
14 Heston?

15 *[The jury was instructed to skip this question if a previous question was answered, "No."
16 Consistently with the instruction, the jury did not answer this question.]*

17 **THIRD CLAIM**
18 **BATTERY**

19 QUESTION NO. 9.

20 Do you find that, in the course of detention or arrest of Robert C. Heston, any
21 of the Defendant Police Officers listed below which acting in the course and scope of
22 their employment by the City of Salinas Police Department, touched Robert C.
23 Heston in an offensive manner to which he did not consent, namely, by intentionally
24 using excessive force in the deployment of Taser ECDs against him?

25 *[The jury was instructed to skip this question if a previous question was answered, "No."
26 Consistently with the instruction, the jury did not answer this question.]*

27 QUESTION NO. 10.

28 With respect to each Defendant Police Officer for whom you answered "yes"
in Question No. 9, do you find that the intentional act of the particular Defendant or
Defendants caused Robert C. Heston to suffer damages prior to his death from the use
of excessive force?

*[The jury was instructed to skip this question if a previous question was answered, "No."
Consistently with the instruction, the jury did not answer this question.]*

QUESTION NO. 11.

With respect to each Defendant Police Officer for whom you answered "yes"
in Question No. 9, do you find that the intentional act of the particular Defendant or
Defendants caused Plaintiffs Betty Lou Heston and Robert H. Heston, the parents of
Robert C. Heston, to suffer damages because the excessive force was a substantial
factor in causing the death of Robert C. Heston?

*[The jury was instructed to skip this question if a previous question was answered, "No."
Consistently with the instruction, the jury did not answer this question.]*

**FOURTH CLAIM
NEGLIGENCE BY MANUFACTURER IN FAILING TO WARN**

QUESTION NO. 12.

Do you find that TASER International was the manufacturer of Taser ECDs which are devices capable of delivering electric shocks to a person against whom they are deployed?

Answer: YES

QUESTION NO. 13.

Do you find that, at the time TASER International manufactured and sold Taser ECDs, a reasonably prudent manufacturer of an electronic control device knew or reasonably should have known that the Taser ECD was dangerous or likely to be dangerous because prolonged exposure to electric shock from the device potentially causes acidosis to a degree which poses a risk of cardiac arrest in a person against whom the device is deployed?

Answer: YES

QUESTION NO. 14.

Do you find that a reasonably prudent manufacturer of an ECD would have warned purchasers of this risk and that TASER International failed to adequately warn purchasers of the risk?

Answer: YES

QUESTION NO. 15.

Do you find that, on February 19, 2005, Salinas Police Officers, while using the product in a manner reasonably foreseeable by TASER International, administered a prolonged deployment of Taser ECDs against Robert C. Heston, and that the failure by TASER International to warn the Salinas Police Officers of the risks of prolonged deployment was a substantial factor in causing the officers to use the device in such a way?

Answer: YES

**FIFTH CLAIM
STRICT PRODUCTS LIABILITY**

QUESTION NO. 16.

Do you find that at the time TASER International manufactured and sold Taser ECDs to the Salinas Police Department, TASER International knew or it was knowable by the use of available scientific knowledge, that prolonged exposure to shocks from Taser ECDs potentially causes acidosis to a degree which poses a substantial danger, namely of causing a person against whom the device is deployed to have a cardiac arrest?

Answer: NO

1 QUESTION NO. 17.

2 Do you find that ordinary purchasers of the Taser ECDs would not have
3 recognized this risk, and that TASER International failed to adequately warn
4 purchasers of this risk?

5 *[The jury was instructed to skip this question if a previous question was answered, "No."
6 Consistently with the instruction, the jury did not answer this question.]*

7 QUESTION NO. 18.

8 If you answered "Yes" to Question No. 15 or "Yes" to Question No. 17, do
9 you find that as a consequence of the prolonged deployment of Taser ECDs prior to
10 his death, Robert C. Heston suffered acidosis to a degree which caused him to have a
11 cardiac arrest?

12 **Answer: YES**

13 QUESTION NO. 19.

14 Do you find that Plaintiffs Betty Lou Heston and Robert H. Heston, the
15 parents of Robert C. Heston, suffered harm because, as a consequence of the cardiac
16 arrest, Robert C. Heston died.

17 **Answer: YES**

18 **DAMAGES**
19 **ESTATE OF ROBERT C. HESTON**

20 QUESTION NO. 20.

21 If you answered "yes" to Question No. 2, Question No. 7, Question No. 10, or
22 Question No. 18, what if any, amount of compensatory damages do you award to the
23 Estate of Robert C. Heston for the injuries he suffered prior to his death?

24 **Answer: \$21,000**

25 QUESTION NO. 21.

26 If you answered "yes" to Question No. 2, Question No. 10, or Question No.
27 18, what if any, amount of punitive damages do you award to the Estate of Robert C.
28 Heston against each Defendant for injuries suffered prior to his death?

Answer:	Defendant Lek Livingston	\$0
	Defendant Juan Ruiz	\$0
	Defendant James Godwin	\$0
	Defendant Michael Dominici	\$0
	Defendant TASER International	\$200,000

ROBERT H. HESTON AND BETTY LOU HESTON

QUESTION NO. 22.

If you answered "yes" to Question No. 3, Question No. 8, Question No. 11, or
Question No. 19, what if any, amount of compensatory damages do you award to
Robert H. Heston and Betty Lou Heston for their loss resulting from the death of
Robert C. Heston?

Answer: \$1,000,000

1 QUESTION NO. 23.

2 If you answered “yes” to Question No. 3, Question No. 8, Question No. 11, or
 3 Question No. 19, what if any, amount of punitive damages do you award to Robert H.
 Heston and Betty Lou Heston for their loss resulting from the death of Robert C.
 Heston?

4 **Answer:**

Defendant Lek Livingston	\$0
Defendant Juan Ruiz	\$0
Defendant James Godwin	\$0
Defendant Michael Dominici	\$0
Defendant TASER International	\$5,000,000

7 **COMPARATIVE FAULT**

8 QUESTION NO. 24

9 If you awarded damages under Question No. 20, what comparative percentage
 of fault do you attribute to each Defendant?

10 **Answer:**

Defendant Lek Livingston	0%
Defendant Juan Ruiz	0%
Defendant James Godwin	0%
Defendant Michael Dominici	0%
Defendant City of Salinas	0%
Defendant TASER International	100%

13 QUESTION NO. 25

14 If you answer “Yes” to Question 18 or Question 19, do you find that Robert
 15 C. Heston’s own negligent conduct caused acidosis to a degree that posed a risk of
 cardiac arrest concurrently with the prolonged deployment of Taser ECDs, and that
 16 these two causes continued to operate concurrently to the point that Robert C. Heston
 had a cardiac arrest?

17 **Answer: YES**

18 QUESTION NO. 26

19 If you answered “yes” to Question No. 25, what comparative percentage of
 fault do you attribute to Robert C. Heston and TASER International?

20 **Answer:**

Robert C. Heston	85%
Defendant TASER International	15%

21 (See Verdict, Docket Item No. 323.)

22
 23 **B. Summary of the Jury Findings**

24 In summary, with respect to the Individual Defendant Police Officers, the jury found that the
 25 officers did not use excessive force when they deployed their Taser devices against Robert C.
 26 Heston. Thus, the jury found that the police officers did not violate the constitutional rights of the
 27

1 deceased or his parents nor did the officers commit a battery. Since there was no finding against the
2 individual officers, as instructed, the jury did not make a finding with respect to the City of Salinas.

3 With respect to Defendant TASER, the jury found that reasonably prudent manufacturers of
4 electronic control devices knew or should have know that prolonged administration of electricity
5 from the devices pose a danger, i.e., a risk of acidosis to a degree which posed a risk of cardiac
6 arrest. The jury found that Defendant TASER failed to warn purchases of those risks. The jury also
7 found that on February 19, 2005, Salinas police officers subjected Robert C. Heston to a prolonged
8 deployment from Taser devices; that Defendant TASER's failure to warn of the risks associated with
9 a prolonged deployment was a substantial factor in causing the police officers to administer a
10 prolonged deployment; and that as a consequence of the prolonged deployment, Robert C. Heston
11 suffered acidosis to a degree which caused him to have a cardiac arrest, leading to his death.

12 With respect to the survival action brought by the Executor of the Heston Estate, the jury
13 awarded \$21,000 in compensatory damages and \$200,000 in punitive damages to the Estate. With
14 respect to the wrongful death action brought by the parents, the jury awarded \$1,000,000 in
15 compensatory damages and \$5,000,000 in punitive damages to the parents.

16 However, the jury found that Robert C. Heston was 85% comparatively at fault in causing
17 his injuries. If these percentages are applied in entering a judgment in favor of his estate and his
18 parents, it would reduce their recovery for compensatory damages to \$30,000 and \$150,000,
19 respectively. The comparative negligence finding would not affect the award of punitive damages.

20 **III. DISCUSSION**

21 **A. Defendant TASER's Renewed Motion for Judgment as a Matter of Law**

22 On a timely basis, Defendant TASER has filed a Renewed Motion for Judgment as a Matter
23 of Law and in the alternatively, a Motion for a New Trial.⁵ Plaintiffs oppose Defendant TASER's
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25 _____
26 ⁵ The Defendant Police Officers and the City of Salinas have filed an opposition to
27 Defendant TASER's motion for a new trial. These Defendants have also filed an opposition to
28 Plaintiffs' conditional motion for a new trial. (See Docket Nos. 356, 348, respectively.)

1 Rule 50 motion and have filed a conditional motion for a new trial. (See Docket Nos. 348, 360,
2 370.)

3 **1. Standards**

4 Federal Rule of Civil Procedure 50 governs motions for judgment as a matter of law
5 (“JMOL”). Under Rule 50(a), “[i]f a party has been fully heard on an issue during a jury trial and
6 the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for
7 the party on that issue, the court may: (A) resolve the issue against the party; and (B) grant a motion
8 for judgment as a matter of law against the party on a claim or defense . . .” Fed. R. Civ. P. 50(a)(1);
9 see also Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 149 (2000). The motion must be
10 made before the case is submitted to the jury. Fed. R. Civ. P. 50(a)(2).

11 Under Rule 50(b), if the court denies the motion for judgment as a matter of law under Rule
12 50(a), “the movant may file a renewed motion for judgment as a matter of law and may include an
13 alternative or joint request for a new trial under Rule 59.” Fed. R. Civ. P. 50(b). “A post-trial
14 motion for judgment can be granted only on grounds advanced in the pre-verdict motion.” Fed. R.
15 Civ. P. 50(b), 1991 advisory committee notes. The standard for granting a renewed post-verdict
16 JMOL is the same as the standard for granting a pre-submission JMOL under Rule 50(a). Winarto
17 v. Toshiba Am. Elecs. Components, Inc., 274 F.3d 1276, 1283 (9th Cir. 2001). A party is entitled to
18 judgment as a matter of law if, under the governing law, there can be but one reasonable conclusion
19 as to the verdict and that is a finding in favor of the moving party. (Id.) The court must draw all
20 reasonable inferences in favor of the nonmoving party and should review all evidence in the record.
21 Reeves, 530 U.S. at 150.

22 **2. Defendant TASER’s Motion for JMOL On All Grounds**

23 In this case, the judgment which Defendant TASER seeks to avoid by this motion would be
24 based on the jury verdict which found (1) that a reasonably prudent manufacturer of an electronic
25 control device knew or reasonably should have known that the device is dangerous or likely to be
26 dangerous because prolonged exposure to electric shock from the device potentially causes acidosis
27 to a degree which poses a risk of cardiac arrest in a person against whom the device is deployed, and

1 (2) that TASER failed to adequately warn its customers of that danger, which caused it to be used in
2 manner which caused the death of Robert C. Heston.

3 The Court finds that there was substantial evidence upon which a reasonable jury could find
4 that under certain conditions, prolonged exposure to electronic control devices posed risks to human
5 health. There was substantial evidence upon which a reasonable jury could find, as this jury did
6 find, that a reasonable manufacturer would have warned of those risks. Moreover, there was
7 substantial evidence upon which a reasonable jury could find that TASER failed to give an adequate
8 warning and that this lack of warning led the Salinas police officers to make prolonged deployments
9 against Robert C. Heston. Without reciting here the evidence in the case, it suffices to point out that,
10 although TASER presented evidence that it gave a warning regarding prolonged deployment,
11 Plaintiffs countered with evidence that the warning was inadequate because it was not done in a way
12 that would capture the attention of customers.

13 Under the standards articulated above, the Court finds no merit for judgment as a matter of
14 law on any of the grounds urged by Defendant TASER, except the one regarding punitive damage
15 awards. Accordingly, the Court DENIES Defendant TASER's Rule 50 motion on all grounds, with
16 the sole exception to its challenge regarding the punitive damage awards, which the Court considers
17 below.

18 **3. Punitive Damages to the Estate**

19 The jury awarded \$200,000 in punitive damages to Robert C. Heston's Estate in its claim for
20 negligent failure to warn. Defendant TASER contends that under the applicable law, punitive
21 damages are not recoverable for that claim.

22 Under California law, punitive damages may be awarded in a product liability action if it is
23 shown that the defendant placed a product on the market in conscious disregard of the safety of
24 consumers and others. Ehrhardt v. Brunswick, Inc., 186 Cal. App. 3d 734, 741 (1986). Thus, under
25 California law, a plaintiff must prove by clear and convincing evidence that the defendant had actual
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1 knowledge of the risk of harm it was creating and, in the face of that knowledge, failed to take steps
2 it knew would reduce or eliminate the risk of harm. Id.

3 In this case, with respect to the award of punitive damages to the Estate, the jury was
4 instructed as follows:

5 If you find for Plaintiffs against TASER International on the Fourth and Fifth
6 Claims, you may award punitive damages if you find by clear and convincing
7 evidence that TASER International’s conduct constitutes a conscious disregard of the
8 probability of injury to others. You must find that TASER International was aware of
9 the probable dangerous consequences of its conduct and deliberately failed to avoid
10 those consequences.

(Closing Jury Instructions at 21-22, hereafter, “Closing Instructions,” Docket Item No. 313.)

The Verdict contained the following question and answer:

11 QUESTION NO. 16.

12 Do you find that at the time TASER International manufactured and sold
13 Taser ECDs to the Salinas Police Department, TASER International knew or it was
14 knowable by the use of available scientific knowledge, that prolonged exposure to
15 shocks from Taser ECDs potentially causes acidosis to a degree which poses a
16 substantial danger, namely of causing a person against whom the device is deployed
17 to have a cardiac arrest?

18 Answer: No.

(Verdict at 9.)

19 The Jury’s “No,” answer to Question No. 16 was a finding that Defendant TASER neither
20 knew the risk of harm that it was creating nor did Defendant TASER consciously disregard a
21 scientifically knowable risk. Thus, there was no finding upon which the jury legally could base an
22 award of punitive damages against Defendant TASER.⁶

23 Accordingly, the Court finds Defendant TASER’s Renewed Motion for Judgment
24 meritorious with respect to the award of punitive damages to the Estate and GRANTS Defendant

25 _____
26 ⁶ The instructions on the Verdict form directed the Jury to consider punitive damages in
27 favor of the Estate against Defendant TASER, “if you answered ‘yes’ to Question No. 18. . . .”
28 Although, Question 18 would only be reached if the Jury answered “yes” to Question No. 16, the
Jury was not required to answer “yes” to Question 16, in order to answer “yes” to Question 18.
Upon further reflection, the Court finds that the instruction should have permitted a consideration of
punitive damages in favor of the Estate against Defendant TASER if and only if the jury answered
“yes” to Questions No. 16 and 17.

1 TASER’s motion. The Jury’s award of punitive damages to the Estate will be disregarded and since
2 the award of punitive damages is legally severable from the compensatory damage award, judgment
3 will be entered accordingly.

4 **4. Punitive Damages to Plaintiffs Parents on their Wrongful Death Claim**

5 Defendant TASER also moves for judgment as a matter of law with respect to the jury’s
6 award of \$5,000,000 of punitive damages to the parents of Robert C. Heston on the ground that
7 under California law, punitive damages are not recoverable in a wrongful death action.

8 California Civil Procedure Code § 377.61 defines the damages available in a wrongful death
9 action as those that are just “under all the circumstances of the case,” but does not “include damages
10 recoverable under Section 377.34.” California Civil Procedure Code § 377.34 provides the damages
11 obtainable in a survival action, and includes damages “the decedent sustained or incurred before
12 death, including any penalties or punitive or exemplary damages.” Since punitive damages are
13 provided for under California Civil Procedure Code § 377.34, they are not allowed in a wrongful
14 death claim.⁷ See Ford Motor Co., v. Superior Court of the State of California, 120 Cal. App. 3d
15 748, 751 (1981); Tarasoff v. Regents of the Univ. of California, 17 Cal. 3d 425, 450 (1976); Pease v.
16 Beech Aircraft Corp., 38 Cal. App. 3d 450 (1974); Rufo v. Simpson, 86 Cal. App. 4th 573, 616
17 n.14, 103 (2001); In re Paris Air Crash, 622 F.2d 1315, 1318 n.2 (9th Cir. 1980).

18 In this case, the jury was instructed on claims against other Defendants for which Mr. & Mrs.
19 Heston could have recovered punitive damages. However, the jury did not find in favor of the
20 parents on those claims. Since the wrongful death claim was the only claim being asserted by the
21 parents against Defendant TASER, there was no claim against Defendant TASER for which the jury
22 could lawfully award punitive damages to Mr. & Mrs. Heston.

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25 ⁷ The Court notes that under California Civil Code § 3294(d), it is *possible* that punitive
26 damages may be available to the survivors of homicide victims in instances where the homicide
27 resulted in the defendant’s conviction of a felony. See Shore v. Gurnett, 122 Cal. App. 4th 166, 175
(2004).

1 The Court finds that the Verdict form improperly contained a place for the jury to give an
 2 award of punitive damages to Plaintiffs Parents against Defendant TASER. Notably, at the
 3 September 26, 2008 hearing on these motions, Plaintiffs' counsel stated that he saw the
 4 inconsistency in the Verdict form when it was presented to him for review prior to closing argument.
 5 However, neither party brought it to the attention of the Court even though there was sufficient time
 6 before the final verdict to cure the inconsistency.

7 Accordingly, the Court finds Defendant TASER's Renewed Motion for Judgment
 8 meritorious with respect to the award of punitive damages to Plaintiffs Parents and GRANTS
 9 Defendant TASER's motion. The Jury's award of punitive damages to the Plaintiffs Parents will be
 10 disregarded and since the award of punitive damages is legally severable from the compensatory
 11 damage award, judgment will be entered accordingly.

12 **B. Defendant TASER's Alternative Motion for a New Trial**

13 In the alternative, Defendant TASER moves for a new trial on several grounds.⁸

14 Rule 59(a) states, "A new trial may be granted . . . in an action in which there has been a trial
 15 by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in
 16 the courts of the United States." Fed. R. Civ. P. 59(a)(1). As is apparent from the text, Rule 59 does
 17 not specify the grounds on which a motion for a new trial may be granted. See Zhang v. Am. Gem
 18 Seafoods, Inc., 339 F.3d 1020, 1035 (9th Cir. 2003). The court is "bound by those grounds that have
 19 been historically recognized." Id. Historically recognized grounds for a new trial include, but are

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 21 ⁸ They are: (1) witnesses called by Plaintiffs to testify as experts were not qualified to
 22 testify and they lacked support for their opinions; (2) the Court provided erroneous supplemental
 23 jury instructions regarding comparative negligence by the deceased; (3) Plaintiffs' counsel's use of
 24 video graphics during closing argument which had not been admitted into evidence; (4) the Jury
 25 putting batteries into the TASER device, which was in evidence, to hear for themselves what it
 26 sounded like when it was cycled; (5) the Court provided an erroneous special verdict form; (6) the
 27 Court provided inadequate jury instructions; (7) there were inconsistent answers on the verdict form;
 (8) Plaintiffs failed to present a witness who was qualified as an expert to testify regarding the
 standard practice in the industry for warnings about electronic control devices; (9) there was a lack
 of evidence to support an award of punitive damages; (10) there was a lack of evidence to support
 the award of compensatory damages to the Estate; and (11) there was a lack of foundational
 evidence that Defendant TASER was the manufacturer and seller of the devices used by the Salinas
 Police Department.

1 not limited to, claims “that the verdict is against the weight of the evidence, that the damages are
2 excessive, or that, for other reasons, the trial was not fair to the party moving.” Montgomery Ward
3 & Co. v. Duncan, 311 U.S. 243, 251 (1940); see also Passantino v. Johnson & Johnson Consumer
4 Prods., 212 F.3d 493, 510 n.15 (9th Cir. 2000).

5 Under Rule 59(a), a new trial may be granted to all or any parties on all or part of the issues,
6 after trial. A partial new trial is proper only if the issue to be retried is “so distinct and separable
7 from the others that a trial of it alone may be had without injustice.” Gasoline Products Co. v.
8 Champlin Refining Co., 283 U.S. 494, 500 (1931); Pumphrey v. K.W. Thompson Tool Co., 62 F.3d
9 1128, 1133 (9th Cir. 1995). A partial new trial solely on damages may be ordered so long as it does
10 not involve a tangled or complex fact situation that makes it unfair to determine damages apart from
11 liability. Wharf v. Burlington Northern R.R. Co., 60 F.3d 631, 638 (9th Cir. 1995) (no injustice
12 resulting from retrial on damages only, without reopening liability issues).

13 In a motion for a new trial, the trial judge has discretion to weigh the evidence and assess the
14 credibility of witnesses. Air-Sea Forwarders, Inc. v. Air Asia Co., Ltd., 880 F.2d 176, 190 (9th Cir.
15 1989). However, the court does not have to weigh the evidence under Rule 59 in the light most
16 favorable to the prevailing party. Landes Constr. Co. v. Royal Bank of Can., 833 F.2d 1365, 1371
17 (9th Cir. 1987).

18 In this case, since the Court has ordered the award of punitive damages disregarded, the sole
19 remaining pertinent grounds for a new trial are any which contend that the trial was fundamentally
20 flawed in a manner which calls into question the Jury’s finding that Defendant TASER is liable for
21 negligent failure to warn. Applying the standards set forth above, the Court finds no basis for
22 granting a new trial and therefore denies Defendant TASER’s alternative motion for a new trial.

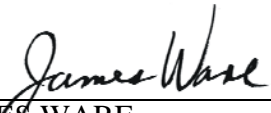
23 The issue becomes whether the errors which have led the Court to strike the punitive damage
24 awards form a basis for granting a new trial. The jury instructions recited the proper legal standard
25 for awarding compensatory damages. Evidence was properly received on both sides of the dispute
26 with respect to the knowledge of a reasonably prudent manufacturer of an electronic control device
27

1 of a risk of danger. Based on that evidence, the jury made a factual finding that Defendant TASER
2 failed to adequately warn purchaser of the danger. The Court finds that the Jury's findings and
3 award of compensatory damages were supported by the evidence. Although there were errors in the
4 instructions on the Verdict form with respect to punitive damages, none of these errors affected the
5 factual findings with respect to Defendant TASER's liability for negligent failure to warn. There is
6 no basis for a conclusion that the legal unavailability of punitive damages casts doubts on the
7 fairness of any other part of the trial.

8 Accordingly, Defendant TASER's alternative motion for a new trial is DENIED. Since the
9 Court has denied Defendant TASER's motion for a new trial, Plaintiffs' conditional motion for a
10 new trial is DENIED as moot. In addition, the Court finds that the disposition of these motions also
11 renders the Officer Defendants' Rule 50 Motions moot.⁹ (See Docket Item Nos. 319, 350.)

12 With respect to the remaining motions for fees and costs: 1) Officer Defendants' Motion for
13 Bill of Costs and 2) Plaintiffs' Motion for Attorney Fees against Defendant TASER, the Court sets a
14 hearing for **December 1, 2008 at 9 a.m.** On or before **November 10, 2008**, the moving party of
15 each motion shall compile a three ring binder which includes: (1) the opening brief, (2) the
16 opposition, (3) the reply and any supporting declarations to be delivered to Chambers.

17
18 Dated: October 24, 2008



JAMES WARE
United States District Judge

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26 _____
27 ⁹ This Order also terminates Defendants City and Officers' motion as shown on Docket Item
28 No. 303. This motion was ruled on the record during the trial.

1 **THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:**

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10 **Dated: October 24, 2008**

Richard W. Wieking, Clerk

11 **By: /s/ JW Chambers**
12 **Elizabeth Garcia**
13 **Courtroom Deputy**