

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

SARLA M. WALKER, individually, as guardian ad litem for ANDRE HENRY, Jr., and as successor in interest of ANDRE HENRY, Sr., deceased, CRYSTAL HENRY, and ANDRE HENRY, Jr., as individuals and successors in interest,

Plaintiffs,

v.

FRESNO POLICE DEPARTMENT, et al.,

Defendants.

1:09-CV-1037 OWW GSA

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS (Doc. 14)

I. INTRODUCTION

Plaintiffs, Sharla M. Walker, individually and as guardian ad litem for Andre Henry, Jr. and successor in interest of Andre Henry, Sr., deceased, Crystal Henry, and Andre Henry, Jr., as individuals and successors in interest (hereinafter "Plaintiffs"), initially filed this lawsuit in Fresno County Superior Court on February 26, 2009. Original Complaint, Doc. 2, at 3. On June 12, 2009, Defendants, the Fresno Police Department ("FPD") and individual FPD Officers Martin and Godwin, removed the action pursuant to Title 28 United States Code, sections 1331 and 1441(b), because the complaint contains numerous federal claims. See Doc. 2. On September 4, 2009, Plaintiffs' filed a First Amended Complaint ("FAC"). Doc. 11.

1 Before the court for decision is Defendants' motion to
2 dismiss the FAC pursuant to Federal Rule of Civil Procedure
3 12(b)(6). Doc. 15. Plaintiffs concede dismissal as to one
4 aspect of the complaint, but oppose as to all others. Doc. 19.
5 Defendants filed a reply. Doc. 20. Oral argument was heard
6 February 8, 2010.
7

8 II. BACKGROUND

9 Plaintiffs allege that on or about January 10, 2008,
10 Defendants served a search warrant at Sharla Walker's residence.
11 FAC ¶6. The Officers "detained and physically restrained" Andre
12 Henry, Sr., Sharla Walker's son and the father of Andre Henry,
13 Jr. and Crystal Henry. *Id.* It is alleged that during the
14 detention, Andre Henry, Sr. "complained that he did not feel well
15 and requested emergency medical attention." *Id.* Instead of
16 providing medical attention, Plaintiffs allege that the defendant
17 officers "mocked and ridiculed" Andre Henry, Sr. FAC ¶7.
18

19 Sharla Walker was contacted by family members about the
20 detention, her son's alleged need for medical care, the denial of
21 his requests for care, and the officers' mocking and ridicule.
22 FAC ¶7. She attempted to reach her son on his cell phone, but
23 the defendant officers answered the phone without identifying
24 themselves and then hung up. FAC ¶8. Plaintiffs allege that the
25 officers similarly thwarted Sharla Walker's attempts to reach her
26 son on the home's landline phone. *Id.* Additionally, when calls
27
28

1 were made to the home's landline phone, the Officers "sometimes
2 before hanging up ... falsely told the caller that they (the
3 officers) were Sharla M. Walker's mother." *Id.*

4 Plaintiffs allege that as a result of the defendant
5 officers' "refusal to allow Andre Henry, Sr. access to emergency
6 medical services, Andre Henry, Sr. died." FAC ¶9.

7
8 The FAC sets forth four claims for relief. The first,
9 brought pursuant to Title 42 United States Code, section 1983
10 ("Section 1983") by all Plaintiffs against all Defendants,
11 alleges that Andre Walker, Sr.'s death was "the result of the
12 deprivation of his 4th Amendment right to be free from
13 unreasonable seizure and excessive force." FAC ¶12. Plaintiffs
14 also allege the death "constituted a violation of plaintiffs'
15 personal 14th Amendment substantive due process rights as the
16 children and parent of Andre Henry, Sr." FAC ¶13.

17
18 The Second Claim for Relief, brought by Sharla Walker
19 against all defendants pursuant to Section 1983 alleges that "the
20 unreasonable conduct" of the defendant officers "in connection
21 with the telephone calls made" by Mrs. Walker constituted a
22 violation of her substantive due process rights to familial
23 association. FAC ¶16.

24
25 The Third Claim for Relief, brought under Section 1983 by
26 all Plaintiffs against all defendants as a "survival action"
27 based on their status as "successors in interest," alleges that
28

1 decedent's demise "was the result of the deprivation of his 4th
2 Amendment right to be free from unreasonable seizure and
3 excessive force." FAC ¶¶ 20, 22.

4 The Fourth Claim for Relief, a state law negligence claim
5 brought by Sharla Walker against all defendants, alleges that
6 defendant officers "negligently responded to and/or terminated
7 the telephone calls" she made, and that as a result she "suffered
8 panic and frustration, along with the severe and extreme
9 emotional distress and mental upset, anguish, pain and suffering
10 to be expected to naturally attend such panic and frustration."
11 FAC ¶25. It is also alleged that Defendant City of Fresno is
12 vicariously liable for the alleged negligence of the defendant
13 officers. FAC ¶26.

14 The Fifth Claim for Relief, a state law intentional
15 infliction of emotional distress claim brought by Sharla Walker
16 against all defendants, alleges that the conduct of the
17 individual defendants in terminating her phone calls was "extreme
18 and outrageous," and was done with the intention of causing her
19 emotional distress," or with reckless disregard of this
20 possibility. FAC ¶29.

21 22 23 24 III. STANDARD OF DECISION

25 Dismissal under Federal Rule of Civil Procedure 12(b)(6) is
26 appropriate where the complaint lacks sufficient facts to support
27 a cognizable legal theory. *Balistreri v. Pacifica Police Dep't,*
28

1 901 F.2d 696, 699 (9th Cir. 1990). To sufficiently state a claim
2 to relief, the pleading "does not need detailed factual
3 allegations" but the "[f]actual allegations must be enough to
4 raise a right to relief above the speculative level." *Bell Atl.*
5 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Mere "labels and
6 conclusions" or a "formulaic recitation of the elements of a
7 cause of action will not do." *Id.* Rather, there must be "enough
8 facts to state a claim to relief that is plausible on its face."
9 *Id.* at 570. In other words, "[t]o survive a motion to dismiss, a
10 complaint must contain sufficient factual matter, accepted as
11 true, to state a claim to relief that is plausible on its face."
12 *Ashcroft v. Iqbal*, --- U.S. ----, 129 S.Ct. 1937, 1949 (2009)
13 (internal quotation marks omitted). The Ninth Circuit has
14 summarized the governing standard, in light of *Twombly* and *Iqbal*,
15 as follows: "In sum, for a [pleading] to survive a motion to
16 dismiss, the non-conclusory factual content, and reasonable
17 inferences from that content, must be plausibly suggestive of a
18 claim entitling the plaintiff to relief." *Moss v. U.S. Secret*
19 *Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (internal quotation
20 marks omitted).

24 IV. DISCUSSION

25 A. First Claim For Relief -- Substantive Due Process Claim 26 Based on Death of Decedent.

27 The Fourteenth Amendment to the United States Constitution
28 prohibits a state from depriving any person of "life, liberty, or

1 property, without due process of law." A family member may
2 assert a Fourteenth Amendment claim "based on the related
3 deprivation of their liberty interest arising out of their
4 relationship with [a decedent]." *Moreland v. Las Vegas Metro.*
5 *Police Dept.*, 159 F.3d 365, 371 (9th Cir. 1998). "This
6 substantive due process claim may be asserted by both the parents
7 and children of a person killed by law enforcement officers."
8 *Id.*

9
10 An allegation of failure to provide medical care to a person
11 arrested for a crime, though not yet convicted, is analyzed under
12 the due process clause of the Fourteenth Amendment. *Lolli v.*
13 *County of Orange*, 351 F.3d 410, 418-19 (9th Cir. 2003). In the
14 Ninth Circuit, such an individual is entitled to due process
15 rights at least as great as the Eighth Amendment protections
16 afforded convicted prisoners:
17

18 Pretrial detainees, whether or not they have been
19 declared unfit to proceed, have not been convicted of
20 any crime. Therefore, constitutional questions
21 regarding the conditions and circumstances of their
22 confinement are properly addressed under the due
23 process clause of the Fourteenth Amendment, rather than
24 under the Eighth Amendment's protection against cruel
25 and unusual punishment. *City of Revere v. Mass. Gen.*
26 *Hosp.*, 463 U.S. 239, 244 (1983); *Bell v. Wolfish*, 441
27 U.S. 520, 535 & n. 16 (1979); *see also Gibson v. County*
28 *of Washoe*, 290 F.3d 1175, 1187 (9th Cir. 2002). In
light of the Supreme Court's observation that the due
process rights of pretrial detainees are "at least as
great as the Eighth Amendment protections available to
a convicted prisoner," *Revere*, 463 U.S. at 244, we have
recognized that, even though the pretrial detainees'
rights arise under the Due Process Clause, the
guarantees of the Eighth Amendment provide a minimum
standard of care for determining their rights,
including the rights to medical and psychiatric care.
Gibson, 290 F.3d at 1187; *Carnell v. Grimm*, 74 F.3d

1 977, 979 (9th Cir. 1996); *Jones v. Johnson*, 781 F.2d
2 769, 771 (9th Cir. 1986).

3 *Or. Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1120 (9th Cir. 2003).

4 Presently, although Plaintiffs do not waive the right to
5 assert a higher standard of care at a later stage of the
6 litigation, Plaintiffs maintain that the FAC adequately states a
7 claim under the Eighth Amendment standard. Doc. 19 at 4. Under
8 that standard, "persons in custody have the established right to
9 not have officials remain deliberately indifferent to their
10 serious medical needs." *Gibson v. County of Washoe*, 290 F.3d
11 1175, 1187 (9th Cir. 2002)(internal citation and quotation
12 omitted). Under the deliberate indifference standard, "a person
13 is liable for denying a prisoner needed medical care only if the
14 person knows of and disregards an excessive risk to inmate health
15 and safety." *Id.* "In order to know of the excessive risk, it is
16 not enough that the person merely be aware of facts from which
17 the inference could be drawn that a substantial risk of serious
18 harm exists, [] he must also draw that inference." *Id.* "If a
19 person should have been aware of the risk, but was not, then the
20 person has not violated the Eighth Amendment, no matter how
21 severe the risk." *Id.* "But if a person is aware of a
22 substantial risk of serious harm, a person may be liable for
23 neglecting a prisoner's serious medical needs on the basis of
24 either his action or his inaction." *Id.*

25 Defendants argue that there are no facts in the FAC
26
27
28

1 indicating deliberate indifference on the part of the individual
2 defendants. Doc. 15 at 4. Therefore, they argue, "there is no
3 indication that the individual defendants knew of the particular
4 risk involved" and/or "consciously disregarded the risk." *Id.*

5 Plaintiffs cite *Jett v. Penner*, 439 F.3d 1091 (2006), which
6 explains:
7

8 In the Ninth Circuit, the test for deliberate
9 indifference consists of two parts. First, the
10 plaintiff must show a "serious medical need" by
11 demonstrating that failure to treat a prisoner's
12 condition could result in further significant injury or
13 the unnecessary and wanton infliction of pain. Second,
14 the plaintiff must show the defendant's response to the
15 need was deliberately indifferent. This second prong-
16 defendant's response to the need was deliberately
17 indifferent-is satisfied by showing (a) a purposeful
18 act or failure to respond to a prisoner's pain or
19 possible medical need and (b) harm caused by the
20 indifference. Indifference may appear when prison
21 officials deny, delay or intentionally interfere with
22 medical treatment, or it may be shown by the way in
23 which prison physicians provide medical care. Yet, an
24 inadvertent or negligent failure to provide adequate
25 medical care alone does not state a claim under § 1983.

26 *Id.* at 1095 (internal citations and quotations omitted).

27 Here, the FAC alleges that, while being physically
28 restrained in his mother's residence, Andre Henry, Sr. complained
of illness and requested emergency medical care. FAC ¶6. The
FAC further alleges that Defendants ignored decedents request for
medical attention, as well as his family's attempts to intercede,
and that this failure to provide care to Mr. Henry, Sr. resulted
in his death. FAC ¶¶ 7-9.

Post-*Iqbal*, a deliberate indifference allegation will not

1 survive a 12(b)(6) motion if it contains only "threadbare
2 recitals of the elements of a cause of action, supported by mere
3 conclusory statements...." *Latimer v. Kolender*, 2009 WL 4156714,
4 *3 (C.D. Cal. Nov. 23, 2009) (quoting *Iqbal*, 129, S. Ct. at
5 1949). For example, in *Brown v. Lewis*, 2009 WL 1530681 (E.D.
6 Cal. Jun. 1, 2009), plaintiff alleged that he became ill during a
7 morning workout and complained to a medical technician "that he
8 had difficulty breathing, was light-headed and was unable to
9 stand." *Id.* at *1. The technician diagnosed him with heat
10 exhaustion and instructed him to cease strenuous activity and
11 drink more water. *Id.* Plaintiff alleged that he had actually
12 suffered a heart attack, and claimed that the technician
13 demonstrated deliberate indifference to his serious medical needs
14 in failing to diagnose and treat him for heart attack at that
15 time. *Id.* This allegation was insufficient under *Iqbal*, because
16 plaintiff "must show that [defendant] knew of or disregarded an
17 excessive risk to [plaintiff's] health." *Id.* To do so, the
18 complaint must contain more than "conclusory allegations to the
19 effect that defendant knew that [plaintiff] had a heart
20 attack.... [Plaintiff] must allege specific facts 'plausibly
21 showing' that defendant had the requisite mental state." *Id.*

22 Here, apart from alleging that decedent complained that he
23 was feeling ill and requested emergency medical care, Plaintiffs
24 do not allege any specific physical complaints or symptoms that
25
26
27
28

1 were explicitly described to or that should have been apparent to
2 either of the Officers to inform them of a serious medical need
3 that they ignored. This is insufficient under *Iqbal*. Plaintiff
4 has requested and shall be afforded an opportunity to amend.

5 Defendants' motion to dismiss the Fourteenth Amendment claim
6 based upon allegedly insufficient medical care is GRANTED WITH
7 LEAVE TO AMEND.
8

9 B. Second Claim for Relief -- Plaintiff, Sharla Walker's
10 Fourteenth Amendment Loss of Familial Association Claim for
11 Being Deprived of Phone Contact.

12 The Supreme Court has recognized that the right to intimate
13 familial relationships is protected by the Fourteenth Amendment.
14 *See Roberts v. United States Jaycees*, 468 U.S. 609, 617-18
15 (1984). However, an individual defendant can only be held liable
16 if he or she acted with "deliberate indifference" to the
17 plaintiff's right of familial relationship and society. *Byrd v.*
18 *Guess*, 137 F.3d 1126, 1134 (9th Cir. 1998), abrogated by statute
19 on other grounds.¹

20 Application of the "deliberate indifference" standard to
21 Fourteenth Amendment familial association claims was reaffirmed
22

23
24 ¹ Defendants' assertion that *Byrd* requires application of a
25 "reckless disregard" standard is not directly supported by the
26 text of that decision. *Id.* at 1134 ("To prove their Fourteenth
27 Amendment claim, the Byrds had to prove that the Officers acted
28 with deliberate indifference to the Byrds' rights of familial
relationship and society by using excessive force against [their
son]."). However, the Ninth Circuit has subsequently interpreted
the "deliberate indifference" test articulated in *Byrd* as
synonymous with "reckless disregard." *See Perez v. City of Los*
Angeles, 98 Fed. Appx. 703, 706 (9th Cir. 2004) (Table).

1 in *Lee v. City of Los Angeles*, 250 F.3d 668 (2001), where the
2 Ninth Circuit found that plaintiffs stated a cause of action by
3 alleging "reckless, intentional and deliberate acts and omissions
4 of defendants," constituting an "unwarranted interference" with
5 the rights of family members. *Id.* at 685-86. Under *Iqbal*, such
6 conclusory statements must be supported by plausible factual
7 allegations.
8

9 Here, Defendants argue that decedent was being detained
10 pursuant to a search warrant, and "[t]he risk of harm to both the
11 police and the occupants is minimized if the officers routinely
12 exercise unquestioned command of the situation." *Michigan v.*
13 *Summers*, 452 U.S. 692, 702-703 (1981). Therefore, their argument
14 continues, to limit possible unwarranted intrusion, it was
15 reasonable for the officers to cut off incoming phone calls to
16 the area being searched.²
17
18

19 ² Defendants also argue that familial association cases emphasize
20 the necessity of a permanent, physical loss of association,
21 citing *Pittsley v. Warish*, 927 F.2d 3, 8 (1st Cir. 1991) and
22 *Tennenbaum v. Williams*, 193 F.3d 581, 600-01 (2nd Cir. 1999).
23 The First Circuit observed, that it has "never held that
24 governmental action that affects the parental relationship only
25 incidentally ... is susceptible to challenge for a violation of
26 due process." *Ortiz v. Burgos*, 807 F.2d 6, 8 (1st Cir. 1986).

27 However, as noted in *Trevino v. Lassen Municipal Utility*
28 *District*, 2008 WL 134063, *4 n.6 (E.D. Cal. Apr. 9, 2008):

29 There is nothing in [the applicable Supreme Court and Ninth
30 Circuit] cases that suggests that this cause of action is
31 only available when the plaintiff has been completely
32 deprived of the companionship of the family member, for
33 example, through death or legal termination of the
34 relationship. *See Smith [v. City of Fontana]*, 818 F.2d

1 This is a close call. Was it reasonable for the Officers to
2 answer the calls and then hang up? Why, if incoming calls were a
3 security concern, did they answer them at all? However, it is
4 Plaintiffs' burden, under *Iqbal*, to allege facts that plausibly
5 suggest any interference with familial association was
6 unwarranted. They have failed to do so. The motion to dismiss
7 is GRANTED WITH LEAVE TO AMEND to permit Plaintiffs an
8 opportunity to more clearly articulate the circumstances
9 surrounding the Officers' conduct
10

11
12 C. Third Claim for Relief -- Fourth Amendment Survival Action.

13 1. Sharla Walker Lacks Standing to Bring this Claim.

14 Plaintiffs concede that Sharla Walker, as decedent's mother,
15 does not have standing to pursue a Fourth Amendment survivor
16 action. "Fourth Amendment rights are personal rights which ...
17 may not be vicariously asserted." *Alderman v. United States*, 394
18 U.S. 165, 174 (1969). However, the survivors of an individual
19

20 [1411,] 1418-19 [(9th Cir. 1987)] (characterizing the claim
21 as the state's "interference with" family relations; also
22 relying on *Pierce v. Society of Sisters*, 268 U.S. 510
23 (1925), which had held that parents' liberty rights were
24 infringed upon by a state regulation that required children
25 to be educated in public schools). Although the nature and
26 irreversibility of the interference may be relevant to a
27 factfinder's determination of what damages may be
28 appropriate, it does not appear dispositive for the question
of whether the claim is cognizable.

(Emphasis added.) Although no familial association cases brought
similar factual scenarios could be located, *Trevino* reasonably
suggests that an allegation of temporary deprivation is not
automatically barred

1 killed as a result of an officer's excessive use of force may
2 assert a Fourth Amendment claim on that individual's behalf under
3 Section 1983 if the relevant state's law authorizes a survival
4 action. *Smith v. City of Fontana*, 818 F.2d 1411, 1416-1417 (9th
5 Cir. 1987).

6
7 In California, personal injury claims suffered during life
8 "survive" to a decedent's estate for the purpose of recovering
9 damages awardable personally to the decedent had he or she lived.
10 Cal. Code Civ. Proc. § 377.20. If decedent passed away without
11 leaving a will, the person(s) who succeed to a cause of action
12 are defined in Sections 6401 and 6402 of the California Probate
13 Code. Cal. Code Civ. Proc. § 377.10. If a decedent does not have
14 a surviving spouse or domestic partner, the estate passes to "the
15 issue of the decedent." Cal. Prob. Code § 6402(a). "If there is
16 no surviving issue," the estate passes "to the decedent's parent
17 or parents equally." Cal. Prob. Code § 6402(b).

18
19 Here, it is undisputed that decedent is Sheila Walker's son
20 and that decedent has at least two living children. Defendants'
21 motion to dismiss Sharla Walker's survival claim is GRANTED on
22 this ground WITHOUT LEAVE TO AMEND.

23
24 2. Challenge to Remaining Fourth Amendment Survival
25 Action.

26 The Fourth Amendment provides that "(t)he right of the
27 people to be secure in their persons, houses, papers, and
28 effects, against unreasonable searches and seizures, shall not be

1 violated, and no Warrants shall issue, but upon probable cause,
2 supported by Oath or affirmation, and particularly describing the
3 place to be searched, and the persons or things to be seized.”

4 Defendants argue that Plaintiffs have failed to set forth any
5 facts in the FAC indicating that the decedent’s Fourth Amendment
6 rights were violated.
7

8 Fourth Amendment claims of excessive force during pretrial
9 detention are evaluated under an objective reasonableness
10 standard. *Lolli*, 351 F.3d at 415 (“[T]he reasonableness inquiry
11 in an excessive force case is an objective one: the question is
12 whether the officers’ actions are objectively reasonable in light
13 of the facts and circumstances confronting them, without regard
14 to their underlying intent or motivation.”). Here, the FAC
15 simply alleges that Defendants “detained and physically
16 restrained” decedent. FAC ¶6. In their opposition brief,
17 Plaintiffs explain that “[w]here, as here, there was no need for
18 force to detain Mr. Henry during execution of the search warrant,
19 the defendants’ use of any force (i.e., physical restraint) is
20 constitutionally unreasonable.” Doc. 19 at 4. But, Plaintiffs
21 ignore the circumstances. In executing a search warrant, police
22 officers may take reasonable action to secure the premises and to
23 ensure their own safety and the efficacy of the search. *See*
24 *Muehler v. Mena*, 544 U.S. 93, 98-100 (2005). This includes
25 detaining the occupants of the house being searched. *Michigan v.*
26
27
28

1 *Summers*, 452 U.S. 692 (1981). Under *Iqbal*, Plaintiffs must
2 allege facts that plausibly suggest the force used was
3 unreasonable. They have failed to do so.

4 Defendants' motion to dismiss the remaining fourth amendment
5 survival action is GRANTED on this ground WITH LEAVE TO AMEND.
6

7 D. Fourth Claim for Relief -- Negligence.

8 The Fourth Claim for relief, brought by Sharla M. Walker
9 against all Defendants, entitled "Negligence," alleges that
10 Defendants' acted "negligently" by the manner in which they
11 "responded to and/or terminated the telephone calls of Plaintiff
12 Sharla M. Walker. This amounts to an allegation of negligent
13 infliction of emotional distress. FAC ¶24.

14 "The law of negligent infliction of emotional distress in
15 California is typically analyzed ... by reference to two
16 'theories' of recovery: the 'bystander' theory and the 'direct
17 victim' theory." *Burgess v. Superior Court*, 2 Cal. 4th 1064,
18 1071 (1992). A "bystander" claim can only be maintained by "a
19 plaintiff [who] seeks to recover damages as a percipient witness
20 to the injury of another." *Id.* at 1072. The FAC does not assert
21 a bystander claim.

22 "Direct victim" claims are analyzed according to the
23 traditional elements of negligence. *See id.* at 1073. Generally,
24 there is "no duty to avoid negligently causing emotional distress
25 to another..." *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th
26
27
28

1 965, 984 (1993). The appropriate way to evaluate claims of
2 negligent infliction of emotional distress is as a claim for
3 "negligence, a cause of action in which a duty to the plaintiff
4 is an essential element." *Id.* "That duty may be imposed by law,
5 be assumed by the defendant, or exist by virtue of a special
6 relationship." *Id.* at 985.
7

8 The lesson of these decisions is: unless the defendant
9 has assumed a duty to plaintiff in which the emotional
10 condition of the plaintiff is an object, recovery is
11 available only if the emotional distress arises out of
12 the defendant's breach of some other legal duty and the
13 emotional distress is proximately caused by that breach
14 of duty. Even then, with rare exceptions, a breach of
15 the duty must threaten physical injury, not simply
16 damage to property or financial interests.

17 *Id.*

18 Plaintiffs maintain that, under California law, all persons
19 owe a general duty "to use due care to avoid injuring others,"
20 citing *Neighbarger v. Irwin Industries, Inc.*, 8 Cal. 4th 532,
21 535-36 (1994), a case in which two industrial firefighters
22 alleged they were burned by a petroleum fire that was negligently
23 caused by defendant's employee. Plaintiffs' argument continues:

24 Thus, when the defendant officers entered upon the
25 affirmative course of conduct of answering the calls
26 made by Mrs. Walker to the telephones of Mrs. Walker's
27 mother and son, they assumed a duty toward Mrs. Walker
28 to act reasonably so as to avoid injury to Mrs. Walker.

Instead of answering the calls properly by identifying
themselves and then stating whether or not Mrs. Walker
could speak with her mother or son, the defendant
officers merely listened to Mrs. Walker's frightened
and frantic pleas to speak with her relatives and
obtain aid for her ill son, and then either terminated

1 the call without saying anything or terminated the call
2 after falsely identifying themselves as Mrs. Walker's
3 mother.

4 Doc. 19 at 6-7.

5 Indeed, all persons do owe a duty of care to ensure that
6 their acts do not cause physical harm to others. *Neighbarger*, 8
7 Cal. 4th 536. But, this general duty of care does not
8 automatically extend to the emotional well-being of individuals
9 not threatened with physical harm. *See Lawson v. Management*
10 *Activities, Inc.*, 69 Cal. App. 4th 652 (1999) (refusing to find
11 that operator of airline had a duty to avoid emotionally
12 traumatizing bystanders who viewed plane crash, but were unhurt).

13 The FAC does not allege that Mrs. Walker was threatened with
14 physical injury or that a duty arises under any other body of
15 law. Defendants' motion to dismiss the negligent infliction of
16 emotional distress claim is GRANTED WITH LEAVE TO AMEND.

17
18 E. Intentional Infliction of Emotional Distress.

19 Defendants moved to dismiss Plaintiff's Fifth Claim for
20 Relief for Intentional Infliction of Emotional Distress, brought
21 by Sharla M. Walker against all defendants, on the ground that
22 the FAC fails to sufficiently allege the requisite "extreme and
23 outrageous conduct" necessary to maintain an IIED claim. Doc. 20
24 at 8. The "conduct to be outrageous must be so extreme as to
25 exceed all bounds of that usually tolerated in a civilized
26 community." *Nally v. Grace Community Church of the Valley*, 47
27
28

1 Cal. 3d 278, 300 (1988). While the outrageousness of a
2 defendant's conduct normally presents an issue of fact, a court
3 may determine, in the first instance, as a matter of law, whether
4 the defendant's conduct may reasonably be regarded as so extreme
5 and outrageous as to permit recovery. See *Trerice v. Blue Cross*
6 *of California*, 209 Cal. App. 3d 878, 883 (1989).
7

8 Plaintiffs oppose dismissal on this ground, arguing that
9 Defendants' conduct "toward Mrs. Walker was not only
10 unreasonable, it was sadistic and cruel." Doc. 18 at 7. But,
11 the test is not a subjective one. Here the facts are sparse and
12 do not show animus or other any other basis for the officers to
13 do more than follow search warrant protocol. Plaintiffs must
14 clearly allege why the Officers' behavior was "sadistic" or
15 "cruel," as opposed to a measure taken as part of the normal
16 course of search warrant operations
17

18 Defendants' motion to dismiss the intentional infliction of
19 emotional distress claim is GRANTED WITH LEAVE TO AMEND.
20

21 V. CONCLUSION

22 For the reasons set forth above, Defendants' motion to
23 dismiss:

- 24 (1) the Fourteenth Amendment claim based upon allegedly
25 insufficient medical care is GRANTED WITH LEAVE TO AMEND;
26 (2) the Fourteenth Amendment claim based on loss of
27 familial association is GRANTED WITH LEAVE TO AMEND;
28

1 (3) Sharla M. Walker's survival claim is GRANTED WITHOUT
2 LEAVE TO AMEND;

3 (4) the remaining fourth amendment survival action is
4 GRANTED WITH LEAVE TO AMEND;

5 (5) the negligent infliction of emotional distress claim is
6 GRANTED WITH LEAVE TO AMEND;

7 (6) the intentional infliction of emotional distress claim
8 is GRANTED WITH LEAVE TO AMEND.
9

10
11 SO ORDERED

12 Dated: February 10, 2010

13 /s/ Oliver W. Wanger
14 Oliver W. Wanger
15 United States District Judge
16
17
18
19
20
21
22
23
24
25
26
27
28