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NOT FOR PUBLICATION

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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**8
9 Lawrence Wade Miles,

No. CV-13-00370-PHX-JJT

10 Plaintiff,

ORDER

11 v.

12 Terra Diaz, *et al.*,

13 Defendants.

14 At issue are Elaine Miles's Motion to Substitute Party (Doc. 176), to which
15 Defendants King and Nowling have filed a Response in opposition (Doc. 178), and
16 Ms. Miles has filed a Reply in Support (Doc. 180)¹; and Defendants' Motion for
17 Judgment on the Pleadings (Doc. 177), to which Plaintiff's counsel has filed a Response
18 (Doc. 179), and Defendants have filed a Reply (Doc. 181). The Court finds both motions
19 suitable for resolution without oral argument. *See* LRCiv 7.2(f).

20 **I. BACKGROUND AND POSTURE**

21 On February 21, 2013, Plaintiff Lawrence Wade Miles, then an inmate in the
22 Arizona Department of Corrections (ADOC), and acting *in pro se*, filed this civil rights
23 action pursuant to 42 U.S.C. § 1983 against Defendants King, Nowling, and other
24 employees of ADOC. (Doc. 1.) In his Complaint, Plaintiff alleged numerous violations of
25 his Constitutional rights arising out of an altercation between him and King and Nowling

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27 ¹ Ms. Miles had previously filed a Motion Regarding Substitution of Party on
28 October 19, 2015 (Doc. 163), to which Defendants filed a Response (Doc. 168), and
Ms. Miles filed a Reply (Doc. 170). To the extent this prior set of briefing contains
additional or different arguments, the Court has considered it along with the subsequent
briefing on the issue of substitution for the deceased Plaintiff.

1 on or about September 12, 2012. Through this Court's previous rulings, several claims
2 and co-Defendants have been dismissed from the action, leaving at present only
3 Plaintiff's Eighth Amendment claims for excessive force as against King and Nowling
4 for actions that occurred after they placed Plaintiff in his cell on September 12, 2012.
5 (Doc. 106.) After this Court issued its Order granting in part and denying in part
6 Defendants' Motion for Summary Judgment and stating that the matter would proceed to
7 trial on the remaining claims, the Court granted Plaintiff's motion to appoint counsel.
8 (Doc. 113.) Counsel for Plaintiff entered an appearance on March 31, 2015. (Doc. 114.)
9 Counsel for both parties prepared for trial, which was set for July 28, 2015.

10 In early July 2015, Plaintiff was released from ADOC custody, having completed
11 his sentence, and on July 16, 2015, less than two weeks before the scheduled trial date in
12 this matter, he passed away. On July 17, 2015, Defendants filed a Motion to Vacate
13 Evidentiary Hearing and Trial in Light of Possible Death of Party. (Doc. 156.) The Court
14 held a hearing later that day and, after discussing the apparent death of Mr. Miles with
15 both counsel, vacated the trial date. Defendants filed a Suggestion of Death Upon the
16 Record on July 20, 2015, and served it upon Plaintiff's counsel the same day. (Doc. 160.)

17 On October 19, 2015, Elaine S. Miles, Plaintiff's mother, filed a Motion
18 Regarding Substitution of Party, evincing an intent "to substitute the personal
19 representative of the estate of Lawrence Wade Miles as a proper party in this action."
20 (Doc. 163 at 1.) In the Motion, Ms. Miles advised the Court she had not yet been
21 appointed the personal representative and requested that the Court not dismiss the action
22 "to allow adequate time for the probate court to appoint her a personal representative."
23 (Doc. 163 at 1.) On January 11, 2016, Ms. Miles filed a Renewed Motion Regarding
24 Substitution of Party, advising that the probate court had appointed her as personal
25 representative of her late son's estate. (Doc. 176.)

1 **II. ANALYSIS**

2 **A. Substitution of Ms. Miles**

3 Rule 25(a)(1) of the Federal Rules of Civil Procedure provides that if a party dies,
4 unless substitution is made within 90 days of the service of a suggestion of death, the
5 action shall be dismissed as to the deceased party. The Rule establishes a procedure that
6 protects those who have an interest in the litigation and the authority to act on behalf of
7 the decedent by permitting substitution for the deceased party without unduly burdening
8 the surviving party. *Barlow v. Ground*, 39 F.3d 231, 233–34 (9th Cir .1994). Under Rule
9 25(a)(1), a party must (1) formally suggest the death of the party upon the record and (2)
10 serve the nonparty representatives of the deceased party with the suggestion of death in
11 the manner provided in Federal Rule of Civil Procedure 4 for the service of a summons.
12 *Id.* at 233. The 90–day period in which a motion for substitution can be made is not
13 triggered until both of these steps are taken. *Id.*

14 Defendants completed the first requirement, but not the second. They argue they
15 should be excused from the second requirement because their identification of Plaintiff’s
16 mother, Ms. Miles, and their provision of her contact information to Plaintiff’s counsel, is
17 enough. In support of their position, Defendants cite to *Russell v. City of Milwaukee*, 338
18 F.3d 662 (7th Cir. 2003), for the proposition that service of a notice of suggestion of
19 death upon no one other than the decedent’s counsel satisfies the second requirement.
20 The Court is not persuaded in this instance. First, the Court in *Russell* assumed without
21 analysis that the defendant had complied with Rule 25(a), and moved directly to the issue
22 of whether, under Fed. R. Civ. P. 6(b), the plaintiff’s widow had shown excusable neglect
23 for her delay in moving for substitution. The opinion in *Russell* thus is not based on any
24 consideration of the issue presented here.

25 Second, as an out-of-circuit case, *Russell* is not controlling.² Another case, *Barlow*
26 *v. Ground*, is. 39 F.3d 231 (9th Cir. 1994). In *Barlow*, the Ninth Circuit held that “the 90

27 ² Nor does the opinion in *Russell* represent a uniform view of what will constitute
28 adequate service under Rule 25(a). The circuits are split on the issue, and for every case
holding as does *Russell*, there is another foreign circuit case providing that service on the
decedent’s attorney is not sufficient. See, e.g., *Samson v. AFC Indus.*, 780 F.3d 679, 681

1 day period provided by Rule 25(a)(1) will not be triggered against [plaintiff's] estate until
2 the appropriate representative of the estate is served a suggestion of death in the manner
3 provided by Federal Rule of Procedure 4.” *Id.* at 233-34. The court in *Barlow* put the
4 onus of service of the representative of the plaintiff’s estate squarely on the defendant,
5 and recognized that the difference in method of service required for that representative—
6 service according to Rule 4—as opposed to the method of service acceptable for another
7 party—service according to Rule 5—was purposeful. *Id.* at 233.

8 Non-party successors or representatives of the deceased party [] may not be
9 protected by the attorney of the deceased party . . . because of the non-
10 party’s distance from the litigation, it may be that a non-party will be
unaware of the need to act to preserve the claim.

11 *Id.* That the decedent’s counsel in this matter subsequently agreed to represent Ms. Miles
12 *pro bono*, and she therefore was made aware of the potential to substitute in on her late
13 son’s claims, does not change the requirement set by *Barlow* or its underlying purpose.
14 *Barlow* provides “clear direction that, where the suggesting party is capable of
15 ascertaining the proper party for substitution, it must serve the suggestion of death on that
16 party to start the 90-day window for the filing of a motion to substitute.” *McNeal v.*
17 *Evert*, No. 2:05-cv-441-GEB-EFB P, 2015 WL 1680496, at *3 (E.D. Cal. Apr. 14, 2015)
18 (discussing *Barlow*). In this matter, it is clear that Defendants, the suggesting parties,
19 were capable of ascertaining the proper party for substitution, as they provided Plaintiff-
20 decedent’s counsel with contact information for Ms. Miles in July 2015. Therefore,
21 Defendants, and not decedent-Plaintiff’s counsel, were charged by Rule 25 with the
22 responsibility of serving Ms. Miles with the notice of suggestion of death. Because they
23 did not do so, the Court finds that the 90-day period for Ms. Miles’ filing of a motion to
24 substitute never began to run.

25 Even if the Court construed Defendants’ filing of the notice on July 20, 2015, as
26 satisfying Rule 25(a) and triggering the 90-day window, the Court would find that

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28 (5th Cir. 2015) (holding that, for purposes of Rule 25(a), “service on the attorney for the
plaintiff-decedent’s estate will not suffice as service on the estate”).

1 Plaintiff had shown good cause for an extension of the time to file her motion for
2 substitution. In her October 19, 2015 Motion Regarding Substitution of Party, Ms. Miles
3 expressly asked for more time to be appointed her son’s personal representative and then
4 move for substitution. (Doc. 163.) Pursuant to Fed. R. Civ. P. 6(b), the Court is
5 empowered to grant that request upon “good cause shown.” Here, Ms. Miles made her
6 request for extension 91 days after Defendants filed their notice, as follows: “[T]o allow
7 Ms. Miles adequate time to be named personal representative, she requests that this Court
8 enlarge the time for her to bring a renewed request to substitute the personal
9 representative Good cause exists here because no one has yet been appointed as the
10 personal representative.” (Doc. 163 at 2.) The Court would agree that Ms. Miles has
11 shown good cause to allow additional time to renew her motion to substitute, if that
12 additional time was necessary.

13 The Court will grant Ms. Miles’ motion to substitute as Plaintiff in this action
14 (Doc. 176).

15 **B. Plaintiff’s Claims for Nominal and Punitive Damages**

16 Defendants move for Judgment on the Pleadings on the grounds that the remaining
17 Eighth Amendment claims of excessive force do not survive the death of original
18 Plaintiff Lawrence Miles. Plaintiff contends that at least her claims for nominal and
19 punitive damages survive for trial.

20 Under Federal Rule of Civil Procedure 12(c), “a party may move for judgment on
21 the pleadings” after the pleadings are closed “but early enough not to delay trial.” A
22 motion for judgment on the pleadings pursuant to Rule 12(c) challenges the legal
23 sufficiency of the opposing party’s pleadings. *Westlands Water Dist. v. Bureau of*
24 *Reclamation*, 805 F. Supp. 1503, 1506 (E.D. Cal. 1992).

25 A motion for judgment on the pleadings should only be granted if “the moving
26 party clearly establishes on the face of the pleadings that no material issue of fact remains
27 to be resolved and that it is entitled to judgment as a matter of law.” *Hal Roach Studios,*
28 *Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1550 (9th Cir. 1989). Judgment on the

1 pleadings is also proper when there is either a “lack of cognizable legal theory” or the
2 “absence of sufficient facts alleged under a cognizable legal theory.” *Balistreri v.*
3 *Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988). In reviewing a Rule 12(c)
4 motion, “all factual allegations in the complaint [must be accepted] as true and
5 construe[d] . . . in the light most favorable to the non-moving party.” *Fleming v. Pickard*,
6 581 F.3d 922, 925 (9th Cir. 2009). Judgment on the pleadings under Rule 12(c) is
7 warranted “only if it is clear that no relief could be granted under any set of facts that
8 could be proved consistent with the allegations.” *Deveratura v. Globe Aviation Sec.*
9 *Servs.*, 454 F.3d 1043, 1046 (9th Cir. 2006) (internal citations omitted).

10 Section 1983 provides no specific remedies for its violation; nor does it address
11 the survivability of civil rights claims upon the death of a plaintiff. Instead, pursuant to
12 42 U.S.C. § 1988, where federal law does not provide suitable remedies for such
13 violations, courts are “to turn to ‘the common law, as modified and changed by the
14 constitution and statutes of the [forum] State’ as long as these are ‘not inconsistent with
15 the Constitution and laws of the United States.’” *Robertson v. Wegmann*, 436 U.S. 584,
16 588 (1978) (quoting 42 U.S.C. § 1988). Courts thus look to state statutes to identify the
17 remedies available in a Section 1983 action. In Arizona, the operative survival statute is
18 A.R.S. §14-3110, which provides:

19 Every cause of action, except a cause of action for damages for breach of
20 promise to marry, seduction, libel, slander, separate maintenance, alimony,
21 loss of consortium or invasion of the right of privacy, shall survive the
22 death of the person entitled thereto or liable therefor, and may be asserted
23 by or against the personal representative of such person, provided that upon
the death of the person injured, damages for pain and suffering of such
injured person shall not be allowed.

24 Under the Arizona survival statute, Plaintiff’s 1983 claims for excessive force survive,
25 except to the extent they seek damages for pain and suffering. On this point, the parties
26 appear to agree. Moreover, the Complaint does not state, nor does Plaintiff appear to
27 argue, that she is claiming any other actual damages.

1 What remains is whether nominal and punitive damages are allowed, and the
2 parties disagree on this issue. Plaintiff argues that because the Arizona survivability
3 statute is silent as to limitation on nominal or punitive damages, and federal law
4 expressly allows them in § 1983 cases, she is entitled to seek both types of damages here.
5 Defendants respond that Arizona law does not allow nominal or punitive damages in state
6 tort actions where no actual damages are available, and thus no such damages should be
7 allowed in this case.

8 Plaintiff is correct that nominal damages are allowed in this matter. Where a jury
9 finds that a plaintiff's constitutional rights were violated, but there were no actual
10 damages, it nonetheless must award "judgment and a \$1.00 nominal damage." *Floyd v.*
11 *Laws*, 929 F.2d 1390, 1401-02 (9th Cir. 1991). Defendants resist the application of
12 federal law on this point, arguing that "[t]o be clear, it is Arizona law that controls here."
13 (Doc. 181 at 2). That argument is incorrect in its breadth. As discussed above, Arizona
14 law does control to the extent that its survivability statute precludes a cause of action or a
15 class of damages, and that preclusion is found by the federal courts not to undermine the
16 purposes of § 1983. The controlling law provides that claims for pain and suffering do
17 not survive a plaintiff's death. But § 14-3110 does not eliminate claims for nominal or
18 punitive damages. And while other Arizona law may address the availability of nominal
19 damages in a non-section 1983 context, the Court does not look to state law beyond the
20 survivability statute to determine the general availability of types of damages in § 1983
21 actions. Thus, nominal damages are available to Plaintiff even where, as here, no actual
22 damages claims are available to her. *See Carey v. Piphus*, 435 U.S. 237, 266 (1978)
23 (holding that violation of constitutional rights should be actionable even where there are
24 no actual damages).

25 The same analysis would apply to punitive damages, in that they are not precluded
26 by Arizona's survivability statute where the original plaintiff dies, and federal law
27 provides that punitive damages may be available even absent actual damages. *See, e.g.,*
28 *Robinson v. Cattaraugus Cnty.*, 147 F.3d 153 (2d Cir. 1998). However, Plaintiff is not

1 entitled to punitive damages in this case because Mr. Miles did not plead them. In his
2 Complaint, Mr. Miles prayed in relevant part for “[m]oney damages in the amount of
3 five-million-dollars-cash.” (Doc. 1, Compl. at 8.) Plaintiff invites the Court to conclude
4 that the above prayer “could only be understood as a request for punitive relief.”
5 (Doc. 179 at 2.) The Court declines that invitation. The mere demand of a large monetary
6 award is not reasonably read as a request for punitive damages. And the Complaint
7 contains no other indicia that Mr. Miles intended to raise a punitive damages claim, such
8 as an allegation of an evil mind on Defendants’ part.

9 Plaintiff argues that throughout the pendency of this matter, Defendants
10 understood Mr. Miles to be seeking punitive damages, citing as evidence that prior to the
11 July 2015 trial date, the parties jointly submitted a Proposed Pretrial Order containing
12 proposed verdict forms that addressed punitive damages. Her argument is unavailing.
13 First, the Court decides this issue in the context of a Motion for Judgment on the
14 Pleadings, in which, pursuant to Fed. R. Civ. P. 12(c), it will consider only the pleadings
15 themselves, and not materials extrinsic to them. *See, e.g., Chavez v. United States*, 683
16 F.3d 1102, 1108-09 (9th Cir. 2012); *cf. Hal Roach Studios*, 896 F.2d at 1550. The Joint
17 Pre-Trial Order is thus beyond the scope of the instant motion.

18 Second, even if the Court were to consider extrinsic filings such as the proposed
19 verdict forms,³ the forms do not estop or preclude Defendants from raising the failure to
20 plead punitive damages here. This matter was within two weeks of trial and Defendants
21 had not raised any issue concerning the availability of punitive damages. Had the case
22 proceeded to trial in July 2015, and had the jury awarded Plaintiff punitive damages,
23 Defendants would have waived the issue of whether punitive damages were properly
24 pleaded, or pleaded at all. But Plaintiff’s passing led to *vacatur* of the trial, and
25 Defendants subsequently filed their Motion for Judgment on the Pleadings, which under
26 the circumstances was timely. Rule 12(c) requires only that such a motion be filed after

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28 ³ *See, e.g., Morgan v. County of Yolo*, 436 F. Supp. 2d 1152, 1155 (E.D. Cal. 2006) (in addition to the pleadings, the court may consider “matters for which judicial notice is proper”).

1 closing of the pleadings but soon enough so as not to interfere with trial. Defendants thus
2 benefit from this turn of events under the rules and are permitted to raise for the first time
3 the issue of whether punitive damages were pleaded. Their contention in the Motion for
4 Judgment on the Pleadings that Plaintiff “had no claims for damages against Defendants
5 other than pain and suffering,” (Doc. 177 at 6), scant as it may be, is properly raised, and
6 upon a review of the Complaint, correct. The Court will grant judgment on the pleadings
7 as to the lack of a claim for punitive damages.

8 For the reasons set forth above,

9 **IT IS ORDERED** granting Ms. Miles’s Renewed Motion Regarding Substitution
10 of Party (Doc. 176).

11 **IT IS FURTHER ORDERED** substituting Elaine Miles as Plaintiff for the
12 decedent, Lawrence Wade Miles, in this matter.

13 **IT IS FURTHER ORDERED** granting in part and denying in part Defendants’
14 Motion for Judgment on the Pleadings (Doc. 177), as follows:

15 Plaintiff’s claims for pain, suffering and punitive damages are extinguished;

16 Plaintiff’s claim for nominal damages survives for trial.

17 **IT IS FURTHER ORDERED** setting this matter for a telephonic status
18 conference on **June 1, 2016 at 2:30 p.m.** before District Judge John J. Tuchi in
19 Courtroom 505, 401 W. Washington Street, Phoenix, AZ 85003. Counsel who will try
20 the case shall have their calendars available and be prepared to discuss the trial schedule,
21 length of trial, and any other issues related to trial of this matter. Chambers will e-mail
22 dial-in information to all self-represented parties or counsel prior to the conference.

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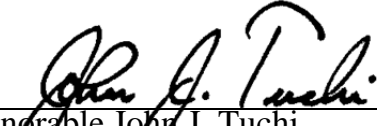
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1 At this initial Status Conference, the Court will set a schedule for the parties to file
2 a joint proposed pretrial order, a joint stipulated statement of the case, proposed voir dire
3 questions, proposed jury instructions, a joint stipulated form of verdict, witness and
4 exhibit lists, a trial memorandum of law, and motions in limine. The Court will also set a
5 schedule for the Final Pretrial Conference and a firm trial date.

6 Dated this 13th day of May, 2016.

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Honorable John J. Tuchi
United States District Judge