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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ROBERT MORRIS and MICHELLE MORRIS,

Plaintiffs,

v.

FRESNO POLICE DEPARTMENT, OFFICERS
CHRISTOPHER LONG, JEREMY DEMOSS,

Defendants.

08-CV-01422-OWW-GSA

MEMORANDUM DECISION AND
ORDER RE: DEFENDANTS'
MOTION TO DISMISS (Doc. 66)

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I. INTRODUCTION

Before the court is a motion to dismiss by defendants City of Fresno Police Department, Officer Christopher Long and Officer Jeremy DeMoss (collectively "Defendants"). The motion is directed at the claims asserted by *pro se* plaintiffs Robert Morris and Michelle Morris in their Fifth Amended Complaint ("FAC"). Plaintiffs, who are proceeding *in forma pauperis*, oppose the motion. The following background facts are taken from the FAC (Doc. 65) and other documents on file in this case.

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II. BACKGROUND

A. Procedural History

Plaintiffs filed their initial complaint on September 23, 2008, and applied for and were granted the right to proceed *in forma pauperis* ("IFP"). Given their IFP status, the magistrate judge screened their initial complaint. See 28 U.S.C. § 1915(e)(2). The initial complaint contained claims for "False Arrest and Imprisonment," "Police Brutality," "Violation of Right to Due Process of Law," "Conspiracy to Deprive Equal Protection of Laws,"

1 "Physical and Emotional Problems," and "Officer Misconduct." The
2 magistrate judge dismissed the complaint with leave to amend. (Doc.
3 15.)

4 Plaintiffs filed a first amended complaint which the
5 magistrate judge screened and dismissed, again with leave to amend.
6 (Doc. 29). Plaintiffs filed a second amended complaint, it was
7 screened, and the magistrate judge issued findings and
8 recommendations which recommended that certain claims proceed while
9 others, along with a named defendant (Brendan Rhames), be
10 dismissed. (Doc. 31).

11 In response to the magistrate judge's findings and
12 recommendations, Plaintiffs filed a document entitled "Objection To
13 Magistrate Judges Findings and Recommendation With Request For
14 Amendment To Complaint." In this submission Plaintiffs agreed to
15 voluntarily dismiss one claim, i.e., the false arrest and
16 imprisonment claim. Plaintiffs also requested to add a claim for
17 "municipal liability."

18 In an order adopting the magistrate judge's findings and
19 recommendations, Plaintiffs' request to add a claim for municipal
20 liability was construed as a motion to amend the complaint. This
21 motion to amend was referred to the magistrate judge for
22 consideration. In light of Plaintiffs' voluntarily dismissal of
23 the false arrest and imprisonment claim, that claim was dismissed
24 without prejudice and the magistrate judge's findings and
25 recommendations were otherwise adopted. (Doc. 35 at 2).

26 Subsequently, the magistrate judge granted Plaintiffs' motion
27 to amend to add the municipal liability claim and Plaintiffs' Third
28 Amended Complaint (TAC) followed. (Doc. 36). The magistrate judge

1 reviewed the TAC and concluded, in an order dated August 4, 2009,
2 that Plaintiffs appeared to state cognizable claims for relief.
3 (Doc. 38). Among other things, that order stated "service is
4 appropriate" for Defendant "Fresno Police Department."

5 Defendants filed a motion to dismiss the TAC on September 1,
6 2009. (Doc. 42). Plaintiffs filed a Fourth Amended Complaint on
7 December 30, 2009. (Doc. 60).¹ Defendants' motion to dismiss the
8 TAC was granted in part on January 27, 2010. (Doc. 63).

9 Plaintiffs filed a Fifth Amended Complaint ("FAC") on February
10 18, 2010. (Doc. 65). Defendants filed a motion to dismiss the FAC
11 on March 10, 2010. (Doc. 66). Plaintiffs' filed opposition to the
12 motion to dismiss on April 28, 2010. (Doc. 71).

13 **B. Plaintiffs' FAC**

14 Plaintiffs' FAC names three defendants: the City of Fresno,
15 Officer Christopher Long, and Officer Jeremy DeMoss. The opening
16 paragraph of the FAC reads:

17 Plaintiffs Mr. & Mrs. Morris claim that their
18 Constitutional [sic] protected Civil Rights were
19 violated. The Plaintiffs claim action under 42 U.S.C.
20 § 1983.

21 (FAC at 1). The remainder of the FAC is organized into two
22 sections: one section contains "Allegations by Plaintiff Mrs.
23 Morris" followed by her request for relief, and another section
24 contains "Allegations by Plaintiff Mr. Morris" followed by his
25 request for relief. (FAC at 1).

26 In her allegations, Mrs. Morris asserts a claim for excessive
27 force against officer DeMoss. In his allegations, Mr. Morris

28 ¹ Plaintiffs filed their Fourth Amended Complaint before the court entered its
order dismissing the TAC. The Fourth Amended Complaint was stricken. (Doc. 61)

1 asserts a claim for excessive force against officer Long and a
2 "municipal liability" claim against the City of Fresno. Both
3 plaintiffs request "unlimited" and punitive damages.

4 **1. Mrs. Morris's Allegations**

5 **a. Excessive Force**

6 Mrs. Morris asserts a claim for "Excessive Force" against
7 officer DeMoss stemming from an incident on "10/28/07." (FAC at
8 1). According to the FAC, Mrs. Morris was "a victim of an assault
9 and robbery," presumably by some third party. (FAC at 1). It
10 appears that DeMoss was the first officer to arrive at the scene of
11 the assault and robbery, which occurred at 2904 E. Austin Way in
12 Fresno, California. (FAC at 1). Defendant Long stopped Plaintiffs
13 a few blocks away from Austin Way at the intersection of Holland
14 Avenue and Fresno Street. (FAC at 1). At some point, a police
15 officer identified in the FAC as "Alexander" placed Mrs. Morris in
16 handcuffs. (FAC at 2). As Mrs. Morris sat on the curb handcuffed,
17 she demanded that her "rights be observed," prompting officers to
18 laugh. (FAC at 2). DeMoss walked over to Mrs. Morris and, without
19 warning, "snatched Plaintiff up" by "quickly and
20 unexpectedly...grabbing [Mr. Morris'] right elbow from behind and
21 lifting her up." (FAC at 2). The force used by DeMoss caused
22 large bruises approximately three to four inches in diameter on the
23 inside of Mrs. Morris' right forearm and bicep. (FAC at 2). Mrs.
24 Morris alleges that she was not under arrest and had not broken any
25 laws at the time DeMoss exercised force against her. (FAC at 2).
26 DeMoss placed Mrs. Morris in his patrol car, drove her to her
27 residence, and "dropped [Mrs. Morris] off." (FAC at 2).

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1 Mrs. Morris contends that "officer DeMoss's actions clearly were a
2 violation of the [Plaintiff's] Fourth Amendment Rights." (FAC at
3 2).

4 **2. Mr. Morris's Allegations**

5 **a. Excessive Force**

6 Mr. Morris contends that Defendant Long "committed excessive
7 force" against him on October 28, 2007 by conducting a "forced
8 blood draw." (FAC at 3). Mr. Morris contends that Long drove him
9 to a Fresno Police Department substation and forced him to submit
10 to a blood draw, denying him the "right" to have either a breath
11 test or urine test. (FAC at 4). Mr. Morris refers to the forcible
12 blood draw as "count 1" of his excessive force claim. (FAC at 3).

13 Mr. Morris also alleges that during the blood draw, Long
14 turned Mr. Morris' wrist backwards and twisted his arm into an arm-
15 bar lock. (FAC at 3). While he held Mr. Morris in the arm-bar
16 lock, Long threatened him by saying "move so I can break your arm."
17 (FAC at 3). Mr. Morris refers to the arm-bar lock as "count 2" of
18 his excessive force claim. (FAC at 3-4). Mr. Morris contends that
19 both the forced blood draw and arm-bar lock violated his rights
20 under the Fourth Amendment. (FAC at 4).

21 **b. Municipal Liability**

22 Mr. Morris asserts a claim for municipal liability against the
23 City of Fresno based on its policy, custom and/or practice of
24 "exonerating officers" accused of excessive force. (FAC at 5).
25 Mr. Morris contends that in response to a formal Internal Affairs
26 report signed by the Deputy Chief of Police, the Department
27 indicated that Long was "within the departments [sic] policy."
28 (FAC at 5). Mr. Morris alleges that the official city policy is

1 one of "discriminatory enforcement" and amounts to "an official
2 policy of 'inaction.'" (FAC at 5).

3 **III. LEGAL STANDARD**

4 Dismissal under Rule 12(b)(6) is appropriate where the
5 complaint lacks sufficient facts to support a cognizable legal
6 theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th
7 Cir.1990). To sufficiently state a claim to relief and survive a
8 12(b)(6) motion, the pleading "does not need detailed factual
9 allegations" but the "[f]actual allegations must be enough to raise
10 a right to relief above the speculative level." *Bell Atl. Corp. v.*
11 *Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).
12 Mere "labels and conclusions" or a "formulaic recitation of the
13 elements of a cause of action will not do." *Id.* Rather, there must
14 be "enough facts to state a claim to relief that is plausible on
15 its face." *Id.* at 570. In other words, the "complaint must contain
16 sufficient factual matter, accepted as true, to state a claim to
17 relief that is plausible on its face." *Ashcroft v. Iqbal*, --- U.S.
18 ----, ----, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (internal
19 quotation marks omitted).

20 The Ninth Circuit has summarized the governing standard, in
21 light of *Twombly* and *Iqbal*, as follows: "In sum, for a complaint to
22 survive a motion to dismiss, the nonconclusory factual content, and
23 reasonable inferences from that content, must be plausibly
24 suggestive of a claim entitling the plaintiff to relief." *Moss v.*
25 *U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir.2009) (internal
26 quotation marks omitted). Apart from factual insufficiency, a
27 complaint is also subject to dismissal under Rule 12(b)(6) where it
28 lacks a cognizable legal theory, *Balistreri*, 901 F.2d at 699, or

1 where the allegations on their face "show that relief is barred"
2 for some legal reason, *Jones v. Bock*, 549 U.S. 199, 215, 127 S.Ct.
3 910, 166 L.Ed.2d 798 (2007).

4 In deciding whether to grant a motion to dismiss, the court
5 must accept as true all "well-pleaded factual allegations" in the
6 pleading under attack. *Iqbal*, 129 S.Ct. at 1950. A court is not,
7 however, "required to accept as true allegations that are merely
8 conclusory, unwarranted deductions of fact, or unreasonable
9 inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988
10 (9th Cir.2001). "When ruling on a Rule 12(b)(6) motion to dismiss,
11 if a district court considers evidence outside the pleadings, it
12 must normally convert the 12(b)(6) motion into a Rule 56 motion for
13 summary judgment, and it must give the nonmoving party an
14 opportunity to respond." *United States v. Ritchie*, 342 F.3d 903,
15 907 (9th Cir.2003). "A court may, however, consider certain
16 materials-documents attached to the complaint, documents
17 incorporated by reference in the complaint, or matters of judicial
18 notice-without converting the motion to dismiss into a motion for
19 summary judgment." *Id.* at 908.

20 **IV. DISCUSSION**

21 **A. Mrs. Morris' Excessive Force Claim**

22 Fourth Amendment excessive force claims are analyzed under an
23 objective reasonableness standard. *Espinosa v. City & County of*
24 *San Francisco*, 598 F.3d 528, 537 (9th Cir. 2010) (citation omitted).
25 Determining whether an officer's use of force was objectively
26 reasonable entails three steps:

27 First, we must assess the severity of the intrusion on
28 the individual's Fourth Amendment rights by evaluating
"the type and amount of force inflicted." Next, we must

1 evaluate the government's interests by assessing (1) the
2 severity of the crime; (2) whether the suspect posed an
3 immediate threat to the officers' or public's safety; and
4 (3) whether the suspect was resisting arrest or
5 attempting to escape. Third, "we balance the gravity of
6 the intrusion on the individual against the government's
7 need for that intrusion." Ultimately, we must balance
8 the force that was used by the officers against the need
9 for such force to determine whether the force used was
10 "greater than is reasonable under the circumstances."

11 *Id.* (citations omitted).

12 Defendants contend that Mrs. Morris' allegations are
13 insufficient to state a violation of her Fourth Amendment rights
14 because "[if] the detention was not invalid, Officer DeMoss'
15 limited use of force was not unreasonable in a constitutional sense
16 because...it served the completely legitimate purpose of releasing
17 Mrs. Morris from the officers' custody." (Motion to Dismiss at 7).
18 Defendants argument fails to account for the factors that must be
19 considered in determining the reasonableness of an officer's use of
20 force. *See id.*

21 The FAC alleges that DeMoss grabbed Mrs. Morris without
22 warning and yanked her to her feet by her elbow while her hands
23 were handcuffed behind her back from a seated position on the curb.
24 (FAC at 2). DeMoss used force sufficient to cause large bruises on
25 Mrs. Morris' arms. (FAC at 2). According to the complaint, Mrs.
26 Morris had not committed any crime, did not pose an immediate
27 threat to officers or to public safety, and was not resisting
28 arrest or attempting to escape, the complaint is sufficient to
allege that the force used by DeMoss was "greater than [was]
reasonable under the circumstances." (FAC at 2).

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1 **B. Mr. Morris' Excessive Force Claim**

2 **1. "Forced" Blood-Draw**

3 Mr. Morris makes the conclusory allegation that a "forced
4 blood-draw" was performed on him by Defendant Long. (FAC at 3).
5 The complaint states "Officer Long never once let the plaintiff Mr.
6 Morris answer if Mr. Morris wanted [a blood test]." (FAC at 4).
7 The complaint alleges that Mr. Morris was "denied the right" to a
8 breath test and urine test, however, the complaint does not allege
9 that Mr. Morris consented to or requested alternatives to his blood
10 draw. (FAC at 4).

11 "The Fourth Amendment is not violated by ...failure to advise
12 [an arrestee], who did not request or consent to a urine or breath
13 test, of their right to choose among the alternative tests."
14 *Nelson v. City of Irvine*, 143 F.3d 1196, 1203-1204 (9th Cir. 1998).
15 Because the complaint does not allege that Mr. Morris consented to
16 alternative testing, the complaint fails to state a Fourth
17 Amendment violation with respect to Mr. Morris' blood test. See
18 *id.* Mr. Morris' blood test claim is DISMISSED.

19 This claim is insufficient after five attempts. Case law
20 reveals that this claim is only cognizable to the extent that
21 Mr. Morris consented to an alternate testing procedure, refused the
22 blood test, but was nonetheless subjected to a forced blood test.
23 See *Nelson*, 143 F.3d at 1203-1204. Mr. Morris has never alleged
24 these facts. On the other hand, this claim is close to being
25 properly pled, because to the extent the officer told Mr. Morris
26 his options but then refused to give him an opportunity to express
27 his consent and forcibly drew blood over Plaintiff's objection,
28 such facts may support a Fourth Amendment claim.

1 **2. Excessive Force Claim**

2 Mr. Morris alleges that he was calm, quiet, cooperative, and
3 "quite nice" during his blood draw. (FAC at 3). Mr. Morris
4 further alleges that while he was calmly having his blood drawn,
5 Defendant Long turned his wrist backwards and twisted Morris' arm
6 into an arm-bar lock, using so much force that Mr. Morris suffered
7 a dislocated shoulder and a torn ligament. (FAC at 3). Mr. Morris'
8 allegations are sufficient to state a Fourth Amendment claim for
9 excessive force. See *Espinosa*, 598 F.3d at 537 (balancing need for
10 use of force against amount of force used). The motion to dismiss
11 is DENIED.

12 **C. Municipal Liability**

13 Municipalities such as the City of Fresno, "are 'persons'
14 under 42 U.S.C. § 1983 and thus may be liable for causing a
15 constitutional deprivation." *Long v. County of Los Angeles*, 442
16 F.3d 1178, 1185 (9th Cir. 2006). In a § 1983 case, a municipality
17 cannot be liable for a constitutional violation on the basis of
18 respondeat superior. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658,
19 691 (1978). Rather, a municipality is "liable only when 'action
20 pursuant to official municipal policy of some nature caused a
21 constitutional tort.'" *Christie v. Iopa*, 176 F.3d 1231, 1235 (9th
22 Cir. 1999) (quoting *Monell*, 436 U.S. at 691). The "official
23 municipal policy" can be an expressly adopted policy or "a
24 longstanding practice or custom." *Id.* (internal quotation marks
25 omitted).

26 Defendants contend that Plaintiffs' municipal liability claim
27 must be dismissed because Plaintiffs have failed to establish that
28 the blood testing procedure employed on Mr. Morris was

1 unconstitutional. (Motion to Dismiss at 7). Defendants cite *City*
2 *of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) for the
3 proposition that "Monell liability may not be imposed absent an
4 underlying violation of the plaintiff's rights that is related to
5 the official policy or custom in question." *Id.*

6 The police department's blood testing policy is not per se the
7 basis for Plaintiffs' claim of municipal liability. Rather, the
8 complaint alleges that the city's policy "violate[s] ones rights
9 [sic] to be protected from 'excessive force'" and that the city
10 "prevents the citizen(s) from holding the officer
11 accountable....for violating ones [sic] rights." (FAC at 5).
12 Plaintiffs contend that the city employs a "policy of inaction"
13 with respect to excessive force claims. Plaintiffs' municipal
14 liability claim based on an alleged "policy of inaction," i.e.
15 failure to investigate and hold officers accountable regarding
16 excessive force claims is raised for the first time in the FAC;
17 Plaintiffs' previous municipal liability claims were based on the
18 City of Fresno's blood draw policy. (See Doc. 60; 37).

19 The complaint fails to state sufficient facts that the city
20 does not investigate and discipline its officers for conduct which
21 violates citizens' constitutional rights to be free from excessive
22 force. The complaint alludes to Plaintiffs filing a complaint with
23 Internal Affairs, and that Internal Affairs concluded that
24 Defendants acted reasonably. (FAC at 5). However, the fact that
25 Internal Affairs may have cleared Defendants of wrongdoing does
26 not, without more, establish a policy of "inaction" or wrongdoing
27 with respect to excessive force claims. See, e.g., *Clouthier v.*
28 *County of Contra Costa*, 591 F.3d 1232, 1253-54 (9th Cir. 2010)

1 (rejecting municipal liability claim based on failure to discipline
2 defendants for unconstitutional acts because allegations did not
3 establish that municipality made a conscious, affirmative choice to
4 approve unconstitutional actions and adopt them as official
5 policy). Plaintiffs' claim against the City of Fresno must be
6 dismissed, without prejudice. However, there must be an end to
7 pleading. Where a court instructs a party regarding a specific
8 pleading deficiency, the party's failure to remedy the deficiency
9 may warrant dismissal of a claim with prejudice. See *Ferdik v.*
10 *Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992).

11 **V. CONCLUSION**

12 For the reasons stated, Defendants' motion is GRANTED in part
13 and DENIED in part, as follows:

- 14 1) Defendants' motion to dismiss Michelle Morris' excessive
15 force claims is DENIED;
- 16 2) Defendants' motion to dismiss Robert Morris' excessive
17 force claim based on the arm-bar lock is DENIED;
- 18 3) Defendants' motion to dismiss Robert Morris' blood draw
19 claim is GRANTED, and the blood draw claim is DISMISSED
20 without prejudice;
- 21 4) Defendants' motion to dismiss Plaintiffs' claim for
22 municipal liability is GRANTED, and Plaintiffs' municipal
23 liability claim is DISMISSED without prejudice;
- 24 5) Any amended complaint is due within thirty (30) days of the
25 electronic filing of this Memorandum Decision. Defendants'
26 responsive pleading is due within twenty (20) days of notice
27 of the electronic filing of any such amended complaint; and
28

1 6) Defendants shall submit a form of order consistent with
2 this Memorandum Decision within five (5) days following
3 electronic service of this decision.

4 IT IS SO ORDERED.

5 **Dated:** May 28, 2010

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE

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