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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MAUREEN ABSTON, individually, and
as Personal Representative of the
Estate of RICHARD ABSTON; COREY
ABSTON; JACY ABSTON; LINDA ABSTON,

Plaintiffs,

v.

CITY OF MERCED, et al.,

Defendants.

09-CV-00511-OWW-GSA

MEMORANDUM DECISION RE:
DEFENDANTS' MOTION FOR
JUDGMENT ON THE PLEADINGS
(Doc. 16)

I. INTRODUCTION

Before the court is a Rule 12(c) motion for judgment on the pleadings brought by Defendant Shane Kensey, a California Highway Patrol officer. The motion is directed at two claims asserted by Plaintiffs Maureen, Corey, Jacy, and Linda Abston in their complaint for a "Violation of Civil Rights." Defendant City of Merced and its police officers named as defendants in this case, Defendants Russ Thomas, J. Hart, B. Dalia, and N. Arellano, have joined Kensey's motion.

II. BACKGROUND

In this civil rights case, Richard Abston, a retired truck driver, died after allegedly being tased by law enforcement. Mr. Abston's surviving spouse, Maureen, and his surviving children, Corey, Jacy, and Linda, are the plaintiffs in this case. The following background facts are taken from their complaint, Document ("Doc.") 1, filed March 18, 2009.

A. Allegations In The Complaint

On the morning of February 7, 2008, the California Highway

1 Patrol dispatched information regarding a vehicle traveling the
2 wrong way on Highway 99. Officer Kensey responded to the dispatch
3 and stopped a silver Dodge pickup truck, driven by Mr. Abston,
4 which had sideswiped several vehicles. (Doc. 1 at 3.)

5 At the time of the stop, Mr. Abston had no shirt on, and
6 officer Kensey could see Mr. Abston's torso. On his sternum, Mr.
7 Abston had a 9-inch scar as a result of open heart surgery about
8 two years prior. Mr. Abston had a defibrillator implanted in his
9 chest to treat his history of congestive heart failure and
10 cardiomyopathy. (*Id.* at 3-4.)

11 Officer Kensey attempted to remove Mr. Abston from the stopped
12 vehicle, but Mr. Abston allegedly resisted. Purportedly, Mr.
13 Abston was sweating profusely, began "speaking of God and of
14 helping a child," seemed agitated and appeared under the influence
15 of a drug. With a baton, Officer Kensey struck Mr. Abston several
16 times allegedly to get the "obviously intoxicated" Mr. Abston under
17 control and arrest him. (*Id.* at 4.)

18 Mr. Abston fled from the vehicle to a big rig stopped in the
19 middle of Highway 99 and climbed on top of the big rig's cab.
20 Officer Kensey pursued Mr. Abston, climbed onto the cab, and then
21 struck Mr. Abston with the baton. Mr. Abston, however, did not
22 desist his resistance. Officer Kensey then sprayed "O.C. spray"
23 (also known as pepper spray) at Mr. Abston. (*Id.* at 4.)

24 Several defendant officers from the Merced Police Department
25 arrived on the scene, including officers Arellano and Hart.
26 Arellano climbed onto the big rig's cab, directed Mr. Abston to get
27 down, and then held Mr. Abston against the big rig. Mr. Abston
28 "continued to struggle" and one officer recommended that they

1 "simply let go" of him. For reasons unspecified, Mr. Abston was
2 released and he ran from the officers. On foot, Hart pursued the
3 topless and intoxicated Mr. Abston and shot him in the back with a
4 stun gun, applying the electronic charge for an unknown period of
5 time. Mr. Abston fell to the ground face-first and broke his nose
6 in the process. Mr. Abston continued to struggle and to "speak[]
7 of God." The officers repeatedly told Mr. Abston to "chill out."
8 Officer Dalia arrived and noticed Mr. Abston on the ground and
9 several officers struggling with him. While Mr. Abston lay face
10 down, several officers "continued using excessive force" on Mr.
11 Abston. (*Id.* at 4-6.)

12 A female C.H.P. officer arrived on the scene and placed nylon
13 restraints on Mr. Abston's legs. At some point, Mr. Abston stopped
14 moving, his face turned purple, and he was turned onto his back.
15 Mr. Abston was "coding." Paramedics attended to Mr. Abston. An
16 unnamed police officer also attempted to locate Mr. Abston's pulse.
17 That officer then took over chest compressions, but was
18 unsuccessful, and Mr. Abston died.¹ (*Id.* at 6.)

19 Allegedly, Taser International, a company that designs, tests,
20 delivers and prepares training materials for stun guns, has issued
21 two published legal warnings specifically notifying taser users to
22 avoid targeting the chest area of individuals with known histories
23 of heart attacks. One publication also noted that individuals
24 exhibiting symptoms of "Excited Delirium" are susceptible to
25 "Sudden In-Custody Death Syndrome" when tased. (*Id.* at 5.)

26
27 ¹ A witness with a video camera recorded significant portions
28 of the incident. The witness turned the video into the Merced
County Sheriff's Department.

1 B. Plaintiffs' Claims

2 In their complaint, Plaintiffs allege that Mr. Abston "died as
3 a direct consequence of the excessive force used against him by the
4 Defendants involved in this incident." (*Id.* at 8.) Plaintiffs
5 allege seven causes of action, only two of which are at issue in
6 this motion: the "First Cause of Action" and the "Fifth Cause of
7 Action."²

8 1. First Cause of Action - 42 U.S.C. § 1983

9 The First Cause of Action alleges a civil rights violation
10 under § 1983 against officers Hart, Dalia, Arellano, and Kensey.
11 In pertinent part, Plaintiffs assert:

12 38. In doing the acts complained of herein [set forth
13 above] and killing Plaintiffs' decedent, RICHARD ABSTON,
14 Defendants . . . acted under color of law to deprive
plaintiffs of certain constitutionally protected rights,
including, but not limited to:

- 15 a. The right to be free from unreasonable searches and
16 seizures, as guaranteed by the Fourth and Fourteenth
17 Amendments to the United States Constitution.

18 No other constitutional violations are described in the First Cause
19 of Action. The First Cause of Action is asserted individually by
20 each named Plaintiff. The caption of the complaint specifies that
21 Ms. Abston is suing individually and as the personal representative
22 of Mr. Abston's estate. Both parties agree that this claim is
23 asserted by Ms. Abston on behalf of Mr. Abston's estate. The First

24
25 ² The causes of action in Plaintiffs' complaint are
26 misnumbered. Plaintiffs allege a "Fifth Cause of Action" and then
27 allege a "Seventh Cause of Action" and an "Eighth Cause of Action"
28 without alleging a sixth cause of action. Even though an "Eighth
Cause of Action" is so denominated, there are a total of seven
causes of action plead in Plaintiffs' complaint.

1 Cause of Action consists of two sets of claims: (1) each individual
2 plaintiff is alleging a civil rights violation for their loss
3 arising out the alleged excessive force and death of Mr. Abston;
4 and (2) Ms. Abston, as the personal representative, is asserting a
5 claim on behalf of Mr. Abston's estate for the damages he
6 sustained.

7 2. Fifth Cause of Action - Cal. Civ. Code § 52.1

8 The Fifth Cause of Action alleges a civil rights violation
9 under California Civil Code § 52.1 against officers Hart, Dalia,
10 Arellano, and Kensey. Plaintiffs allege:

11 58. The conduct of Defendants . . . as described herein,
12 acting in the course and scope of their employment for
13 Defendant City and the State of California, violated
14 California Civil Code Section 52.1, in that they
15 interfered with Plaintiffs' decedent's exercise and
16 enjoyment of his civil rights, through use of wrongful
17 and excessive force, and failure to make any proper or
18 reasonable arrest of said decedent.

19 59. As a direct and proximate result of Defendants'
20 violation of Civil Code Section 52.1, Plaintiffs'
21 decedent suffered [a] violation of his constitutional
22 rights, and suffered damages as set forth herein.

23 60. Since this conduct occurred in the course and scope
24 of their employment, Defendant CITY is therefore liable
25 pursuant to respondeat superior.

26 This cause of action is brought on behalf of Mr. Abston's estate.

27 C. Defendants' Motion

28 Defendants advance one principal argument against the First
Cause of Action. Defendants argue that Plaintiffs cannot maintain
their own Fourth Amendment, excessive force claims under § 1983
because they were not subject to the alleged excessive force.
Defendants do not contest the Estate's Fourth Amendment, excessive
force claim. As to the Fifth Cause of Action, Defendants argue and
Plaintiffs impliedly concede that Ms. Abston cannot bring a claim

1 on behalf of Mr. Abston's estate under California Civil Code §
2 52.1, as this claim did not survive his death. Plaintiffs oppose
3 the motion only as to the First Cause of Action.

4 III. STANDARD OF DECISION

5 A party may move for judgment on the pleadings after the
6 pleadings are closed. Fed. R. Civ. P. 12(c). A Rule 12(c) motion
7 challenges the legal adequacy of the opposing party's pleadings.
8 *Westlands Water Dist. v. Bureau of Reclamation*, 805 F.Supp. 1503,
9 1506 (E.D. Cal. 1992). In deciding a motion for judgment on the
10 pleadings, a court must "must accept all factual allegations in the
11 complaint as true and construe them in the light most favorable to
12 the non-moving party." *Fleming v. Pickard*, __ F.3d __, 2009 WL
13 2871532, at *2 (9th Cir. Sept. 9, 2009). "[T]he allegations of the
14 moving party which have been denied are assumed to be false." *Hal*
15 *Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1550
16 (9th Cir. 1990).

17 "Judgment on the pleadings is properly granted when there is
18 no issue of material fact in dispute, and the moving party is
19 entitled to judgment as a matter of law." *Fleming*, 2009 WL 2871532
20 at *2. Judgment on the pleadings is not appropriate if the court
21 "goes beyond the pleadings to resolve an issue; such a proceeding
22 must properly be treated as a motion for summary judgment." *Hal*
23 *Roach Studios*, 896 F.2d at 1550. "A court may, however, consider
24 certain materials-documents attached to the complaint, documents
25 incorporated by reference in the complaint, or matters of judicial
26 notice-without converting the motion to dismiss [or motion for
27 judgment on the pleadings] into a motion for summary judgment."
28 *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); see

1 also *Summit Media LLC v. City of Los Angeles*, 530 F. Supp. 2d 1084,
2 1096 (C.D. Cal. 2008).

3 To assess the adequacy of pleadings, the same legal standard
4 applies to a motion for judgment on the pleadings as applies to a
5 Rule 12(b)(6) motion to dismiss. See *Dworkin v. Hustler Magazine*
6 *Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989).

7 IV. DISCUSSION AND ANALYSIS

8 A. First Cause Of Action - § 1983

9 "Fourth Amendment rights are personal rights which . . . may
10 not be vicariously asserted." *Rakas v. Illinois*, 439 U.S. 128, 133-
11 34 (1978) (internal quotation marks omitted). Because Fourth
12 Amendment rights are personal and cannot be vicariously asserted,
13 Ms. Abston and her children lack standing to assert their own
14 Fourth Amendment claims for the alleged excessive force used on Mr.
15 Abston. See *Moreland v. Las Vegas Metro. Police Dep't*, 159 F.3d
16 365, 369 (9th Cir. 1998); *Smith v. City of Fontana*, 818 F.2d 1411,
17 1417 (9th Cir. 1987), overruled on other grounds by *Hodgers-Durgin*
18 *v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999); *Crumpton v. Gates*,
19 947 F.2d 1418, 1422 (9th Cir. 1991).

20 In *Crumpton*, the court rejected a Fourth Amendment claim
21 asserted by a son whose father was shot and killed by the police.

22 The court reasoned:

23 Viewing the allegations in the light most favorable to
24 Crumpton, as we must on review of summary judgment,
25 Crumpton's father may have sustained a constitutionally
26 cognizable Fourth Amendment deprivation when shot by
27 police *But Crumpton cannot assert his father's*
28 *Fourth Amendment rights.*

Crumpton, 947 F.2d at 1422 (emphasis added). Similarly, in *Smith*,
the court rejected a Fourth Amendment, excessive force claim

1 asserted by the children of a man shot and killed by the police.

2 The court reasoned:

3 Mr. Smith's children, suing in their individual
4 capacities, also assert a claim for relief under the
5 Fourth Amendment. However, the Supreme Court has held
6 that Fourth Amendment rights are personal rights which .
7 . . . may not be vicariously asserted. *The children were
not directly subjected to the excessive use of state
force and therefore cannot maintain personal causes of
action under section 1983 in reliance on this Fourth
Amendment theory.*

8 *Smith*, 818 F.2d at 1417 (emphasis added) (citation and internal
9 quotation marks omitted).

10 Because Ms. Abston and her children were not directly
11 subjected to the alleged excessive force used on Mr. Abston, they
12 cannot maintain personal civil rights causes of action under the
13 Fourth Amendment. Mr. Abston's Fourth Amendment rights were
14 personal to him and may be asserted, if at all, only by his estate.
15 *Moreland*, 159 F.3d at 369; *Smith*, 818 F.2d at 1416-17.

16 Plaintiffs do not dispute that they cannot maintain their own
17 Fourth Amendment causes of action under § 1983. Rather Plaintiffs'
18 opposition suggests the First Cause of Action does not actually
19 allege such Fourth Amendment claims:

20 Representing Decedent ABSTON'S estate, in the first cause
21 of action Plaintiff MAUREEN ABSTON claims that the
22 Defendant Officers violated the Decedent's Fourth
23 Amendment right to be free from unreasonable searches and
24 seizures. Additionally, each Plaintiff asserts a
personal substantive due process claim based on the
violation of their right to familial companionship and
society pursuant to 42 U.S.C. § 1983 in violation of
their Fourteenth Amendment rights.

25 (Doc. 19 at 8.) In other words, Plaintiffs suggest that the only
26 Fourth Amendment claim pleaded in the complaint is asserted on
27 behalf of Mr. Abston's estate. This reading of the complaint is
28

1 untenable.

2 The First Cause of Action specifically alleges that the
3 officers "acted under color of law to deprive *plaintiffs* of certain
4 constitutionally protected rights" including "[t]he right to be
5 free from unreasonable searches and seizures, as guaranteed by the
6 Fourth and Fourteenth Amendments to the United States
7 Constitution." (Doc. 1 at 9.)³ Ms. Abston and her children are the
8 "plaintiffs" in the case and, accordingly, they have alleged Fourth
9 Amendment claims. The First Cause of Action gives no notice that
10 Plaintiffs claim a Fourteenth Amendment due process right for loss
11 of familial rights.

12 Ms. Abston and the children cannot maintain their own Fourth
13 Amendment claims under § 1983 for the alleged excessive force used
14 on Mr. Abston. Their individual Fourth Amendment claims are
15 DISMISSED WITHOUT LEAVE TO AMEND.

16 B. Fifth Cause of Action - Cal. Civ. Code § 52.1

17 Section 52.1 of the California Civil Code provides individuals
18 with a statutory means by which to seek relief, in a civil case,
19 for certain misconduct that interferes with their rights under
20 federal or state constitutional provisions or laws. As stated in
21 § 52.1(a):

22 If a person or persons, whether or not acting under color
23 of law, interferes by threats, intimidation, or coercion,
24 or attempts to interfere by threats, intimidation, or
25 coercion, with the exercise or enjoyment by any
26 individual or individuals of rights secured by the
Constitution or laws of the United States, or of the
rights secured by the Constitution or laws of this state,
the Attorney General, or any district attorney or city
attorney may bring a civil action

27 ³ In this case, the Fourth Amendment applies to the officers'
28 conduct by virtue of the Fourteenth Amendment.

1 In turn, § 52.1(b) grants individuals the right to civilly sue only
2 in their "own name" and on their "own behalf" for conduct
3 prohibited under § 52.1(a):

4 Any individual whose exercise or enjoyment of rights
5 secured by the Constitution or laws of the United States,
6 or of rights secured by the Constitution or laws of this
7 state, has been interfered with, or attempted to be
8 interfered with, as described in subdivision (a), may
9 institute and prosecute *in his or her own name and on his
10 or her own behalf* a civil action for damages, . . . ,
11 injunctive relief, and other appropriate equitable relief
12

13 (Emphasis added.)

14 In the Fifth Cause of Action, Ms. Abston asserts a § 52.1
15 claim on behalf of Mr. Abston's estate. A private plaintiff,
16 however, like Ms. Abston, cannot assert a claim on behalf of a
17 decedent under § 52.1 because the claim must be "on his or her own
18 behalf." *Bay Area Rapid Transit Dist. v. Superior Court*, 38 Cal.
19 App. 4th 141, 144 (1995) (concluding that § 52.1 "is simply not a
20 wrongful death provision" and "is limited to plaintiffs who
21 themselves have been the subject of violence or threats"); *Tolosko-*
22 *Parker v. County of Sonoma*, Nos. C 06-06841 CRB, C 06-06907 CRB,
23 2009 WL 498099, at *5 (N.D. Cal. Feb. 26, 2009) ("California Civil
24 Code § 52.1 does not provide a right of action for the parents of
25 a decedent; rather, it only provides for a personal cause of action
26 for the person who has been subjected to violence or threats which
27 interfered with that person's . . . rights."); see also *LeBlanc v.*
28 *City of Los Angeles*, No. CV 04-8250 SVW (VBKx), 2006 WL 4752614, at
*21-22 (C.D. Cal. Aug. 16, 2006). Plaintiffs do not challenge that
Ms. Abston lacks standing to assert such a claim.

The motion as to the § 52.1 claim asserted on behalf of Mr.
Abston's estate is GRANTED WITHOUT LEAVE TO AMEND.

V. CONCLUSION

For the reasons stated:

1. As to the First Cause of Action, Defendants' motion for judgment on the pleadings as to the Fourth Amendment claims asserted individually by Maureen, Corey, Jacy, and Linda Abston, is GRANTED WITHOUT LEAVE TO AMEND.

2. As to the Fifth Cause of Action, Defendants' motion for judgment on the pleadings as to the § 52.1 claim asserted on behalf of Mr. Abston's estate is GRANTED WITHOUT LEAVE TO AMEND.

Defendant shall submit a form of order consistent with, and within five (5) days following electronic service of, this Memorandum Decision.

IT IS SO ORDERED.

Dated: October 20, 2009

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE