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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

THE ESTATE OF CECIL ELKINS, JR., et
al.,

 Plaintiffs,

 v.

CALIFORNIA HIGHWAY PATROL, et al,

 Defendants.

Case No. 1:13-cv-01483-AWI-SAB

FINDINGS AND RECOMMENDATION
RECOMMENDING THAT DEFENDANTS’
MOTION TO DISMISS BE PARTIALLY
GRANTED

ECF NO. 41

OBJECTIONS DUE WITHIN FOURTEEN
DAYS

On July 3, 2014, Defendant Hipolito Pelayo filed a motion to dismiss. (ECF No. 41.)
The motion to dismiss was referred to the undersigned magistrate judge for Findings and
Recommendations pursuant to 28 U.S.C. § 636(b)(1)(B) and Federal Rule of Civil Procedure 72.
(ECF No. 42.)

The hearing on the motion to dismiss took place on October 1, 2014. Neli Palma and
Peter Meshot appeared telephonically on behalf of Defendants. Nichelle Jones appeared
telephonically on behalf of Plaintiffs. For the reasons set forth below, the Court recommends
that the motion to dismiss be partially granted.

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1 **I.**

2 **BACKGROUND**

3 This action was filed on September 12, 2013. (ECF No. 1.) The operative complaint is
4 the First Amended Complaint filed on May 6, 2014. (ECF No. 35.) Plaintiffs claims arise from
5 an incident alleged to have occurred on November 13, 2012 in the City of Pixley. Plaintiffs
6 allege that law enforcement officers shot and killed Cecil Elkins, Jr. (“the Decedent”) while
7 attempting to arrest him.

8 Plaintiffs allege that Defendant Pelayo and several “Doe” officers from the California
9 Highway Patrol, Tulare County Sheriff’s Department, the Tulare County Regional Gang
10 Enforcement Team, the Department of Justice Central Valley Gang Task Force and the Tulare
11 Police Department pursued the Decedent on foot. Plaintiffs further allege that the Decedent was
12 shot in the back by Defendant Pelayo despite the fact that the Decedent was unarmed and posed
13 no reasonable threat to anybody.

14 **II.**

15 **LEGAL STANDARDS FOR MOTIONS TO DISMISS**

16 Under Federal Rule of Civil Procedure 12(b)(6), a party may file a motion to dismiss on
17 the grounds that a complaint “fail[s] to state a claim upon which relief can be granted.” A
18 complaint must contain “a short and plain statement of the claim showing that the pleader is
19 entitled to relief.” Fed. R. Civ. P. 8(a)(2). “[T]he pleading standard Rule 8 announces does not
20 require ‘detailed factual allegations,’ but it demands more than an unadorned, the-defendant-
21 unlawfully harmed-me accusation.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell
22 Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). In assessing the sufficiency of a
23 complaint, all well-pleaded factual allegations must be accepted as true. Iqbal, 556 U.S. at 678-
24 79. However, “[t]hreadbare recitals of the elements of a cause of action, supported by mere
25 conclusory statements, do not suffice.” Id. at 678.

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1 **III.**

2 **DISCUSSION**

3 Defendant Pelayo raises five arguments in his motion to dismiss. First, Pelayo argues
4 that Plaintiffs failed to allege compliance with the presentation requirements of the Government
5 Claims Act. Second, Pelayo argues that Plaintiffs Tina Terrel and Cecil Elkins cannot recover
6 on a wrongful death claim. Third, Pelayo argues that Cecil Elkin’s claim for negligent infliction
7 of emotional distress fails because he is not alleged to have witnessed the shooting. Fourth,
8 Pelayo argues that he cannot be liable for negligent hiring, training or supervision. Fifth, Pelayo
9 argues that Plaintiffs state no cognizable claim under the Vane Act.

10 **A. Compliance with California’s Claims Presentation Requirements**

11 Defendant Pelayo argues that Plaintiffs fail to allege that they complied with the
12 Government Claims Act, California Government Code § 945.4, by filing a timely administrative
13 claim prior to filing this action. “As a prerequisite for filing suit for ‘money or damages’ against
14 a public entity, the California Government Claim Act requires presentation of a claim to the
15 public entity.” General Sec. Services Corp. v. County of Fresno, 815 F. Supp. 2d 1123, 1131
16 (E.D. Cal. 2011); see also Cal. Gov’t Code § 945.4. “A plaintiff must allege facts demonstrating
17 either compliance with the Government Tort Claims Act requirement or an excuse for
18 noncompliance as an essential element of the cause of action. [Citation.] Failure to allege
19 compliance or an excuse for noncompliance constitutes a failure to state a cause of action and
20 results in a dismissal of such claims.” D.K. ex rel. G.M. v. Solano County Office of Educ., 667
21 F. Supp. 2d 1184, 1195 (E.D. Cal. 2009) (citing State of California v. Superior Court, 32 Cal. 4th
22 1234, 1243-44 (2004)).

23 Plaintiffs contend that they complied with the claims presentation requirements, but it
24 appears that they have not pled such compliance in their complaint. Accordingly, the Court will
25 recommend that Plaintiffs’ claims be dismissed with leave to amend to plead such compliance.

26 **B. Wrongful Death Claims Brought by Plaintiffs Tina Terrel and Cecil Elkins**

27 Defendant Pelayo argues that Plaintiffs Tina Terrel and Cecil Elkins lack standing to
28 bring a claim for the wrongful death of their son.

1 Plaintiffs argue that Tina Terrel and Cecil Elkins have standing because they were
2 financially dependent upon the Decedent. “Regardless of their status as heirs, parents may sue
3 for the wrongful death of their child ‘if they were dependent on the decedent.’” Chavez v.
4 Carpenter, 91 Cal. App. 4th 1433, 1445 (2001) (citing California Code Civ. Proc. § 377.60(b)).
5 However, the First Amended Complaint only vaguely alleges that Tina Terrel and Cecil Elkins
6 are “heirs” who sustained economic damages as a result of the death of the Decedent. This
7 vague allegation is insufficient to support the conclusion that Tina Terrel and Cecil Elkins were
8 financially dependent upon the Decedent. Accordingly, the Court recommends that this claim be
9 dismissed, but with leave to amend to include sufficient factual allegations to support the
10 conclusion that Tina Terrel and Cecil Elkins were financially dependent upon the Decedent.

11 **C. Cecil Elkins Claim for Negligent Infliction of Emotional Distress**

12 Defendant Pelayo argues that Plaintiff Cecil Elkins’ claim for negligent infliction of
13 emotional distress fails because he was not present when the Decedent was shot and killed.

14 Negligent infliction of emotion distress is one form of the tort of negligence, with the
15 same elements of duty, breach of duty, causation, and damages. Burgess v. Superior Court, 2
16 Cal. 4th 1064, 1072 (1992). California law recognizes negligence claims on a “bystander”
17 theory of liability:

18 The “bystander” cases ... address “question of duty in
19 circumstances in which a plaintiff seeks to recover damages as a
20 percipient witness to the injury of another.” [Citation.] These
21 cases “all arise in the context of physical injury or emotional
22 distress caused by the negligent conduct of a defendant *with whom*
23 *the plaintiff had no preexisting relationship, and to whom the*
defendant had not previously assumed a duty of care beyond that
owed to the public in general.” [Citation.] In other words,
bystander liability is premised upon a defendant’s violation of a
duty not to negligently cause emotional distress to people who
observe conduct which causes harm to another.

24 Burgess v. Superior Court, 2 Cal. 4th 1064, 1072-73 (1992) (italics in original). ““In the absence
25 of physical injury or impact to the plaintiff himself, damages for emotional distress should be
26 recoverable only if the plaintiff: (1) is closely related to the injury victim, (2) is present at the
27 scene of the injury-producing event at the time it occurs and is aware that it is causing injury to
28 the victim and, (3) as a result suffers emotional distress beyond that which would be anticipated

1 in a disinterested witness.” Burgess v. Superior Court, 2 Cal. 4th 1064, 1073 (1992) (quoting
2 Thing v. La Chusa, 48 Cal. 3d 644, 647 (1989)).

3 The First Amended Complaint does not allege that Cecil Elkins was “present at the scene
4 of the injury-producing event at the time it occurs” and “was aware that it is causing injury to the
5 victim.” The complaint only alleges that Cecil Elkins witnessed the Decedent lying dead on the
6 ground at some point in time after the Decedent was shot. At the hearing, Plaintiffs’ counsel
7 admitted that Cecil Elkins did not perceive Decedent being shot, but did arrive later and
8 perceived Decedent either dead or dying on the ground after he was shot.

9 Plaintiffs’ argument was rejected by the Supreme Court of California in Thing. In Thing,
10 the decedent was injured when struck by an automobile driven by the defendant. Thing, 48 Cal.
11 3d at 647. The decedent’s mother was nearby, but neither saw nor heard the accident. Id. After
12 being told of the accident, “[s]he rushed to the scene where she saw her bloody and unconscious
13 child, whom she believed was dead, lying in the roadway.” Id. at 647-48. The Supreme Court of
14 California held that the mother did not possess a valid cause of action for negligent infliction of
15 emotional distress because “[s]he did not observe defendant’s conduct and was not aware that
16 her son was being injured.” Id. at 668. The court “disapprov[ed] the suggestion in prior cases
17 that a negligent actor is liable to all those persons ‘who may have suffered emotional distress on
18 viewing or learning about the injurious *consequences* of his conduct’ rather than on viewing the
19 injury-producing *event*, itself.” Bird v. Saenz, 28 Cal. 4th 910, 916 (2002) (quoting Thing, 48
20 Cal. 3d at 668) (italics in original).

21 Here, like in Thing and in Bird, Cecil Elkins cannot recover on a negligent infliction of
22 emotional distress theory because he did not observe Defendants’ conduct. Under Thing, the
23 “injury-producing event” is limited in definition to the precise moment when Defendants’
24 conduct injured the Decedent, i.e., the moment when the bullet was fired. Thing and Bird
25 rejected a broader definition which would permit recovery to persons who perceived the
26 consequences of a defendant’s conduct immediately after the injury producing event.

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1 Liability for negligent infliction of emotional distress only attaches if Cecil Elkins was
2 present when the Decedent was shot and perceived¹ the shooting. The First Amended Complaint
3 does not allege that Cecil Elkins perceived the Decedent being shot at the moment it occurred.
4 Accordingly, the Court will recommend that this claim be dismissed. Moreover, the Court
5 recommends that leave to amend be denied unless Plaintiffs demonstrate (for instance, in
6 objections to these findings and recommendations) that Cecil Elkins can allege that he
7 contemporaneously perceived the shots fired which caused Decedent's death.

8 **D. Plaintiffs' Claim for Negligent Hiring, Training and Supervision Against**
9 **Defendant Pelayo**

10 Defendant Pelayo argues that Plaintiffs cannot maintain a claim against Defendant Pelayo
11 for negligence in hiring, training or supervising himself. Plaintiffs concede this argument, but
12 with reservation of their right to reassert a claim against a Doe defendant who may be liable for
13 their negligent hiring, training or supervision of Pelayo. Accordingly, the Court will recommend
14 that this claim against Pelayo be dismissed.

15 **E. Plaintiffs' Bane Act Claims**

16 Defendant Pelayo argues that Plaintiff cannot state a cognizable claim under California's
17 Bane Act. The Bane Act prohibits any person from interfering "by threats, intimidation, or
18 coercion ... with the exercise or enjoyment by any individual ... of rights secured by the
19 Constitution or laws of the United States." Cal. Civ. Code § 52.1. "The essence of a Bane Act
20 claim is that the defendant, by the specified improper means (i.e., 'threats, intimidation or
21 coercion'), tried to or did prevent the plaintiff from doing something he or she had the right to do
22 under the law or to force the plaintiff to do something that he or she was not required to do under
23 the law." Austin B. v. Escondido Union School Dist., 149 Cal. App. 4th 860, 883 (2007) (citing
24 Jones v. Kmart Corp., 17 Cal. 4th 329, 334 (1998)).

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26 ¹ For purposes of a negligent infliction of emotional distress claim, Cecil Elkins is not required to have visually
27 perceived the shooting, but the law does require that he perceive the shooting incident by at least one of his senses.
28 Ra v. Superior Court, 154 Cal. App. 4th 142, 148-49 (2007). Though, to support a claim based upon hearing the
shooting, Plaintiffs would also have to allege facts that demonstrate that the shots heard were in circumstances
where Cecil Elkins was reasonably certain that the shots heard caused harm to the Decedent. Id.

1 At the hearing, Defendants argued that Plaintiffs fail to state any claims under the Bane
2 Act because the complaint admits that the Decedent was attempting to elude apprehension by
3 law enforcement officials at the time he was shot. However, it has long been established that
4 “apprehension by the use of deadly force is a seizure subject to the reasonableness requirement
5 of the Fourth Amendment.” Tennessee v. Garner, 471 U.S. 1, 7 (1985). Accordingly, the mere
6 fact that the Decedent was eluding capture does not per se defeat a claim that Decedent’s
7 constitutional rights were violated. At the hearing, Defendants also suggested that Plaintiffs
8 cannot recover under the Bane Act because Plaintiffs have a claim under 42 U.S.C. § 1983.
9 However, it is well established that plaintiffs are permitted to plead multiple legal theories in a
10 complaint. MB Financial Group, Inc. v. U.S. Postal Service, 545 F.3d 814, 819 (9th Cir. 2008)
11 (“...a plaintiff is generally entitled to plead alternative or multiple theories of recovery on the
12 basis of the same conduct on the part of the defendant.”).

13 Defendant argues that Plaintiffs lack standing to bring claims under the Bane Act. The
14 Bane Act provides a personal cause of action for victims of a hate crime and does not provide
15 derivative liability for claims brought by third parties, such as the parents of a victim. Bay Area
16 Rapid Transit Dist. v. Superior Court, 38 Cal. App. 4th 141, 144 (1995). However, the court in
17 Bay Area Rapid Transit Dist. made no analysis of whether Bane Act claims of a decedent
18 survive the death of the decedent pursuant to California Code of Civil Procedure § 377.20 and
19 pass to the decedent’s successor in interest pursuant to California Code of Civil Procedure §
20 377.30. In Medrano v. Kern County Sheriff’s Officer, 921 F. Supp. 2d 1009, 1016 (E.D. Cal.
21 2013), the Court held that Bane Act claims do survive the death of the decedent and may be
22 brought by the decedent’s heirs. California Code of Civil Procedure § 377.20(a) states that
23 “[e]xcept as otherwise provided by statute, a cause of action for or against a person is not lost by
24 reason of the person’s death, but survives subject to the applicable limitations period.”
25 Defendants identify no statutory provision which suggests that Bane Act claims do not survive
26 the death of the Decedent.

27 The Court finds that Bane Act claims survive the death of the Decedent and may be
28 brought by the Decedent’s successor in interest pursuant to California Code of Civil Procedure

1 §§ 377.20 and 377.30. However, the Court notes that in this case, the only person entitled to
2 bring a claim on behalf of the Decedent is Plaintiff Creasha Elkins, as the successor in interest to
3 the Decedent designated by California Code of Civil Procedure § 377.30. Accordingly, the
4 Court recommends that the Bane Act claim be dismissed to the extent that it is brought on behalf
5 of any Plaintiff other than Creasha Elkins.

6 **IV.**

7 **CONCLUSION AND RECOMMENDATION**

8 For the reasons set forth above, the Court finds that Plaintiffs' claims should be dismissed
9 with leave to amend to allege facts demonstrating compliance with the claims presentation
10 requirements of California's Government Tort Claims Act. The Court further finds that
11 Plaintiffs Tina Terrel and Cecil Elkins' claims for wrongful death should be dismissed with leave
12 to amend to allege facts demonstrating that they have standing to bring wrongful death claims as
13 parents who were financially dependent upon the Decedent. The Court further finds that
14 Plaintiff Cecil Elkins' claim for negligent infliction of emotional distress should be dismissed,
15 without leave to amend unless Plaintiffs demonstrate that they can allege that Cecil Elkins
16 perceived the gun shots which caused the Decedent's death. The Court further finds that
17 Plaintiffs' claims for negligent hiring, training, and supervision against Defendant Pelayo should
18 be dismissed, as he cannot be held liable for negligently hiring himself or for negligently training
19 or supervising himself. Finally, the Court finds that Plaintiffs' Bane Act claims are cognizable to
20 the extent that they are brought by Plaintiff Creasha Elkins as the successor in interest to the
21 Decedent, but the Bane Act claims brought by any other Plaintiff should be dismissed for lack of
22 standing.

23 Accordingly, it is **HEREBY RECOMMENDED** that Defendant Pelayo's motion to
24 dismiss be **PARTIALLY GRANTED** and that Plaintiffs' First Amended Complaint be
25 **DISMISSED**, with leave to amend.

26 These Findings and Recommendations are submitted to the United States District Judge
27 assigned to this case, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the
28 Local Rules of Practice for the United States District Court, Eastern District of California.

1 Within fourteen (14) days after being served with a copy, any party may file written objections
2 with the court and serve a copy on all parties. Such a document should be captioned “Objections
3 to Magistrate Judge’s Findings and Recommendation.” The Court will then review the
4 Magistrate Judge’s ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that
5 failure to file objections within the specified time may waive the right to appeal the District
6 Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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8 IT IS SO ORDERED.

9 Dated: October 1, 2014


UNITED STATES MAGISTRATE JUDGE

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