

1
2
3 **UNITED STATES DISTRICT COURT**
4 **FOR THE EASTERN DISTRICT OF CALIFORNIA**
5

6 **TAMETRIA NASH-PERRY,**

7 **Plaintiff,**

8 **v.**

9 **CITY OF BAKERSFIELD,**
10 **OFFICER ALEJANDRO PATINO,**
11 **JASON OKAMOTO, as a nominal**
12 **defendant, and DOES 1-10, inclusive,**

13 **Defendants.**

1:18-CV-01512-LJO-JLT

**ORDER GRANTING MOTION TO
DISMISS (ECF NO. 29)**

14 This action, initially filed October 31, 2018, concerns a use of deadly force incident on August
15 19, 2018. Plaintiff Tametria Nash-Perry alleges in her currently operative Third Amended Complaint
16 (“TAC”) that Defendant Police Officers of the City of Bakersfield used excessive, deadly force when
17 they shot and killed her son, Christopher Okamoto. ECF No. 27. The TAC also includes claims against
18 the City of Bakersfield. *Id.*

19 Before the Court for decision is Defendants’ motion to dismiss: (1) Plaintiff’s Fifth Amendment
20 claim on the ground that no such claim can be maintained against a non-federal defendant; (2) Plaintiffs’
21 claim of entitlement to bring any survival action for failure to comply with California Code of Civil
22 Procedure (“CCCP”) § 377.21, which requires the filing of an affidavit or declaration providing certain
23 information about the Plaintiff’s right to commence an action for the decedent; and (3) Plaintiffs’
24 negligence claim for failure to allege properly the elements of that tort. ECF No. 29.

25 Plaintiff does not oppose dismissal. She does not address dismissal of the Fifth Amendment

1 claim, but maintains leave to amend would be appropriate as to the survival and negligence actions. ECF
2 No. 30. Specifically, Plaintiff asserts she is in a position to comply with CCCP § 377.32 in any amended
3 complaint, *id.* at 4-5, and presents specific proposed language she intends to include in any amended
4 negligence claim. *Id.* at 607. Defendants do not object to the Court permitting Plaintiff to file a fourth
5 amended complaint, so long as that amendment is the last. *See* ECF No. 31.

6 Accordingly, having reviewed the entire record, the Court GRANTS the motion to dismiss. The
7 Fifth Amendment claim is DISMISSED WITHOUT LEAVE TO AMEND. Because Plaintiff has
8 provided viable bases for amendment of the survival and negligence claims, those claims are
9 DISMISSED WITH LEAVE TO AMEND. There will be no further opportunities for amendment. It is
10 time for this case to move forward.

11 **CONCLUSION AND ORDER**

12 For the reasons set forth above:

- 13 (1) The Fifth Amendment claim is DISMISSED WITHOUT LEAVE TO AMEND; and
14 (2) The survival and negligence claims are DISMISSED WITH LEAVE TO AMEND.
15 (3) Any amended complaint shall be filed within fourteen (14) days of the date of this order;

16 Thereafter, Defendants shall have fourteen (14) days to file a responsive pleading or motion.

- 17 (4) There will be no further opportunities for amendment.
18

19 IT IS SO ORDERED.

20 Dated: October 9, 2019

/s/ Lawrence J. O'Neill
UNITED STATES CHIEF DISTRICT JUDGE