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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

SHELLY LEMIRE, individually and as )  
a personal representative for the )  
ESTATE OF ROBERT ST. JOVITE, )  
GERARD CHARLES ST. JOVITE, and )  
NICOLE ST. JOVITE, )

2:08-cv-00455-GEB-EFB

ORDER GRANTING DEFENDANTS'  
MOTION TO DISMISS\*

Plaintiffs, )

v. )

ARNOLD SCHWARZENEGGER, CALIFORNIA )  
DEPARTMENT OF CORRECTIONS AND )  
REHABILITATION, JAMES E. TILTON, )  
TOM L. CARY, D.K. SISTO, REBECCA )  
CAHOON, ALFREDO ALCARAZ, RAYMOND )  
WADE, CHERYL ORRICK, GALE MARTINEZ, )  
GORDON WONG, JAMES NUEHRING, )  
SHABREEN HAK, ALVARADO TRAQUINA, )  
ALFREDO NORIEGA, JOHN M. DUSAY, )  
C. HOLLIDAY, JAIME CHUA, DODIE )  
HICKS, )

Defendants. )

On December 15, 2009, Defendants filed a motion to dismiss  
Plaintiffs' Fourth Amended Complaint ("FAC") for failure to state a  
claim under Federal Rule of Civil Procedure 12(b)(6). Plaintiffs  
allege the following claims in their FAC: (1) deliberate indifference

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\* This matter is deemed suitable for decision without oral  
argument. E.D. Cal. R. 230(g).

1 under 42 U.S.C. § 1983 in violation of the Eighth and Fourteenth  
2 Amendments against all Defendants in their individual capacities;  
3 (2) supervisory liability under 42 U.S.C. § 1983 for promulgating  
4 unconstitutional policies and customs in violation of the Eighth  
5 Amendment against Defendants Schwarzenegger, Tilton, Carey, Sisto,  
6 Traquina, Nuehring, Wong, Martinez, and Orrick in their individual  
7 capacities; (3) supervisory liability under 28 U.S.C. § 1983 for  
8 negligent hiring and failure to train and supervise against Defendants  
9 Schwarzenegger, Tilton, Carey, Sisto, Traquina, Nuehring, Wong,  
10 Martinez, and Orrick in their individual capacities; (4) violations of  
11 the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12010 and  
12 section 504 of the Rehabilitation Act ("RA"), 29 U.S.C. § 794 against  
13 Defendants Schwarzenegger, Tilton, Carey, Sisto, Traquina, Nuehring,  
14 Wong, Martinez, and Orrick in their individual capacities; (5) state  
15 law negligence and wrongful death against all Defendants; (6) medical  
16 malpractice against Defendants California Department of Corrections  
17 and Rehabilitation ("CDCR"), Hak, Traquina, Noriega, Dusay, and Hicks;  
18 (7) failure to summon medical care under California Government Code  
19 sections 844.6 and 845.6 against all Defendants; and (8) civil rights  
20 violations under California Unruh Act, California Civil Code section  
21 51, against all Defendants. Defendants seek dismissal of CDCR and all  
22 official capacity claims, dismissal of Defendants Schwarzenegger,  
23 Tilton, Carey, Sisto, and Traquina from the first claim, dismissal of  
24 Defendants Schwarzenegger, Tilton, Martinez, Nuehring, Orrick, and  
25 Wong from the second claim, and dismissal of the third through eighth  
26 claims. For the following reasons, the dismissal motion is GRANTED.  
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1           **I. Allegations Contained in Plaintiffs' Fourth Amended Complaint**

2           Robert St. Jovite ("Robert") was found dead in his prison  
3 cell at the California State Prison-Solano ("CSP-Solano") by his  
4 cellmate, John Lee Harden, at approximately 3:10 p.m. on May 10, 2006.  
5 (FAC 1:21-24, ¶ 27.) Robert was a mentally ill inmate housed in the  
6 medical unit in CSP-Solano at the time of his death. (FAC 1:22-25.)  
7 Robert suffered from chronic pain and mental health problems  
8 throughout his incarceration at CSP-Solano. (FAC ¶ 26.) Robert and  
9 his mother, Plaintiff Sherie Lemire, requested "medical and mental  
10 health assessment, care, and treatment" for Robert during his  
11 incarceration. (Id.) These requests were only "partially-effective,"  
12 "wholly ineffective," or were "completely ignored." (Id.) On March  
13 29, 2006, Robert submitted a Health Care Services Request in which he  
14 requested "further medical treatment." (Id.)

15           When Robert's cellmate Harden found Robert on May 10, 2006,  
16 Robert was hanging by a bed sheet wrapped around his neck from a  
17 ceiling vent above the toilet. (FAC ¶ 27.) Harden "got [Robert] down  
18 to the ground," began calling for help, and performed cardiopulmonary  
19 resuscitation (CPR) on Robert. (FAC ¶¶ 27-28.) Harden yelled to  
20 Corrections Officer Rebecca Cahoon to "hurry up." (FAC ¶ 28.) Cahoon  
21 then "stopped for several minutes" and stated, "Nobody tells me to  
22 hurry up." (FAC ¶ 28.) After Cahoon arrived, she stated "I'm not  
23 medical I don't respond to man down calls when [i]nmates bang on  
24 doors." (Id.) Cahoon did not immediately signal the tower to ask for  
25 assistance and did not perform CPR on Robert. (Id.) Cahoon then  
26 stated to Harden, "it's all done, come out of there." (Id.) Harden  
27 was then handcuffed and removed from the area. (Id.) Defendants  
28 Orrick, Martinez, Wong, Hak, Noriega, Nuehring, Alcaraz, Wade,

1 Holliday, Chua, and Hicks "responded" but failed to perform CPR on  
2 Robert or provide him with immediate and adequate medical attention.  
3 (Id.) The Vacaville Fire Department arrived "thirty minutes later"  
4 and performed CPR on Robert. (FAC ¶ 29.) Plaintiffs allege in their  
5 FAC Robert "would have benefitted from the administration of timely  
6 life-saving medical measures, including CPR." (FAC ¶ 31.)

7 Plaintiffs' also allege: "On June 9, 2005, Judge Karlton in  
8 the case of Coleman v. Schwarzenegger (Eastern District of California  
9 Case No. CI S-90-0520) issued an order requiring the CDCR to develop  
10 and implement a policy mandating that [CPR] be performed by  
11 correctional officers upon inmates." (FAC ¶ 34.) Plaintiffs allege  
12 Defendants' failure to promulgate these policies resulted in Robert's  
13 "long term suffering and ultimately death." (FAC ¶¶ 38-40.)

## 14 **II. Legal Standard**

15 "A Rule 12(b)(6) motion tests the legal sufficiency of a  
16 claim." Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). To  
17 avoid dismissal, Plaintiffs must allege "enough facts to state a claim  
18 to relief that is plausible on its face." Bell Atlantic Corp. v.  
19 Twombly, 550 U.S. 544, 570 (2007). When considering a dismissal  
20 motion, all "allegations of material fact are taken as true and  
21 construed in the light most favorable to the nonmoving party."  
22 Thompson v. Davis, 295 F.3d 890, 895 (9th Cir. 2002). However, this  
23 "tenet . . . is inapplicable to threadbare recitals of a cause of  
24 action's elements, supported by mere conclusory statements." Ashcroft  
25 v. Iqbal, 556 U.S. ---, 129 S.Ct. 1937, 1940 (2009).

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1 **III. Analysis**

2 **A. Plaintiffs' First Claim for Deliberate Indifference Under 42**  
3 **U.S.C. § 1983 Against The CDCR**

4 Defendants argue Plaintiffs' first claim alleged under  
5 42 U.S.C. § 1983 against the CDCR should be dismissed since the CDCR  
6 is not a "person" subject to suit under § 1983 and that Eleventh  
7 Amendment immunity bars Plaintiffs' claim against the CDCR. (Defs.'  
8 Mot. to Dismiss 5:18-6:10.) "State agencies . . . are not 'persons'  
9 within the meaning of § 1983 and are therefore not amenable to suit  
10 under that statute." Maldonado v. Harris, 370 F.3d 945, 951 (9th Cir.  
11 2004). "The [CDCR] is a state agency and thus not a 'person' under §  
12 1983." Johnson v. California Dep't of Corr. and Rehab., 2009 WL  
13 2425073, \*3 (E.D. Cal. 2009); see also Gilbreath v. Cutter Biological,  
14 Inc., 931 F.2d 1320, 1326 (9th Cir. 1991) ("arms of the State such as  
15 the Arizona Department of Corrections are not persons under section  
16 1983").

17 In addition, "[i]n the absence of a waiver by the state or a  
18 valid congressional override, under the eleventh amendment, agencies  
19 of the state are immune from private damage actions or suits for  
20 injunctive relief brought in federal court. The State of California  
21 has not waived its Eleventh Amendment immunity with respect to claims  
22 brought under § 1983 in federal court . . . ." Dittman v. California,  
23 191 F.3d 1020, 1025-26 (9th Cir. 1999) (cites, quotations, and  
24 brackets omitted). Accordingly, the Eleventh Amendment bars  
25 Plaintiffs' first claim against the CDCR. See Brown v. California  
26 Dept. of Corrections, 554 F.3d 747, 752 (9th Cir. 2009) ("The district  
27 court correctly held that the California Department of Corrections and  
28 the California Board of Prison Terms were entitled to Eleventh

1 Amendment immunity.”). Therefore, Plaintiffs’ first claim alleged  
2 against the CDCR under 42 U.S.C. § 1983 is dismissed without leave to  
3 amend on the basis of Eleventh Amendment immunity.

4 **B. Plaintiffs’ Federal Claims Against Individual Defendants in Their**  
5 **Official Capacities**

6 Defendants also seek dismissal of Plaintiffs’ federal claims  
7 alleged against the individually named Defendants in their official  
8 capacities. (Defs.’ Mot. to Dismiss 6:11-13.) Plaintiffs allege in  
9 “The Parties” section of their FAC that the Defendants are being sued  
10 “in their individual and official capacities.” (FAC ¶¶ 8-21).  
11 However, Plaintiffs’ federal claims are alleged against each  
12 individual Defendant in his or her individual capacity only. (FAC  
13 13:3-4, 16:7, 18:14, 21:24). “[A] suit against a state official in  
14 his or her official capacity is not a suit against the official but  
15 rather is a suit against the official's office. As such, it is no  
16 different from a suit against the State itself.” Will v. Michigan  
17 Dept. of State Police, 491 U.S. 58, 71 (1989) (cite omitted).  
18 “Therefore, state officials sued in their official capacities . . .  
19 are not ‘persons’ within the meaning of § 1983 and are therefore  
20 generally entitled to Eleventh Amendment immunity.” Flint v.  
21 Dennison, 488 F.3d 816, 825 (9th Cir. 2007). Since Plaintiffs have  
22 not alleged a sufficient basis to maintain an official capacity claim  
23 against any of the moving individual Defendants, Defendants’ motion to  
24 dismiss Plaintiffs’ official capacity claims is GRANTED with leave to  
25 amend.

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1 **C. Plaintiffs' First Claim: Deliberate Indifference Under 42 U.S.C.**  
2 **§ 1983 in Violation of the Eighth Amendment**

3 Defendants also seek dismissal of Plaintiffs' first claim  
4 based on "deliberate indifference" under the Eighth Amendment alleged  
5 against Defendants Schwarzenegger, Tilton, Carey, Sisto, and Traquina,  
6 arguing Plaintiffs failed to allege sufficient facts to make this  
7 claim actionable. (Defs.' Mot. to Dismiss 6:17-19.)

8 Plaintiffs allege in this claim that Defendants "knew, or  
9 should have known, of Robert's serious medical, physical and mental  
10 health conditions, were deliberately indifferent to them[,] ignored  
11 them, [and] failed to provide access to and delivery of adequate  
12 medical intervention, care and attention to him." (FAC ¶ 44.)

13 Plaintiffs further allege, "As a result of Defendants' deliberate  
14 indifference, [Robert] was deprived of the necessary and indicated  
15 medical intervention, care and treatment . . . causing him to suffer  
16 . . . in violation of his Eighth Amendment rights[,] resulting in his  
17 wrongful death." (FAC ¶ 47.) Plaintiffs also allege:

18 Defendants failed to administer CPR or cause CPR or  
19 other life saving measures to be implemented in a  
20 timely fashion after [Robert] was found in the  
21 afternoon of May 10, 2006. Defendants also caused  
22 [Robert's] cellmate, John Lee Harden, to stop  
23 giving [Robert] CPR. Defendants' complete failure  
24 to attempt to revive [Robert] until paramedics  
25 arrived approximately 30 minutes later ensured his  
26 death and violated his Eighth Amendment Rights.

27 (FAC ¶ 48.)

28 To state an Eighth Amendment deliberate indifference claim,  
Plaintiffs are required to allege that Defendants "knew that [Robert]  
faced a substantial risk of serious harm and 'disregarded that risk by  
failing to take reasonable measures to abate it.'" Hearns v. Terhune,  
413 F.3d 1036, 1042 (9th Cir. 2005) (quoting Farmer v. Brennan, 511

1 U.S. 825, 842 (1994)). Here, Plaintiffs do not allege facts showing  
2 that Defendants Schwarzenegger, Tilton, Carey, Sisto, or Traquina knew  
3 of Robert's medical conditions. Plaintiffs have set forth only  
4 conclusory allegations, which are insufficient to state a cognizable  
5 claim. Therefore, this portion of the motion is GRANTED with leave to  
6 amend.

7 **D. Plaintiffs' Second and Third Claims for Supervisory Liability**  
8 **Under 42 U.S.C. § 1983**

9 Defendants seek dismissal of Plaintiffs' second claim in  
10 which Plaintiffs allege Defendants Schwarzenegger, Tilton, Martinez,  
11 Nuehring, Orrick, and Wong are liable under 42 U.S.C. § 1983 as  
12 supervisors for their subordinates' behavior that caused Plaintiffs'  
13 Eighth Amendment rights to be violated. (Defs.' Mot. to Dismiss 8:17-  
14 20.) Plaintiffs' allegations are premised on Defendants' alleged  
15 promulgation of unconstitutional policies and customs that violate the  
16 Eighth Amendment. Defendants argue Plaintiffs have failed to allege  
17 sufficient facts to state claim. (Def.'s Mot. to Dismiss 7:20.)  
18 These Defendants also seek dismissal of Plaintiffs' third claim  
19 alleged against them under 42 U.S.C. § 1983 based on their status as  
20 supervisors; specifically, Plaintiffs allege Defendants are liable for  
21 their subordinates' behavior that caused Plaintiffs' Eighth Amendment  
22 rights to be violated. (FAC ¶¶ 65-71.) These allegations are  
23 premised on Defendants alleged negligent hiring and failure to train  
24 and supervise the referenced subordinates. Plaintiffs counter both  
25 dismissal motions arguing, "The Coleman Court has ordered CDCR to  
26 change their practices, hire, train and supervise their employees.  
27 These responsibilities flow all the way up and down the chain of  
28



1 command. Had the Coleman orders been followed in this case, [Robert]  
2 would likely be alive today.” (Plts.’ Opp’n 4:15-20.)

3 “Liability under § 1983 arises only upon a showing of  
4 personal participation by the defendant[s]. A supervisor is only  
5 liable for constitutional violations of his subordinates if the  
6 supervisor participated in or directed the violations, or knew of the  
7 violations and failed to act to prevent them. There is no respondeat  
8 superior liability under § 1983.” Taylor v. List, 880 F.2d 1040, 1045  
9 (9th Cir. 1989) (cite omitted). Here, Plaintiffs have alleged no  
10 facts explaining how the Defendants participated in, directed, or knew  
11 of and failed to act on any violations of Robert’s constitutional  
12 rights. Although Plaintiffs argue “the Coleman litigation put  
13 Defendants on notice of their unconstitutional policies, practices,  
14 customs and procedures,” Plaintiffs have not alleged Defendants knew  
15 their subordinates were violating the mandates of Coleman or any  
16 regulation concerning Robert’s medical or mental-health treatment.  
17 (Plts.’ Opp’n 7:18-19.) Plaintiffs’ conclusory allegations that  
18 Defendants have not complied with the mandates of Coleman are  
19 insufficient to state claim for supervisory liability. Therefore,  
20 Defendants’ motion to dismiss Plaintiffs’ second claim and third claim  
21 against the above named defendants is GRANTED with leave to amend.

22 **E. Plaintiffs’ Fourth Claim for Violation of the ADA and the RA**

23 Defendants also seek dismissal of Plaintiffs’ fourth claim  
24 in which Plaintiffs allege Defendants Schwarzenegger, Tilton, Carey,  
25 Sisto, Traquina, Nuehring, Wong, Martinez, and Orrick violated the ADA  
26 and the RA. Defendants argue individual liability is precluded under  
27 both statutes. (Defs.’ Mot. to Dismiss 10:22-23.) Plaintiffs did not  
28 respond to this portion of the motion.

1           The Ninth Circuit has not directly addressed whether the ADA  
2 or the RA provide for individual capacity suits against state  
3 officials. The Ninth Circuit "decline[d] to address the issue" in  
4 Eason v. Clark County School District, 303 F.3d 1137, 1144-45 (9th  
5 Cir. 2002), in which it cited Vinson v. Thomas, 288 F.3d 1145, 1156  
6 (9th Cir. 2002), a case in which the Ninth Circuit held "that a  
7 plaintiff cannot bring an action under 42 U.S.C. § 1983 against a  
8 State official in her individual capacity to vindicate rights created  
9 by Title II of the ADA or section 504 of the Rehabilitation Act." The  
10 Second Circuit addressed the issue in Garcia v. S.U.N.Y. Health  
11 Sciences Center, 280 F.3d 98, 107 (2d Cir. 2001), and as the court  
12 stated there, "neither Title II of the ADA nor § 504 of the [RA]  
13 provides for individual capacity suits against state officials."  
14 Therefore, Defendants' motion to dismiss Plaintiffs' fourth claim is  
15 GRANTED. Since the defects in Plaintiffs' fourth claim cannot be  
16 cured by amendment, Plaintiffs are not given leave to amend.

17 **F. Plaintiffs' State Law Claims**

18           Finally, Defendants seek dismissal of Plaintiffs' fifth  
19 through eighth state law claims. Specifically, Defendants seek  
20 dismissal of Plaintiffs' claims for negligence, wrongful death,  
21 medical malpractice, negligence in violation of California Government  
22 Code sections 844.6 and 845.6, and violation of the California Unruh  
23 Act. Defendants argue these claims "are barred because [Plaintiffs]  
24 did not plead that they complied with or were excused from complying  
25 with the California Tort Claims Act" ("CTCA"). (Defs.' Mot. to  
26 Dismiss 5:4-5.)

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1           The CTCA requires that a tort claim against a public entity  
2 or its employees be presented to the California Victim Compensation  
3 and Government Claims Board no more than six months after the cause of  
4 action accrues. Cal. Gov. Code §§ 905.2, 910, 911.2, 945.4, 950-  
5 950.2. Presentation of a written claim, and action on or rejection of  
6 the claim are conditions precedent to suit. State v. Superior Court  
7 of Kings County, 32 Cal. 4th 1234, 1244-45 (2004); Manigold v.  
8 California Pub. Utils. Comm'n, 67 F.3d 1470, 1477 (9th Cir. 1995).  
9 Compliance with the CTCA must be affirmatively alleged in the  
10 complaint and "failure to allege compliance or circumstances excusing  
11 compliance with [this] claim presentation requirement [results in] a  
12 complaint . . . fail[ing] to state facts sufficient to constitute a  
13 cause of action." State v. Superior Court, 32 Cal. 4th at 1245; see  
14 also Karim-Panahi v. Los Angeles Police Dept., 839 F.2d 621, 627 (9th  
15 Cir. 1988) (affirming dismissal of pendent state law claims against  
16 public employee where plaintiff failed to allege compliance with the  
17 CTCA).

18           Plaintiffs' fifth through eighth claims are subject to  
19 the provisions of the CTCA. See, e.g., Renteria v. City of Maywood,  
20 2009 WL 3297152, \*6 (E.D. Cal. 2009) (claim under California Unruh  
21 Act); Hernandez v. Jordan, 2009 WL 937960, \*2 (E.D. Cal. 2009) (claim  
22 based on negligence under section 844.6); Davis v. Sutley, 2008 WL  
23 1817262, \*6 (E.D. Cal. 2008) (claim based on defendant's failure to  
24 provide medical care under section 845.6). Since Plaintiffs have  
25 failed to allege compliance with the CTCA in their FAC, Defendants'  
26 motion to dismiss Plaintiffs' fifth, sixth, seventh, and eighth claims  
27 is GRANTED with leave to amend.

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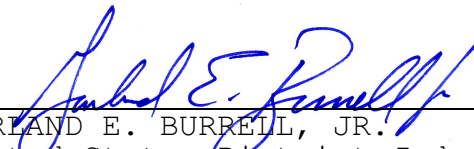
1 **IV. Conclusion**

2 For these reasons, Defendants' motion to dismiss is GRANTED  
3 in its entirety. It is ORDERED:

- 4 1. Plaintiffs' first claim against the CDCR is dismissed without  
5 leave to amend.
- 6 2. Plaintiffs' claims against all Defendants in their official  
7 capacities are dismissed with leave to amend.
- 8 3. The portion of Plaintiffs' first claim, in which Plaintiffs  
9 allege Defendants Schwarzenegger, Tilton, Carey, Sisto, and  
10 Traquina were deliberately indifferent in violation of the Eighth  
11 Amendment, is dismissed with leave to amend.
- 12 4. Plaintiffs' second claim against Defendants Schwarzenegger,  
13 Tilton, Martinez, Nuehring, Orrick, and Wong is dismissed with  
14 leave to amend.
- 15 5. Plaintiffs' third claim is dismissed with leave to amend.
- 16 6. Plaintiffs' fourth claim is dismissed without leave to amend.
- 17 7. Plaintiffs' fifth through eighth claims are dismissed with leave  
18 to amend.

19 Plaintiffs have twenty (20) days from the date on which this Order is  
20 filed to file a fifth amended complaint addressing the deficiencies  
21 discussed in this Order that they have been granted leave to amend.

22 Dated: January 28, 2010

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GARLAND E. BURRELL, JR.  
United States District Judge