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

ROGER ARDEN ELSETH; PATRICIA)	
ANN ELSETH; and ALLEN ELSETH, by)	2:08-cv-02890-GEB-CMK
his guardian ad litem, ROGER)	
ARDEN ELSETH and PATRICIA ANN)	
ELSETH,)	<u>ORDER GRANTING MOTION FOR</u>
)	<u>SUMMARY ADJUDICATION*</u>
Plaintiffs,)	
)	
v.)	
)	
VERNON SPEIRS, Chief Probation)	
Officer of the County of)	
Sacramento, individually; Deputy)	
Probation Officer RONALD TAM,)	
individually; and Deputy)	
Probation Officer JEFF ELORDUY,)	
individually,)	
)	
Defendants.)	
_____)	

Defendants Verne Speirs, Ronald Tam, and Jeff Elorduy ("Defendants") move for summary adjudication on Plaintiffs' first claim, which is titled "Assault and Battery upon a Juvenile." Specifically, Defendants seek summary adjudication of the following issues:

- 1) Plaintiffs Patricia Elseth and Roger Elseth's first claim against all Defendants;
- 2) Plaintiff Allen Elseth's first claim against Defendant Verne Speirs; and

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

1 3) Plaintiff Allen Elseth's first claim against Defendant
2 Ronald Tam.²

3 For the reasons stated below, each Defendant's motion for
4 summary adjudication will be granted.

5 **I. LEGAL STANDARD**

6 A party seeking summary judgment bears the initial burden of
7 demonstrating the absence of a genuine issue of material fact for trial.
8 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "A fact is
9 'material' when, under the governing substantive law, it could affect
10 the outcome of the case." Thrifty Oil Co. v. Bank of America Nat. Trust
11 and Sav. Ass'n, 322 F.3d 1039, 1046 (9th Cir. 2003) (quoting Anderson v.
12 Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). An issue of material
13 fact is "genuine" when "the evidence is such that a reasonable jury
14 could return a verdict for the nonmoving party." Id. (quotation
15 omitted).

16 When the defendant is the moving party and is seeking summary
17 judgment on one or more of a plaintiff's claims,

18 [The defendant] has both the initial burden of
19 production and the ultimate burden of persuasion on
20 [the motion]. In order to carry its burden of
21 production, the [defendant] must either produce
22 evidence negating an essential element of the
23 [plaintiff's claim] or show that the [plaintiff]
24 does not have enough evidence of an essential
25 element to carry its ultimate burden of persuasion
26 at trial. In order to carry its ultimate burden of
27 persuasion on the motion, the [defendant] must
28 persuade the court that there is no genuine issue
 of material fact.

27 ² Defendant Jeff Elorduy is moving for summary adjudication only
28 on Plaintiffs Patricia Elseth and Roger Elseth's claim. He is not
seeking summary adjudication on Plaintiff Allen Elseth's claim. (Def.'s
Mem. of P.&A. in Supp. of Mot. for Summ. Adjud. 2 n.1.)

1 Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Companies, Inc., 210 F.3d
2 1099, 1102 (9th Cir. 2000) (citations omitted).

3 If the moving party satisfies its initial burden, "the non-
4 moving party must set forth, by affidavit or as otherwise provided in
5 [Federal] Rule [of Civil Procedure] 56, specific facts showing that
6 there is a genuine issue for trial." T.W. Elec. Serv., Inc. v. Pacific
7 Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (quotations
8 and citation omitted) (emphasis omitted). "[The] non-moving plaintiff
9 cannot rest upon the mere allegations or denials of the adverse party's
10 pleading but must instead produce evidence that sets forth specific
11 facts showing that there is a genuine issue for trial." Estate of Tucker
12 ex rel. Tucker v. Interscope Records, Inc., 515 F.3d 1019, 1030 (9th
13 Cir. 2008) (quotation omitted).

14 Evidence must be viewed "in the light most favorable to the
15 non-moving party," and all "all reasonable inferences" that can be drawn
16 from the evidence must be drawn "in favor of [the non-moving] party."
17 Nunez v. Duncan, 591 F.3d 1217, 1222-23 (9th Cir. 2010).

18 Local Rule 260(b) further requires:

19 Any party opposing a motion for summary judgment or
20 summary adjudication [must] reproduce the itemized
21 facts in the [moving party's] Statement of
22 Undisputed Facts and admit those facts that are
23 undisputed and deny those that are disputed,
24 including with each denial a citation to the
particular portions of any pleading, affidavit,
deposition, interrogatory answer, admission, or
other document relied upon in support of that
denial.

25 It is the non-moving party's obligation to "identify with reasonable
26 particularity the evidence that precludes summary judgment." Simmons v.
27 Navajo County, Ariz., 609 F.3d 1011, 1017 (9th Cir. 2010) (quotation
28 omitted). The district court "has no independent duty to scour the

1 record in search of a genuine issue of triable fact." Id. (quotation
2 omitted).

3 **II. UNCONTROVERTED FACTS**

4 On December 5, 2006, Plaintiff Allen Elseth ("Allen") was
5 housed at the Sacramento County Juvenile Hall. (Pls.' Resp. to Defs.'
6 Statement of Undisputed Facts ("SUF") #10.) That morning, an officer
7 noticed Allen was standing in the doorway of his cell looking out the
8 window, which was against the rules. Id. #11. The officer asked him to
9 back away from the window, but Allen refused. Id.

10 Sometime thereafter, Defendants Ronald Tam ("Tam") and Jeff
11 Elorduy ("Elorduy"), who were on-duty as members of the facility's
12 security response team, were called to respond to a disruption in
13 Allen's room. Id. #12. Tam and Elorduy went to his room and admonished
14 Allen to follow the rules. Id.

15 Shortly thereafter, Elorduy and Tam received another call to
16 respond to Allen's room. Id. #13. They went to the housing unit and met
17 with Probation Assistant Iohola Thomas ("Thomas"), who told them that
18 Allen was kicking his door and yelling gang slurs and derogatory
19 comments. Id. Thomas, Elorduy and Tam went to Allen's room, where he
20 was laying on his bed. Id. #14. Allen denied he was the person who had
21 been yelling and kicking the door. Id.

22 Eventually, Thomas asked Elorduy and Tam to remove Allen from
23 his room. Id. #15. Elorduy placed Allen's left arm in an arm bar, and
24 Thomas did the same with his right arm. Id. Tam restrained Allen's legs.
25 Id. Thomas and Elorduy then transitioned Allen into a rear wrist lock.
26 Id. Allen alleges that during this interaction, Elorduy struck him in
27 the face. Id. #16. He denies that Thomas or Tam hit him. Id.

1 After the officers secured Allen, Elorduy grabbed one of
2 Allen's shoulders, Thomas grabbed the other shoulder, and Tam grabbed
3 his feet and carried him out of the room. Id. #17.

4 At the time of the incident, Defendant Verne Speirs ("Speirs")
5 was the Chief Probation Officer of the Sacramento County Probation
6 Department. Id. #7. He was not involved in removing Allen from his room
7 and did not supervise his removal. Id. #19.

8 Allen does not remember ever meeting or talking to Speirs.
9 Id. #20. Before the filing of this action, Plaintiffs Roger Elseth and
10 Patricia Elseth had no contact with any Defendant. Id. #23.

11 Prior to December 5, 2006, Tam and Elorduy received training
12 regarding the use of force on juveniles and how to respond to situations
13 in Juvenile Hall. Id. #22. They were also aware that the County of
14 Sacramento had a use of force policy in effect at the time, and received
15 training on that policy prior to December 5, 2006. Id.

16 The Sacramento County Probation Department ("Department")
17 created a distinct training unit that specialized in teaching Probation
18 Assistants and Deputy Probation Officers the proper methods for handling
19 juveniles in detention and use of force. Id. #24. Outside trainers were
20 brought in to provide routine training and specialized training on
21 crisis de-escalation. Id. The Department also sent staff members to
22 training sessions around the country to learn the most advanced
23 techniques to incorporate within the Department's training. Id.

24 As of December 5, 2006, the Department also had established
25 policies governing complaints of staff misconduct, including excessive
26 force. Id. #25. The policies required prompt and impartial
27 investigations of all complaints. Id.

28

1 The Department investigated Allen's allegations concerning his
2 removal from his room on December 5, 2006 and concluded Allen's
3 allegations of excessive force were unfounded. Id. #26.

4 III. DISCUSSION

5 Plaintiffs allege this action is premised on 28 U.S.C. §
6 1343(a)(3) and 42 U.S.C. § 1983 and is brought to "redress the
7 deprivation of civil rights arising under the Constitution of the United
8 States, [the] 8th Amendment (Cruel and Unusual Punishment) and [the]
9 14th Amendment § 1, to redress injuries inflicted under color of law,
10 and the denial of both substantive due process and procedural due
11 process." (Fifth Am. Compl. ¶ 1.1.) The only claim asserted against
12 Defendants is Plaintiffs' first claim, which is titled "Assault and
13 Battery Upon a Juvenile." Id. at 13:24-14-20.

14 Plaintiffs' first claim concerns the following allegations
15 against Speirs, Tam, and Elorduy:

16 On or about 12/05/2006, CERT team members,
17 including Tam and Elorduy, acting under color of
18 state law, secured [Allen] in a private room and
19 inflicted corporal punishment without due process
or provocation, by beating him for a period of time
causing severe personal injuries, emotional
distress, and pain.

20 Speirs by his administrative indifference or
21 willful neglect, failed to train the CERT team in
22 the proper methods of response to situations in the
23 Juvenile Centers, and the limits of their authority
to inflict corporal punishment upon the minors
housed therein.

24 Speirs by his administrative indifference or
25 willful neglect, created an environment of
26 hostility that permitted Tam and Elorduy to
subjectively, but objectively unreasonably, believe
their conduct was authorized.

27 (Fifth Am. Compl. ¶¶ 4.3, 4.5, 7.3, 7.4, 7.5.)
28

1 **A. Plaintiffs Roger Elseth and Patricia Elseth's Claim against**
2 **Defendants**

3 Defendants contend they are entitled to summary adjudication
4 on Plaintiffs Patricia Elseth and Roger Elseth's first claim, arguing,
5 *inter alia*, "there are no facts alleged to show that [they] suffered any
6 injury as a result of the action or inaction of Defendants[;]"
7 therefore, they "lack standing to make a claim against [them]." (Mot.
8 7:14-15, 7:26-28.) Plaintiffs rejoin that "[t]hey have standing to sue
9 to attempt to redress wrongs they believe were perpetrated upon their
10 son." (Pls.' Opp'n ("Opp'n") 14:13-14.)

11 To establish standing in federal court, "[a] plaintiff must
12 allege personal injury fairly traceable to the defendant's allegedly
13 unlawful conduct and likely to be redressed by the requested relief."
14 Allen v. Wright, 468 U.S. 737, 751 (1984). Further, the injury must be
15 "particularized," i.e. it "must affect the plaintiff in a personal and
16 individual way." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 n.1
17 (1992). A plaintiff generally "cannot rest his claim to relief on the
18 legal rights or interests of [others]." Madrigal v. Tommy Bahama Group,
19 Inc., No. CV 09-08924 SJO (MANx), 2010 WL 4384235, at *4 (C.D. Cal. Oct.
20 18, 2010) (quoting Warth v. Seldon, 422 U.S. 490, 499 (1975).)

21 Although Roger Elseth and Patricia Elseth are listed as
22 Plaintiffs in this claim, they do not allege that they have suffered any
23 injury caused by Defendants. Patricia Elseth and Roger Elseth are not
24 even mentioned in the allegations specific to the first claim . (Fifth
25 Am. Compl. 13:24-14-20.) Further, it is uncontroverted that Tam, Elorduy
26 and Speirs had no contact with Patricia Elseth or Roger Elseth until
27 after this federal lawsuit was filed. Therefore, Defendants have shown
28 the absence of a genuine issue of material fact on this standing issue.

1 Plaintiffs request in their Opposition leave to amend the
2 Fifth Amended Complaint "to substitute Speirs as the defendant in the
3 third [claim for Failure to Protect]," which was alleged only against
4 former defendant Richard Saxton, M.D. (Opp'n 5:4-6, 13:15-19, 16:9-10.)
5 Plaintiffs' counsel declares "[d]uring the period that [he] filed the
6 [Fifth] Amended complaint, [he] was under stress and time constraints,"
7 and "[e]vidently . . . struck the claim [as to] Gordon and Speirs,
8 leaving Saxton by mistake and inadvertence." (Decl. of Lynch, 1:18-23.)
9 Plaintiffs also argue since "the allegations are all the same,"
10 "Defendants cannot claim prejudice." (Opp'n at 13:17-19.) Defendants
11 oppose Plaintiffs' request, arguing "an amendment just two months before
12 trial would cause great prejudice to Defendants as no discovery has been
13 conducted into the claims Plaintiffs now attempt to bring." (Defs. Reply
14 ("Reply") 12:6-8.) Defendants further counter, Plaintiffs' counsel's
15 claim that he inadvertently "dropped" the third claim against Gordon and
16 Speirs "is incorrect" since a "review of the Fourth Amended Complaint
17 reveals that even in that document . . . the [t]hird [claim] was only
18 asserted against Saxton." (Reply 6:9-19.)

19 Plaintiffs' request for leave to amend is not properly before
20 the court, since it was not made in a noticed motion. See E.D. Cal. R.
21 230 (b). Further, Plaintiffs have not shown "good cause," to amend the
22 Status (Pretrial Scheduling) Order, in which the last dates for
23 amendment, discovery and law and motion are prescribed. Fed. R. Civ.
24 Proc. 16(b)(4); see Johnson v. Mammoth Recreations, Inc., 975 F.2d 604,
25 607-08 (9th Cir. 1992) (indicating when a party moves to amend his or
26 her complaint after a Federal Rule of Civil Procedure 16 scheduling
27 order has been filed, the amendment issue is reached only if the party
28 shows "good cause" to amend the scheduling order). Plaintiffs provide no

1 explanation for their delay in seeking to amend the Fifth Amended
2 Complaint approximately fourteen months after it was filed. (Decl. of
3 Lynch, 1.)

4 For the stated reasons, Defendants' motion for summary
5 adjudication on Patricia Elseth and Roger Elseth's first claim is
6 granted.

7 **B. Plaintiff Allen Elseth's Claim against Defendant Verne Speirs**

8 Defendant Verne Speirs argues he is entitled to summary
9 adjudication of Allen's excessive force claim since Allen "does not
10 allege that Speirs personally participated in [Allen's removal from his
11 room]" and "there are no facts or evidence [to] support a supervisory
12 liability claim against [him]." (Mot. 9:9-10, 9:18-19.) Plaintiff
13 rejoins, "there are facts . . . that support a supervisory liability
14 claim against Speirs" since no report of suspected child abuse was made
15 to Child Protection Services in connection with Allen's alleged
16 injuries, Elorduy and Tam did "not understand that they were required to
17 report 'suspected' [child] abuse" as mandated under California law, and
18 mandatory child abuse reporting was not reflected in the Department's
19 policies and procedures. (Opp'n 6:10-17, 16:20, 19:22-20:3.) Defendants
20 reply that Plaintiffs are attempting to improperly introduce a "new
21 theory of liability into the case[, which was] not alleged against
22 [Speirs] in the Fifth Amended Complaint." (Reply 8:12-14.)

23 To recover under 42 U.S.C. § 1983 against an individual in his
24 or her supervisory capacity, a plaintiff must prove the defendant
25 "directed his or her subordinates to commit the offensive act," "set
26 into motion a series of acts by others which he knew or reasonably
27 should have known would cause others to inflict the constitutional
28 injury," "knew of the violations being committed by subordinates yet

1 failed to act to prevent them," or "acquiesc[ed] in the constitutional
2 deprivations of which the complaint is made." Gonzalez v. City of
3 Fresno, No. 1:06-cv-01751-OWW-TAG, 2009 WL 2208300, at *4 (E.D. Cal.
4 July 23, 2009) (quotations and citations omitted). "The Ninth Circuit
5 also recognizes that '[s]upervisory liability [can be] imposed against
6 a supervisory official in his individual capacity for his own culpable
7 action or inaction in the training, supervision, or control of his
8 subordinates'" Id. (quoting Menotti v. City of Seattle, 409 F.3d
9 1113, 1149 (9th Cir.2005).)

10 While the Ninth Circuit has articulated various
11 circumstances in which a supervisor can be liable
12 in a § 1983 case, the common theme is that to
13 impose individual liability on a supervisor, the
14 supervisor must have either taken part in the
alleged constitutional violation or in some manner
caused the constitutional violation through his or
her own culpable action or inaction.

15 Id. at *5 (quotation and citations omitted).

16 Here, the unopposed Declaration of Verne Speirs and Allen's
17 deposition testimony evince that Speirs neither personally participated
18 in, nor supervised, Allen's removal from his room. (Allen Depo. 144:2-8,
19 Defs.' App. of Ex., Ex. B; Verne Decl. ¶8, Ex. H.) Further, it is
20 undisputed that the Department had policies in effect at the time of the
21 alleged incident concerning both the use of force on juveniles and
22 complaints about staff misconduct, and the Department had a separate
23 training unit, which specialized in training officers on the use of
24 force and the proper methods in handling juveniles in detention. Both
25 Tam and Elorduy declare they received such training prior to the
26 incident. (Elorduy Decl. ¶ 7, Ex. I; Tam Decl. ¶ 7, Ex. J.) Lastly, it
27 is uncontroverted that the Department conducted an internal
28 investigation into Allen's allegations.

1 Plaintiffs did not allege any inadequacies concerning
2 mandatory child abuse reporting as a basis for Speirs' supervisory
3 liability in their Fifth Amended Complaint. (Fifth Am. Compl. ¶¶ 7.3-
4 7.4.) Therefore, Plaintiffs cannot rely upon such allegations to oppose
5 Defendants' motion for summary adjudication. Montoya v. Time Warner
6 Telecom Holdings, Inc., No. 1:08-CV-00227 AWI-DLB, 2009 WL 3157529, at
7 *11 (E.D. Cal. Sept. 28, 2009) ("A party cannot oppose summary judgment
8 on grounds not in issue under the pleadings.") (citing Navajo Nation v.
9 U.S. Forest Serv., 535 F.3d 1058, 1080 (9th Cir. 2008)). "The purpose of
10 the complaint . . . is to apprise defendants of the claims which will be
11 made and for which an answer and defense prepared. Plaintiff may not, by
12 way of opposition to summary judgment, expand his claims into areas not
13 fairly encompassed by the complaint." Soto v. Runnels, No. Civ S-04-0571
14 FCD GGH P, 2006 WL 1837906, at *3 (E.D. Cal. July 5, 2006), Report and
15 Recommendation adopted by 2006 WL 2549128 (E.D. Cal. Sep. 1, 2006),
16 aff'd, 265 Fed. Appx. 605 (9th Cir. 2008).

17 Since there is no evidence in the record that Speirs "[took]
18 part in [Allen's] alleged constitutional violation or in some manner
19 caused the constitutional violation through [his] own culpable action or
20 inaction," Speirs' motion for summary adjudication on Allen Elseth's
21 first claim is granted. Gonzalez v. City of Fresno, 2009 WL 2208300, at
22 *5.

23 **C. Plaintiff Allen Elseth's Claim against Defendant Ronald Tam**

24 Defendant Ronald Tam moves for summary judgment on Allen
25 Elseth's first claim, arguing, *inter alia*, "there is no evidence that
26 Tam subjected [Plaintiff] to cruel and unusual punishment." (Mot. 12:23-
27 25.) Plaintiffs counter, a "triable issue of material fact" exists on
28 the claim against Tam because both Tam and Elorduy "admit [to]

1 restraining Allen," and Tam did nothing to prevent the injury. (Opp'n
2 7:2-5, 21:3-12.)

3 The gravaman of Allen's first claim is his allegation that he
4 was subjected to "corporal punishment" when Tam and Elorduy "beat[] him
5 for a period of time." (Fifth Am. Compl. ¶ 7.2.) However, Allen gave
6 deposition testimony that only Elorduy hit him, and Tam declares his
7 only physical contact with Allen was "plac[ing] his legs in a figure
8 four[,] and holding him by his feet when he, Elorduy and Thomas removed
9 Allen from his room. (Allen Depo. 143:9-17, Ex. B; Tam Decl. ¶¶ 4-6, Ex.
10 J.) Tam further declares he did not strike Allen or cause any part of
11 Allen's face to come into contact with anything during his interactions
12 with Allen. (Tam Decl. ¶6, Ex. J.)

13 Plaintiffs contend circumstantial evidence disputes Tam's
14 averment that he did not strike Allen's face, including the "history of
15 present illness" section of a Forensic Medical Consultation dated
16 February 14, 2007 ("Consultation"). (SUF # 16, 21.) Defendants object to
17 the entirety of the Consultation on hearsay grounds. (Defs.' Objections
18 to Evid. 5:6-7.)

19 The relevant portion of the Consultation states:

20 Allen is a 17-year-old male adolescent
21 detained at the Sacramento County Juvenile Hall
22 when he suffered injuries to his face and eyes on
23 December 5, 2006. He reported to the staff, his
24 attorney, and his parents that he was beaten by
staff. Specifically, he reported that on December
5, 2006, the staff . . . held Allen down, and hit
him in the face three times"

25 (Decl. of Sheri Patricle, Ex. 1.)

26 Notwithstanding Defendants' evidentiary objection, the
27 Consultation does not create a genuine issue of fact that Tam struck
28 Allen, especially when considered against Allen's own, specific

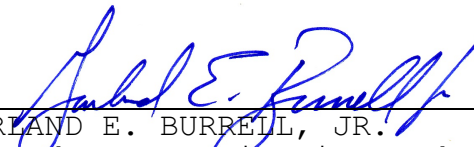
1 testimony that only Elorduy hit him; Tam never hit him. (Allen Depo.
2 143:9-17, Ex. B.) Therefore, Defendants have shown the absence of a
3 genuine issue of material fact on this issue.

4 Further, Plaintiffs did not allege a failure to protect theory
5 of liability against Tam in their Fifth Amended Complaint. (Fifth Am.
6 Compl. ¶ 7.2.) Therefore, they cannot rely upon this theory in
7 opposition to Defendants' summary adjudication motion. See Torres v.
8 City of Madera, 655 F. Supp. 2d 1109, 1128 (E.D. Cal. 2009) ("A
9 plaintiff cannot raise a new theory of liability in [his] opposition to
10 a motion for summary judgement or adjudication.") (citations omitted).
11 Accordingly, Tam's motion for summary adjudication on Allen Elseth's
12 first claim is granted.

13 **IV. CONCLUSION**

14 For the stated reasons, each Defendant's motion for summary
15 adjudication is GRANTED.

16 Dated: February 24, 2011

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19 _____
GARLAND E. BURRELL, JR.
United States District Judge