

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DAVID FONTANA, LISA FONTANA,)	Case No. 2:10-CV-00710 JAM-KJN
)	
Plaintiff,)	
)	
v.)	<u>ORDER GRANTING</u>
)	<u>DEFENDANTS' MOTION TO DISMISS</u>
)	
ALPINE COUNTY, SHERIFF JOHN)	
CRAWFORD, UNDER SHERIFF ROB)	
LEVY, SERGEANT RON MICHITARIAN,)	
OFFICER ED BRAZ, OFFICER SPENCER)	
CASE, DISTRICT ATTORNEY WILL)	
RICHMOND, and DOES 1-100,)	
)	
Defendants.)	

This matter comes before the Court on Defendants' Alpine County, Sheriff John Crawford, Under Sheriff Rob Levy, Sergeant Ron Michitarian, Officer Ed Braz, Officer Spencer Case, and District Attorney Will Richmond, (collectively "Defendants") Motion to Dismiss Plaintiffs' First Amended Complaint and Motion to Strike pursuant to California Code of Civil Procedure 425.16 (Doc. #14). Plaintiffs David Fontana and Lisa Fontana ("Plaintiffs") oppose the Motion (Doc. #16).¹

¹ This motion was determined to be suitable for decision without oral argument. E.D. Cal. L. R. 230(g). The hearing was scheduled for February 09, 2011.

1 I. FACTUAL AND PROCEDURAL BACKGROUND

2 In July 2006, two girls who were friends with David Fontana's
3 ("Fontana") daughter, accused him of touching them inappropriately.
4 After an investigation, Fontana was charged and tried for the
5 crime. He was acquitted.

6 Plaintiffs bring this action for alleged civil rights and
7 state law violations that occurred during the investigation,
8 arrest, and trial. Defendants filed a Motion to Dismiss (Doc. #8)
9 the original Complaint and the Court granted in part and denied in
10 part the Motion ("Order," Doc. #12). Plaintiffs amended their
11 Complaint (Doc. #13) and Defendants now move to dismiss this First
12 Amended Complaint ("FAC").

13
14 II. OPINION

15 A. Legal Standard

16 1. Motion to Dismiss

17 A party may move to dismiss an action for failure to state a
18 claim upon which relief can be granted pursuant to Federal Rule of
19 Civil Procedure 12(b)(6). In considering a motion to dismiss, the
20 court must accept the allegations in the complaint as true and draw
21 all reasonable inferences in favor of the plaintiff. Scheuer v.
22 Rhodes, 416 U.S. 232, 236 (1975), overruled on other grounds by
23 Davis v. Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319,
24 322 (1972). Assertions that are mere "legal conclusions," however,
25 are not entitled to the assumption of truth. Ashcroft v. Iqbal,
26 129 S. Ct. 1937, 1950 (2009), citing Bell Atlantic Corp. v.
27 Twombly, 550 U.S. 544, 555 (2007). To survive a motion to dismiss,
28 a plaintiff needs to plead "enough facts to state a claim to relief

1 that is plausible on its face.” Twombly, 550 U.S. at 570.
2 Dismissal is appropriate where the plaintiff fails to state a claim
3 supportable by a cognizable legal theory. Balistreri v. Pacifica
4 Police Department, 901 F.2d 696, 699 (9th Cir. 1990).

5 Upon granting a motion to dismiss for failure to state a
6 claim, the court has discretion to allow leave to amend the
7 complaint pursuant to Federal Rule of Civil Procedure 15(a).
8 “Dismissal with prejudice and without leave to amend is not
9 appropriate unless it is clear . . . that the complaint could not
10 be saved by amendment.” Eminence Capital, L.L.C. v. Aspeon, Inc.,
11 316 F.3d 1048, 1052 (9th Cir. 2003).

12 2. Section 1983

13 Plaintiff’s first three claims against Defendants are brought
14 under 42 U.S.C. § 1983. To prevail in a § 1983 civil action against
15 state actors for the deprivation of

16 “rights, privileges, or immunities secured by the
17 Constitution and laws, a plaintiff must show that
18 (1) acts by the defendants (2) under color of state
19 law (3) deprived him of federal rights, privileges
20 or immunities and (4) caused him damage. Section
21 1983 is not itself a source of substantive rights,
22 but merely provides a method for vindicating federal
rights elsewhere conferred. Accordingly, the
conduct complained of must have deprived the
plaintiff of some right, privilege or immunity
protected by the Constitution or laws of the United
States.”

23 Thornton v. City of St. Helens, 425 F.3d 1158, 1163-64 (9th Cir.
24 2005) (internal citations omitted).

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1 B. Claims for Relief

2 1. District Attorney Will Richmond

3 In its Order, this Court held that when initiating prosecution
4 and when presenting the state's case, District Attorney Will
5 Richmond ("Richmond") was immune from civil liability, but he could
6 be held liable for unconstitutional conduct when acting in an
7 investigatory capacity. Order at 6-7. Since Plaintiffs did not
8 assert any plausible allegations to suggest that Richmond engaged
9 in unconstitutional investigatory conduct, the Court granted
10 Defendants' motion to dismiss all claims against Richmond without
11 prejudice.

12 In their Complaint (Doc. #1), Plaintiffs alleged that Richmond
13 "pursued the case without sufficient evidence. . . ." Compl. at
14 ¶ 25. The FAC includes additional allegations that Richmond
15 suppressed evidence, knew or should have known that the other
16 defendants made false statements, covered up the other defendants
17 wrongdoing, failed to establish policies and procedures sufficient
18 to protect against Brady violations, and failed to adhere to
19 "general prosecutorial policy" in relation to David Fontana. FAC
20 ¶ 23. These new allegations, however, are still insufficient since
21 they are all related to the criminal prosecution of David Fontana.
22 Plaintiffs' FAC fails once again to allege any facts that would
23 indicate Richmond acted unconstitutionally during the investigation
24 or engaged in any conduct which violated Plaintiffs' constitutional
25 rights outside of his role as a prosecutor preparing a case for
26 trial. Richmond is entitled to absolute prosecutorial immunity as
27 to all claims brought against him in the FAC. Prosecutors are
28 "absolutely immune from liability under Section 1983 for their

1 conduct in initiating a prosecution and in presenting the State's
2 case, insofar as that conduct is intimately associated with the
3 judicial phase of the criminal process." Burns v. Reed, 500 U.S.
4 478, 478 (1991) (internal citations omitted). Plaintiffs have been
5 given two opportunities to try to properly plead claims against
6 Richmond and have failed both times. It is clear that any claims
7 against Richmond cannot be saved by further amendment.
8 Accordingly, Defendants' Motion to Dismiss Richmond as a defendant
9 is GRANTED WITH PREJUDICE.

10 2. Second and Third Causes of Action - § 1983 Claims
11 Under the Sixth and Fourteenth Amendments

12 In the Complaint, Plaintiffs alleged that that Defendants
13 destroyed exculpatory evidence in violation of Fontana's Sixth and
14 Fourteenth Amendment rights. In its Order, this Court indicated
15 that "[i]t is unclear how the alleged withholding of evidence
16 violated Mr. Fontana's Sixth Amendment rights given his acquittal."
17 Order at 15:10-11. Accordingly, the Court instructed Plaintiffs to
18 plead how Defendants' alleged withholding of evidence harmed
19 Fontana. Order at 15:7-13.

20 In the FAC Plaintiffs have failed to provide the necessary
21 additional facts to properly state a Section 1983 claim for
22 violations of their rights pursuant to the Sixth and Fourteenth
23 Amendments. Plaintiffs FAC contains identical allegations for
24 both the Second and Third Causes of Action. These allegations are
25 still too vague and do not include facts that demonstrate that
26 Defendants failed to disclose evidence to the detriment of the
27 Plaintiffs. Absent more, the allegations in these claims are still
28 insufficient to maintain a cause of action for violation of

1 Plaintiffs' due process rights under either the Sixth or Fourteenth
2 Amendments.

3 In addition to Plaintiffs' inadequate amended pleading, the
4 Ninth Circuit recently ruled that plaintiffs who prevail in an
5 underlying criminal action have no Brady-related due process claims
6 under § 1983. Smith v. Almada, 623 F.3d 1078, 1087-88 (9th Cir.
7 2010). Plaintiffs fail to address Smith in their opposition,
8 thereby conceding that this case requires a dismissal of their
9 Sixth and Fourteenth Amendment claims.

10 Plaintiffs attempt to save their Fourteenth Amendment claim by
11 including a new argument in their Opposition that Defendants
12 engaged in an "impermissibly motivated prosecution." Opp'n. (Doc.
13 #16) at 4:23. The FAC is devoid of any allegations to support the
14 claim that Fontana was selectively prosecuted based on his
15 membership in a protected class. See Wayte v. U.S., 470 U.S. 598,
16 608 (1985) ("the decision to prosecute may not be deliberately
17 based upon an unjustifiable standard such as race, religion, or
18 other arbitrary classification"). Alleged child molesters are not
19 members of a protected class. See Rough v. Montana State Dept. of
20 Family Services, No. 91-35441, 1992 WL 132861, *4 (9th Cir. June
21 15, 1992) (dismissing Plaintiffs' § 1983 claims because Plaintiffs,
22 who claimed they are members of a protected class of wrongly
23 accused child abusers, failed to allege any facts showing a
24 violation of their rights). Therefore, because Plaintiffs have
25 twice failed to state cognizable claims, and these claims cannot be
26 saved by further amendment, Defendant's Motion to Dismiss the
27 Second and Third Causes of Action in the FAC is GRANTED WITH
28 PREJUDICE.

1 3. Sixth Cause of Action -- Malicious Prosecution

2 In the FAC, Plaintiffs have included a separate state law
3 claim for malicious prosecution. Defendants move to dismiss this
4 claim under California Gov't. Code section 821.6 which provides
5 that:

6 A public employee is not liable for injury caused
7 by his instituting or prosecuting any judicial or
8 administrative proceeding within the scope of his
employment, even if he acts maliciously and without
probable cause.

9 Plaintiffs' opposition does not specifically address this
10 argument. The Court finds that because Plaintiffs' Sixth Cause of
11 Action for malicious prosecution is predicated on the criminal
12 prosecution of David Fontana - a judicial proceeding as defined by
13 Section 821.6 - all individual Defendants are immune from liability
14 with respect to this claim. Moreover, since the individual
15 Defendants are immune from liability, the County also is immune
16 pursuant to Government Code § 815.2(b). Accordingly, Defendants'
17 motion to dismiss Plaintiffs' Sixth Cause of Action is GRANTED WITH
18 PREJUDICE.

19 4. State Law Claims

20 In the FAC, Plaintiffs allege various state law claims in
21 conjunction with their First, Second and Third Causes of Action.
22 FAC at ¶¶ 33, 39, 45. Plaintiffs have also asserted independent
23 state law claims in their Fourth (loss of consortium), Fifth
24 (Violations of California Gov't. Code § 820.21), Sixth (Malicious
25 Prosecution), Seventh (Defamation/False Light) and Eighth
26 (Intentional Infliction of Emotional Distress) Causes of Action.
27 Defendants move to dismiss these claims on a number of grounds.
28

1 a. Fifth Cause of Action - Gov't. Code § 820.21

2 This claim cannot survive as a matter of law because § 820.21
3 does not apply to peace officers and all the individual named
4 Defendants are peace officers. Plaintiffs concede this point in
5 their opposition. Accordingly, the Fifth Cause of Action is
6 DISMISSED WITH PREJUDICE.

7 b. Sixth Cause of Action - Malicious Prosecution

8 For the reasons set forth above, this claim is DISMISSED WITH
9 PREJUDICE.

10 c. Fourth Cause of Action - Loss of Consortium

11 In its Order, this Court instructed Plaintiff to plead Mrs.
12 Fontana's loss of consortium claim separately and include an
13 allegation as to when the claim accrued. (Order at 16:12-16.) In
14 their FAC, Plaintiffs plead this claim separately but fail to
15 identify when this claim accrued. Plaintiffs also fail to show
16 that Lisa Fontana timely filed a government tort claim. In their
17 Opposition, Plaintiffs contend that, should the Court dismiss her
18 state law claim for loss of consortium, Lisa Fontana should be
19 permitted to convert this claim into a violation of her civil
20 rights. Plaintiffs' contention is without merit. It is clear to
21 this Court that Plaintiffs are unable to cure the multiple defects
22 contained in Mrs. Fontana's sole claim. Accordingly, this Fourth
23 Cause of Action is DISMISSED WITH PREJUDICE. In addition, Lisa
24 Fontana is DISMISSED as a Plaintiff from this case.

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1 d. Seventh Cause of Action - Defamation/False
2 Light

3 Plaintiffs' Seventh Cause of Action for defamation and false
4 light is brought only against Defendant Ed Braz. Defendant Braz
5 moves to dismiss this claim under California Code of Civil
6 Procedure § 425.16 (Anti-SLAPP statute). In their Opposition,
7 Plaintiffs fail to address any of the arguments raised by Defendant
8 Braz. Plaintiffs have not opposed or contended that alleged acts
9 of Defendant Braz are not subject to the protection of California
10 Code of Civil Procedure § 425.16. Plaintiffs assert, without any
11 supporting authority, that the Court should deny Defendants' motion
12 to dismiss this claim because Defendants did not submit
13 declarations in conjunction with their anti-SLAPP motion.
14 Plaintiffs have failed to meet their burden of demonstrating a
15 probability of prevailing on their claim and failed to establish a
16 prima facie case for defamation and false light. In addition,
17 Plaintiffs have failed to address application of immunities to the
18 facts pled. For all these reasons, Defendants' motion to dismiss
19 the Seventh Cause of Action is GRANTED WITH PREJUDICE.

20 e. Eighth Cause of Action - Intentional
21 Infliction of Emotional Distress

22 Defendants argue that all state law claims in Plaintiffs' FAC,
23 including the Eighth Cause of Action, should be dismissed because
24 Plaintiffs have failed to establish that their state law claims are
25 not barred by their failure to timely file a government tort claim.
26 Plaintiffs acknowledge, in their Opposition, that a party must file
27 a tort claim within six months of the accrual of the cause of
28 action. Opp. (Doc. #16) at 6:2; Cal. Gov't. Code § 911.2.

1 Plaintiff David Fontana contends that Government Code § 911.4
2 allows him up to one year from the time of accrual to file a tort
3 claim if he presented a late claim. Opp. (Doc. #16) at 6:3-5.
4 Plaintiffs' interpretation of this statute is incorrect.

5 Plaintiffs filed their tort claim on November 18, 2009. The
6 County of Alpine deemed this claim to be untimely and sent notice
7 pursuant to Government Code § 911.8. Section 911.8 provides that
8 where a claim is rejected on grounds of untimeliness, a prospective
9 plaintiff must first petition the appropriate court for an order
10 relieving him from the claims presentation requirements. Id.; see
11 Cal. Gov't. Code §§ 945.4, 946.6. Any such petition must be filed
12 within six months from the time that the application to present a
13 late claim was denied. Cal. Gov't. Code § 911.8(b).

14 Plaintiffs have not alleged, nor can they, that they ever
15 petitioned an "appropriate court" for an order excusing them from
16 complying with the claims presentation requirements contained in
17 the Government Code. Plaintiffs also have not clearly alleged the
18 date(s) their state tort law claims, including the Eighth Cause of
19 Action, accrued. Defendants contend that these claims, other than
20 the malicious prosecution claim, accrued no later than January 18,
21 2008 - the date David Fontana was arrested. Plaintiffs argue that
22 these claims did not accrue until May 29, 2009 - the date David
23 Fontana was acquitted. Plaintiffs' FAC, however, does not include
24 sufficient facts to support their argument that all the state
25 claims did not accrue until May 29, 2009. Moreover, Plaintiffs
26 never challenged the County of Alpine's rejection of their tort
27 claim based on untimeliness. In their Opposition, Plaintiffs also
28 attempt to apply the "continuing violations" doctrine to their

1 state law claims but fail to cite any legal authority that supports
2 such an application. In short, because Plaintiffs have not pled
3 sufficient facts in their Eighth Cause of Action to demonstrate
4 that this claim was part of a timely filed government tort claim,
5 it cannot survive as a matter of law.² Thus, Defendants' Motion to
6 Dismiss this cause of action is GRANTED WITH PREJUDICE.

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8 III. ORDER

9 For the reasons set forth above:

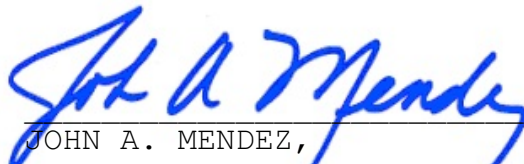
10 1. All claims in the FAC against Defendant WILL RICHMOND,
11 are DISMISSED WITH PREJUDICE and he is dismissed as a Defendant in
12 this case;

13 2. Plaintiffs' Second, Third, Fourth, Fifth, Sixth, Seventh
14 and Eighth Causes of Action are DISMISSED WITH PREJUDICE and Lisa
15 Fontana is dismissed as a Plaintiff in this case; and

16 3. The parties are ordered to submit a Joint Status Report
17 within twenty (20) days of this Order setting forth their
18 respective positions as to whether Plaintiffs' First Cause of
19 Action in the FAC is still viable as to the Defendants other than
20 WILL RICHMOND. Defendants did not raise any specific arguments in
21 their motion as to the First Cause of Action and, therefore, the
22 Court needs further briefing on this issue.

23 IT IS SO ORDERED.

24 Dated: February 15, 2011



JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE

25
26 ² The Court would dismiss Plaintiffs' Fourth, Fifth and Seventh
27 Causes of Action for this additional reason as well.
28