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7 UNITED STATES DISTRICT COURT
8 FOR THE EASTERN DISTRICT OF CALIFORNIA

9 JERRY LUM, et al.,

10 NO. CIV. S-10-1807 LKK/DAD

11 Plaintiffs,

12 v.

O R D E R

13 COUNTY OF SAN JOAQUIN,
14 et al.,

15 Defendants.
16 _____/

17 This case arises from the death of Jeremy Lum, whose body was
18 discovered in the San Joaquin River three days after he was
19 released from San Joaquin County Jail. Pending before the court is
20 a motion for summary judgment by defendants. This order will
21 address all issues in that motion with the exception of whether any
22 entity has Monell liability.

23 **I. Factual Background**

24 The following facts are undisputed, unless noted.

25 Plaintiffs in this case are the parents of decedent Jeremy Lum
26 ("Lum"). Lum was diagnosed with bipolar disorder, and was admitted

1 to St. Joseph's Behavioral Health Center for bipolar episodes on
2 multiple occasions between 2005 and 2009. Despite his disorder, Lum
3 played sports in high school and graduated from U.C. Berkeley. Lum
4 worked for a family company and lived on his own.

5 On July 8, 2008, Lum's father went to Lum's house to pick him
6 up for dinner. Lum was asleep, and Mr. Lum woke him up to tell him
7 that it was time for dinner. Lum did not know it was dinner time,
8 and refused to go with Mr. Lum. Mr. Lum was surprised by Lum's
9 behavior.

10 Later that evening, Lum appeared at the Archuleta residence,
11 which is .3 miles from his home. Lum was wearing shorts and a t-
12 shirt, but no shoes. Lum said that he was looking for a female with
13 a name that the Archuletas did not know. Jestina Archuleta called
14 911. Lum was at the Archuletas door for approximately three
15 minutes, and then wandered around the Archuletas' front yard
16 looking confused. Lum then walked across the street, stopped for
17 some time facing a light pole. Lum then entered the Fireside Inn,
18 a bar, and then exited. Plaintiffs assert that Lum was inside the
19 bar for less than one minute. See James Archuleta Depo. 23:3-19.
20 Lum then went to a nearby park and stood by some poles with his
21 dog.

22 Sergeants Steven Pease and Raymond Walters and Deputy Davis
23 ("the arresting officers") contacted Lum. The arresting officers
24 are all employees of the San Joaquin County Sheriff's Department.
25 According to a declaration by San Joaquin County Sheriff's
26 Department Lieutenant John Williams, the county Sheriff's

1 Department "provides the City of Lathrop police services pursuant
2 to contract." Decl. Williams.

3 Lum had vomit on his shirt, and appeared confused and
4 disoriented.

5 At some point, the officers decided to arrest Lum and take him
6 to jail, although the facts surrounding this decision are heavily
7 disputed by the parties. It is undisputed that at least Sergeant
8 Pease thought that Lum was having a mental health episode.

9 Before taking him to jail, the officers attempted to locate
10 Lum's family. Sergeant Walters called Lum's father's cell phone,
11 and the call went to voicemail. Sergeants Pease and Walters took
12 Lum's dog to Lum's home.

13 Mr. Archuleta testified that he asked one of the officers what
14 was going on, and the officer responded "we think he's off his
15 meds." Each of the officers denies saying this to Mr. Archuleta.
16 Lum did not tell the arresting officers that he had any mental
17 disorder.

18 Deputy Davis transported Lum to the San Joaquin County Jail,
19 which is operated by San Joaquin County. At the jail, Lum told
20 Officer Mendoza that he was under the care of a doctor for his
21 bipolar condition during a medical screening questionnaire. Officer
22 Mendoza placed Lum in a holding cell shortly after midnight. Some
23 time between midnight and 6:00 a.m., Officer Mendoza observed Lum
24 trying to open imaginary doors inside the holding cell.

25 County policy requires officers to check on arrestees in
26 sobering cells ever 15 minutes and to make a note of these checks

1 on an inmate observation log. See San Joaquin County Sheriff's
2 Department Custody Division Policy Manual Section 3.1.0., Ex. B to
3 Moule Decl., ECF No. 78. Officer Mendoza did not check on Lum every
4 15 minutes, but he recorded on the log that he did so.

5 A note was entered at 5:00 a.m. that Lum was observed by Nurse
6 Velarde. At 6:00 a.m., release officer Fernandez started her shift.
7 She reviewed the files of inmates scheduled for release that
8 morning. Fernandez released Lum at 7:30 a.m.

9 Lum's family reported him missing on July 9, 2009. On July 12,
10 2009, Lum's body was found in the San Joaquin River. The cause of
11 death was declared to be drowning caused, or contributed to, by
12 amphetamine and Orphenadrine toxicity.

13 Plaintiffs' Second Amended Complaint ("SAC") alleges the
14 following claims for relief arising from the facts described above:
15 Section 1983 Claim for Violation of Decedent's Fourth Amendment
16 Rights; Section 1983 Claim for Violation of Plaintiffs' Fourteenth
17 Amendment Rights; Section 1983 Claim for Inadequate and Reckless
18 Training; Violation of the Americans with Disabilities Act;
19 Wrongful Death-Negligence; and False Arrest.

20 **II. Standard for a Motion for Summary Judgment**

21 Summary judgment is appropriate "if the movant shows that
22 there is no genuine dispute as to any material fact and the movant
23 is entitled to judgment as a matter of law." Fed. R. Civ. P.
24 56(a); Ricci v. DeStefano, 557 U.S. 557, 129 S. Ct. 2658, 2677
25 (2009) (it is the movant's burden "to demonstrate that there is 'no
26 genuine issue as to any material fact' and that they are 'entitled

1 to judgment as a matter of law'"); Walls v. Central Contra Costa
2 Transit Authority, 653 F.3d 963, 966 (9th Cir. 2011) (same).

3 Consequently, "[s]ummary judgment must be denied" if the court
4 "determines that a 'genuine dispute as to [a] material fact'
5 precludes immediate entry of judgment as a matter of law." Ortiz
6 v. Jordan, 562 U.S. ___, 131 S. Ct. 884, 891 (2011), quoting Fed.
7 R. Civ. P. 56(a); Comite de Jornaleros de Redondo Beach v. City of
8 Redondo Beach, ___ F.3d ___, 2011 WL 4336667 at 3 (9th
9 Cir. September 16, 2011) (same).

10 Under summary judgment practice, the moving party bears the
11 initial responsibility of informing the district court of the basis
12 for its motion, and "citing to particular parts of the materials
13 in the record," Fed. R. Civ. P. 56(c)(1)(A), that show "that a fact
14 cannot be ... disputed." Fed. R. Civ. P. 56(c)(1); In re Oracle
15 Corp. Securities Litigation, 627 F.3d 376, 387 (9th Cir. 2010)
16 ("The moving party initially bears the burden of proving the
17 absence of a genuine issue of material fact"), citing Celotex v.
18 Catrett, 477 U.S. 317, 323 (1986).

19 If the moving party meets its initial responsibility, the
20 burden then shifts to the non-moving party to establish the
21 existence of a genuine issue of material fact. Matsushita Elec.
22 Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986);
23 Oracle Corp., 627 F.3d at 387 (where the moving party meets its
24 burden, "the burden then shifts to the non-moving party to
25 designate specific facts demonstrating the existence of genuine
26 issues for trial"). In doing so, the non-moving party may not rely

1 upon the denials of its pleadings, but must tender evidence of
2 specific facts in the form of affidavits and/or other admissible
3 materials in support of its contention that the dispute exists.
4 Fed. R. Civ. P. 56(c)(1)(A).

5 "In evaluating the evidence to determine whether there is a
6 genuine issue of fact," the court draws "all reasonable inferences
7 supported by the evidence in favor of the non-moving party."
8 Walls, 65.3 F.3d at 966. Because the court only considers
9 inferences "supported by the evidence," it is the non-moving
10 party's obligation to produce a factual predicate as a basis for
11 such inferences. See Richards v. Nielsen Freight Lines, 810 F.2d
12 898, 902 (9th Cir. 1987). The opposing party "must do more than
13 simply show that there is some metaphysical doubt as to the
14 material facts Where the record taken as a whole could not
15 lead a rational trier of fact to find for the nonmoving party,
16 there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at
17 586-87 (citations omitted).

18 **III. Analysis**

19 **A. First Claim: Section 1983 Claim for Violation of Decedent's** 20 **Fourth Amendment Rights.**

21 This claim is against defendants City of Lathrop, and Deputy
22 Davis, Sergeant Walters, and Sergeant Pease (the "arresting
23 officers"). Plaintiffs allege that the arresting officers
24 unlawfully arrested Lum, and that "in the City of Lathrop, police
25 sergeants, including Sergeants Walters and Pease, are invested by
26 law-or by custom or usage having the force of law-with final

1 policymaking authority to effect arrests and/or ratify or sanction
2 arrests made by other officers." Second Amended Complaint ("SAC")
3 ¶ 56, ECF No. 26. Plaintiffs allege that the City of Lathrop is
4 liable pursuant to Monell v. Department of Social Services, 365
5 U.S. 167 (1978), because Sergeants Walker and Pease were acting as
6 municipal officials. Plaintiffs allege that the City of Lathrop has
7 a custom, policy, practice, or procedures pertaining to the
8 treatment and temporary detention of people arrested pursuant to
9 California Penal Code § 647(f), which makes it a misdemeanor to be
10 intoxicated in public.

11 Defendants claim that the arresting officers are entitled to
12 qualified immunity, and that the arresting officers do not have
13 final policy-making authority for the City of Lathrop. The question
14 of whether the City is liable for the arresting officers' conduct
15 under a Monell theory will be addressed in a later order of this
16 court, following additional briefing from the parties.

17 **i. Qualified Immunity**

18 Qualified immunity "protects government officials from
19 liability for civil damages insofar as their conduct does not
20 violate clearly established statutory or constitutional rights of
21 which a reasonable person would have known." Pearson v. Callahan,
22 129 S.Ct. 808, 815, 172 L. Ed. 2d 565 (2009). In order to be
23 clearly established, "the contours of the right must be
24 sufficiently clear" so as to be obvious to a reasonable official.
25 Anderson v. Creighton, 483 U.S. 635, 640 (1978). To meet this
26 standard, the right alleged to be violated cannot be only the

1 "general constitutional guarantee (e.g., the Fourth Amendment
2 freedom from unreasonable searches and seizures), but its
3 application in a particular context." Baker v. Racansky, 887 F.2d
4 183, 186 (9th Cir. 1989) (citing Anderson, 483 U.S. at 639-40 and
5 Todd v. United States, 849 F.2d 365, 370 (9th Cir. 1988)).

6 A warrantless arrest by an officer is reasonable under the
7 Fourth Amendment where there is probable cause to believe that a
8 criminal offense has been or is being committed. Devenpeck v.
9 Alford, 543 U.S. 146, 153 (2004). Whether probable cause exists
10 depends on the reasonable conclusion to be drawn from the facts
11 known to the arresting officer at the time of the arrest. Id. An
12 officer's subjective reason for making the arrest is not relevant.
13 "Evenhanded law enforcement is best achieved by the application of
14 objective standards of conduct, rather than standards that depend
15 on the subjective state of mind of the officer." Horton v.
16 California, 496 U.S. 128, 138 (1990).

17 Qualified immunity shields arresting officers from suit for
18 damages if "a reasonable officer could have believed the arrest to
19 be lawful, in light of clearly established law and the information
20 the [arresting] officers possessed." Anderson v. Creighton, 483
21 U.S. 635, 641 (1987). Even law enforcement officials who
22 "reasonably but mistakenly conclude that probable cause is present"
23 are entitled to immunity. Hunter v. Bryant, 502 U.S. 224, 227
24 (1991).

25 A § 1983 defendant is entitled to summary judgment if
26 "discovery fails to uncover evidence sufficient to create a genuine

1 issue as to whether the defendant" violated clearly established
2 law. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985). Summary
3 judgment on qualified immunity is not proper unless the evidence
4 permits only one reasonable conclusion. Where "conflicting
5 inferences may be drawn from the facts, the case must go to the
6 jury." Munger v. City of Glasgow Police Dep't, 227 F.3d 1082, 1087
7 (9th Cir. 2000).

8 Here, the arresting officers are entitled to qualified
9 immunity if, under the circumstances, it was reasonable for the
10 officers to believe that plaintiff was intoxicated. The arresting
11 officers are entitled to summary judgment if there is no genuine
12 issue as to whether it was reasonable for the officers to believe
13 that plaintiff was intoxicated. Drawing all inferences in favor of
14 the non-moving party, the court cannot conclude, on the record
15 before it, that this was a reasonable belief under the
16 circumstances.

17 James Archuleta, who had a three minute conversation with Lum
18 shortly before his arrest, testified that Lum "looked like he was
19 walking fine," and did not recall him stumbling. Depo. James
20 Archuleta 24:18-20. Mr. Archuleta asserted that "there was no
21 slurring. I could understand what he was saying." Id. 25:17-18. Mr.
22 Archuleta testified that he did not smell any alcohol on Lum,
23 despite having talked with him at a distance of about three feet.
24 Id. 49:2. Mr. Archuleta also testified that he asked one of the
25 officers what was going on with Lum, and the officer responded
26 "Well, we think he's off his meds." Id. 42:2.

1 The Arrest Report dated July 8, 2009 charged Lum with public
2 intoxication, California Penal Code §647(f). The check box for
3 "mumbles/slurred" is checked, but no narrative description is
4 included. A second page of the Arrest Report is dated July 11,
5 2009, two days after Lum was reported missing, and states that Lum
6 was staggering, with red watery eyes, slurred speech, and the odor
7 of alcohol.¹

8 A report prepared by Sergeant Walters states that prior to
9 July 8, 2009 Walters "was familiar with Jeremy Lum having a mental
10 health condition." Missing Person Report, Ex. 14 to Walker Decl.,
11 ECF No. 88.

12 Sergeant Pease testified that Lum was "slurring" and that he
13 was exhibiting signs of a person suffering from mental illness.
14 Depo. Pease, 29:15-31:1. Pease testified "The answers [Lum] would
15 give to questions weren't connected to the questions, complete
16 disconnect. In my opinion, it appeared he was having visual
17 hallucinations, seeing things that weren't there. Those would be
18 things that mostly made me believe there was mental health issues."
19 Id. 31:3-8. Pease also testified that the arresting officers
20 discussed the fact that Lum was having a mental health episode, but
21 that he also was intoxicated. Id. 45:18-22.

22 Mr. Crabtree, a bartender at the Fireside Inn testified that
23 he spoke to Lum after Lum left the Archuleta residence, but before
24

25 ¹ Defendants assert that the later date is the date that the
26 report was entered into a database, but that both pages of the
arrest report were completed on July 8, 2009.

1 the police arrived. Mr. Crabtree testified that Lum appeared steady
2 on his feet, and that he did not mumble or have slurred speech.
3 Depo. Crabtree 23:20-28:3. Mr. Crabtree testified that nothing in
4 his interaction with Lum on July 8 suggested that Lum had been
5 drinking. Id. 41:2-7.

6 Defendants offer a deposition of plaintiffs police expert,
7 Stephen D'Arcy as evidence that it would have been reasonable for
8 the officers to arrest Lum under §647(f). Contrary to defendants'
9 assertion, MSJ 11, D'Arcy did not agree that it was reasonable to
10 arrest Lum. D'Arcy stated that it would have been reasonable
11 assuming that "all of the elements of the crime were present and
12 the officers have made that decision based upon constitutional
13 standards." Depo. D'Arcy 113: 5-7.²

14 Plaintiffs' psychiatry expert testified that many of the
15 symptoms of mental illness that Lum displayed on a videotape from
16 the jail, could also be symptoms of alcohol intoxication. Depo.
17 Saldanha.

18 The court concludes that there remains a genuine issue as to
19 whether the defendants had probable cause to arrest Lum for public
20 intoxication. Based on the evidence submitted, the court cannot

21
22 ² Defendants' Motion for Summary Judgment cites a quotation
23 from the D'Arcy deposition that does not appear in the transcript.
24 Defendants quote the following exchange from the deposition: "Q:
25 Okay. So it was appropriate then to arrest Mr. Lum for public
26 intoxication? A: That's the option they elected, yes. Q: But was
it an appropriate election of the number of options to arrest him
under 647(f)? A: Yes, it fell under the elements of the crime." See
Defs.' Mot. 11. That exchange does not appear in the deposition
transcript at the page and lines cited, or anywhere else as far as
the court can tell.

1 conclude that it is uncontestable that a reasonable officer would
2 have believed that probable cause existed for the arrest under the
3 circumstances. Hunter v. Bryant, 502 U.S. 224, 227 (1991).
4 Accordingly, defendants are not entitled to summary judgment on the
5 basis of qualified immunity.

6 **B. Second Claim: Section 1983 Claim for Violation of Plaintiffs'**
7 **Fourteenth Amendment Rights**

8 This claim is alleged against the arresting officers and
9 Officer Mendoza. Plaintiffs allege that Lum was a pre-trial
10 detainee, creating a special relationship between the decedent and
11 the defendants and giving rise to a duty not to leave Lum in a
12 situation that was more dangerous than the one they found him in.
13 Specifically, plaintiffs allege that by failing to administer a
14 medical or psychological evaluation at the time of arrest and
15 detention, and by releasing him six miles from home without money,
16 shoes, a phone, or a means of transportation, the defendants placed
17 Lum in a situation that was more dangerous than the one they found
18 him in.

19 Generally, public officials are not liable for omissions. See,
20 e.g., DeShaney v. Winnebago County Dep't of Social Services, 489
21 U.S. 189 (1989). There are two exceptions to this general rule: the
22 state-created danger exception, and the special relationship
23 exception. Where there is "affirmative conduct on the part of the
24 state in placing the plaintiff in danger," an official may be
25 liable for harm that occurs. L.W. v. Grubbs, 974 F.2d 119, 121 (9th
26 Cir. 1992). This "state-created danger" exception has been found

1 where a police officer ejected a woman from a vehicle in a high-
2 crime area where she was subsequently raped, Wood v. Ostrander, 879
3 F.2d 583 (9th Cir. 1989); where police officers detained an
4 intoxicated woman one third of a block from her home on a cold
5 night and then released her to walk home alone after sending her
6 husband home, and the plaintiff suffered from hypothermia, Kneipp
7 v. Tedder, 95 F.3d 1199 (3d Cir. 1996); and where officers ejected
8 a drunk patron from a bar on a freezing Montana night where he died
9 from hypothermia, Munger v. City of Glasgow Police Dep't, 227 F.3d
10 1082, 1087 (9th Cir. 2000). In each of these cases, the court
11 concluded that the plaintiff was in a worse position after the
12 officers intervened, and that the state acted with deliberate
13 indifference to a known or obvious danger. Patel v. Kent Sch.
14 Dist., 648 F.3d 965 (9th Cir. 2011).

15 Under the "special relationship" exception, an officer may
16 also be liable for an omission "when a state takes a person into
17 its custody and holds him there against his will," including by
18 incarceration. Patel v. Kent Sch. Dist., 648 F.3d 965 (9th Cir.
19 2011). This exception only applies when a person is in custody.

20 In this case, plaintiffs allege under both the special
21 relationship and the state-created danger theories, although they
22 conflate the two.

23 **i. Special Relationship**

24 Defendants argue that any special relationship between Lum and
25 defendants terminated once Lum was released from jail, and Lum died
26 after being released from custody.

1 In Coscia v. Town of Pembroke, 659 F.3d 37 (1st Cir. 2011),
2 the court held that "in the absence of a risk of harm created or
3 intensified by state action there is no due process liability for
4 harm suffered by a prior detainee after release from custody in
5 circumstances that do not effectively extend any state impediment
6 to exercising self-help or to receiving whatever aid by others may
7 normally be available." In Coscia, the plaintiff exhibited signs
8 of mental distress while in custody and committed suicide shortly
9 after being released.

10 The court finds the Coscia holding to be inapplicable here,
11 because there is a triable issue as to whether the risk of harm to
12 Lum was intensified during his arrest and detention, where he had
13 no access to his medications under the circumstances noted above.

14 **ii. State-Created Danger**

15 Plaintiffs allege that by failing to administer a medical or
16 psychological evaluation during Lum's detention, the defendants
17 placed Lum in a situation more dangerous than the one they found
18 him in. Specifically, prior to Lum's arrest, he was closer to home
19 than when he was released from jail, less in need of medication,
20 and he had his dog with him.

21 Plaintiffs allege that defendants acted with deliberate
22 indifference towards a known danger to plaintiffs. Plaintiffs have
23 provided evidence that Officer Mendoza falsified an observation log
24 by recording that he had checked on Lum in the sobering cell when,
25 in fact, he hadn't checked on him as required by policy. According
26 to plaintiffs, Nurse Naval reported finding Lum alert and oriented,

1 even though the time of her examination was after Lum had been
2 released and had left the jail. Further, Lum told Officer Mendoza
3 that he was bipolar and under the care of a Dr. Lee, and that he
4 was taking medications. Officer Mendoza testified that he did not
5 know what "bipolar" meant, Depo. Mendoza 79:14-15, and he proceeded
6 to process Lum as an intoxicated person, and noted "No medical
7 conditions," into the jail's database. Mendoza did not call a nurse
8 to examine Lum at that time because, in his opinion, "you don't
9 call a nurse for drunk people." Id. 87: 10-11.

10 The court finds that a reasonable jury could find that by
11 arresting, detaining, and then releasing Lum without conducting a
12 proper medical evaluation, defendants put him in a more dangerous
13 state than he was in prior to arrest. A jury could conclude that
14 Lum's mental condition worsened while he was held in jail overnight
15 with no access to his medication. The court also finds that there
16 is a triable issue as to whether Officer Mendoza was deliberately
17 indifferent to Lum's well being.

18 The arresting officers did apparently fail to alert jail
19 personnel that Lum appeared to be having a mental health episode.
20 Given the disputed facts under these circumstances, the court
21 cannot find the arresting officers were not deliberately
22 indifferent to Lum's well being.

23 Accordingly, the court denies defendants' motion for summary
24 judgment on the Second Claim for relief.

25 **iii. Due Process Right to Medical Care While in Custody**

26 Apart from the state-created danger and special relationship

1 theories of liability, there is a triable question as to whether
2 defendants deprived Lum of his right to medical care while in the
3 custody of the county. In the pre-conviction context, that right
4 derives from the due process clause, which "imposes, at a minimum,
5 the same duty the Eighth Amendment poses: persons in custody have
6 the established right to not have officials remain deliberately
7 indifferent to their serious medical needs," including psychiatric
8 needs. Gibson v. County of Washoe, 290 F.3d 1175, 1187 (9th Cir.
9 2002).

10 A defendant is deliberately indifferent in this context if he
11 knows of and disregards an excessive risk to the detainee's health
12 and safety. Farmer v. Brennan, 511 U.S. 825 (1970). The defendant
13 must actually be aware of the risk; it is not enough if he should
14 have known of the risk but did not. Id.

15 It is apparent to the court that Officer Mendoza should have
16 known of the excessive risk to Lum's safety. Lum told Mendoza that
17 he was bi-polar, under the care of a doctor, and on medications.
18 Mendoza observed Lum trying to open imaginary doors in his cell.
19 The court concludes that there is a triable issue on the question
20 of whether Officer Mendoza actually knew of a risk to Lum's health
21 and safety. A jury might not find it credible that Officer Mendoza
22 did not know that "bi-polar" refers to a serious mental health
23 condition, despite being having received training on dealing with
24 individuals with mental health issues. See Sida Report, ECF No. 48
25 at 15. Moreover, again the conduct of the arresting officers in
26 this regard cannot be resolved by the court.

1 Accordingly, the court finds that the defendants are not
2 entitled to summary judgment on the second claim for relief.

3 **C. Third Claim: Monell liability for "kick-out" policy**

4 As their third claim for relief, plaintiffs allege that the
5 City of Lathrop and County of San Joaquin ("the municipal
6 defendants") have a policy of accepting arrestees on "kick-out"
7 charges, holding them arbitrarily, and then releasing them in a
8 manner that puts them a risk of harm. Plaintiffs allege that
9 plaintiffs Fourteenth Amendment rights were violated as a result
10 of this policy.

11 In their complaint, plaintiffs alleged "other arrestees
12 charged as kickouts, and holding them for an arbitrary period of
13 time only to release them without any guidance, protection, or
14 assistance." However, plaintiffs have submitted evidence of only
15 one other similar incident involving San Joaquin County and another
16 city.

17 Evidence of only one prior incident does not raise a triable
18 fact as to whether there was a policy of treating "kickout"
19 arrestees in a unconstitutional manner. "Proof of a single incident
20 of unconstitutional activity is not sufficient to impose liability
21 under Monell, unless proof of the incident includes proof that it
22 was caused by an existing, unconstitutional local government]
23 policy, which policy can be attributed to a [local government]
24 policymaker. Meehan v. County of Los Angeles, 856 F.2d 102, 107
25 (9th Cir. Cal. 1988) (quoting City of Oklahoma v. Tuttle, 471 U.S.
26 808 (1985)). Plaintiffs provide no further evidence of an

1 unconstitutional policy with respect to kickout arrestees. Indeed,
2 plaintiffs argue that Officer Mendoza violated county policy that
3 requires inmates to be seen by Correctional Health Staff if booking
4 officers learn that an arrestee is on medication but doesn't have
5 the medication with him.

6 Accordingly, the court finds that the municipal defendants are
7 entitled to summary judgment on Claim 3.

8 **D. Claim Four: Inadequate Training**

9 Plaintiffs' Fourth Claim is for inadequate and reckless
10 training by the municipal defendants. In order to sustain such a
11 claim, plaintiffs would have to demonstrate a triable fact that the
12 "inadequacy of police training. . ." in this case "amounts to
13 deliberate indifference to the rights of persons with whom the
14 police come into contact." City of Canton v. Harris, 489 U.S. 378,
15 388 (1989). Plaintiffs have submitted no evidence of such
16 indifference. Rather, both plaintiffs and defendants have submitted
17 evidence of numerous policies adopted by the city and county with
18 respect to training officers to deal with mental health situations.

19 Accordingly, defendants are entitled to summary judgment on
20 Claim 4.

21 **E. Claim Five: ADA**

22 Plaintiffs allege that the municipal defendants discriminated
23 against Lum on the basis of a disability, and that they failed to
24 accommodate him, in violation of the Americans with Disabilities
25 Act.

26 The Ninth Circuit has held squarely that the ADA applies to

1 local law enforcement and correctional facilities. Lee v. City of
2 Los Angeles, 250 F.3d 668 (9th Cir. 2001). As this court previously
3 noted, "There are two theories generally recognized by courts in
4 applying the ADA in the context of arrests. See Gohier v. Enright,
5 186 F.3d 1216, 1221 (10th Cir. 1999). First, where police wrongly
6 arrested someone with a disability because they misperceived the
7 effects of that disability as criminal activity. *Id.* at 1220.
8 Second, where although police have properly investigated and
9 arrested a person with a disability for a crime unrelated to that
10 disability, they failed to reasonably accommodate the person's
11 disability in the course of investigation or arrest, causing the
12 person to suffer greater injury or indignity in that process than
13 other arrestees. *Id.* at 1220-21 (citing *Gorman*, 152 F.3d at 912-13
14 (holding such claim viable); *Rosen*, 121 F.3d at 157-58 (suggesting
15 in dicta such claim not viable); *Patrice v. Murphy*, 43 F.Supp.2d
16 5 1156 (W.D. Wash. 1999) (holding such claim not viable.))" Order,
17 ECF No. 25. See also Barnes v. Gorman, 536 U.S. 181 (2002)
18 (reversing only the award of punitive damages in an ADA case
19 involving a disabled arrestee injured during transport to jail).

20 Plaintiffs' complaint alleges both theories here.

21 For the same reasons stated above, the court concludes that
22 there is a triable issue as to whether the defendants wrongfully
23 arrested Lum because they perceived the effects of a disability as
24 intoxication. Defendants have submitted evidence indicating that
25 it was reasonable to conclude that Lum was intoxicated, and
26 plaintiffs have submitted counterevidence to the contrary.

1 Accordingly, the court cannot grant summary judgment for defendants
2 as to the first theory of ADA liability.

3 Plaintiff's opposition does not offer any argument or evidence
4 in support of the second theory of liability. Defendants argue that
5 since Lum did not make any request for an accommodation, no
6 obligation to accommodate him was triggered. Defendants cite to
7 employment cases to support this proposition. The court finds no
8 binding case law that requires such a request before the ADA's
9 protections are triggered in the context of correctional
10 facilities. For example, in Pierce v. County of Orange, 526 F.3d
11 1190, 1217 (9th Cir. 2008), the Ninth Circuit held that the
12 district court had erred in denying relief to disable prisoners
13 seeking accommodations, without any mention of a specific
14 pre-litigation request for an accommodation.

15 Moreover, the four elements of an ADA claim in the context of
16 prison accommodations do not include a request for an
17 accommodation. Those elements are: "(1) the plaintiff is an
18 individual with a disability; (2) the plaintiff is otherwise
19 qualified to participate in or receive the benefit of some public
20 entity's services, programs, or activities; (3) the plaintiff was
21 either excluded from participation in or denied the benefits of the
22 public entity's services, programs, or activities, or was otherwise
23 discriminated against by the public entity; and (4) such exclusion,
24 denial of benefits, or discrimination was by reason of the
25 plaintiff's disability." Thompson v. Davis, 295 F.3d 890, 895 (9th
26 Cir. 2002).

1 As defendants' only argument against plaintiffs' second theory
2 of ADA liability is that Lum never requested an accommodation, the
3 court DENIES defendants' request for summary judgment on the ADA
4 claim.

5 **F. Claims Six and Seven: State Claims**

6 Plaintiffs assert a wrongful death claim against all
7 defendants and a false arrest claim against the arresting officers.

8 **i. Immunity**

9 The defendants assert that they are immune from plaintiffs'
10 state law causes of action for wrongful death and false arrest.
11 Defendants argue that two immunities apply in this instant case:
12 Government Code Section 845.8(a), and Government Code 855.8(a).

13 The former of those sections provides: "Neither a public
14 entity nor a public employee is liable for any injury resulting
15 from determining whether to parole or release a prisoner or from
16 determining the terms and conditions of his parole or release or
17 from determining whether to revoke his parole or release." The term
18 "prisoner" includes an individual arrested for intoxication and
19 released without charge. Teter v. City of Newport Beach, 30 Cal.
20 4th 446 (2003). The immunity applies to injuries to the released
21 prisoner. In Ladd v. County of San Mateo, 12 Cal. 4th 913 (1996),
22 the California Supreme Court held that the immunity in Section
23 845.8(b), concerning prisoners attempting to escape, applies to
24 injuries sustained by the escaping prisoner. There, the Court noted
25 that the statute uses broad terms, and that "the reasons for
26 providing immunity for injuries caused by fleeing prisoners apply

1 equally, or with greater force, to self-inflicted injuries." Id.
2 at 919. "The chilling effect upon law enforcement and custodial
3 officers' performance of their duties that would result from the
4 imposition of liability for a public employees' failure to maintain
5 custody over a prisoner is the same whether that liability arises
6 from an injury to a third party or an injury to the escaped or
7 escaping prisoner." Id. The same reasoning applies with respect to
8 Section 845(a), applicable here, and the immunity applies to
9 injuries caused to Lum by those who made the decision to release
10 him.

11 Plaintiffs assert their wrongful death claim against all
12 defendants. The Section 845(a) immunity only applies to decisions
13 to release a prisoner. Here, it may apply to any officer who made
14 the decision to release Lum, and any municipal defendant that may
15 otherwise have Monell liability for that decision. The Section
16 845(a) immunity cannot apply to the arresting officers or to
17 Officer Mendoza, who were uninvolved in the decision to release
18 Lum. Accordingly, only those defendants who were responsible for
19 the decision to release Lum are immune from the wrongful death
20 claim on the basis of Section 845.8(a), and are subject to summary
21 judgment on the basis of that immunity.

22 Government Code 855.8(a) provides: "Neither a public entity
23 nor a public employee acting within the scope of his employment is
24 liable for injury resulting from diagnosing or failing to diagnose
25 that a person is afflicted with mental illness or addiction or from
26 failing to prescribe for mental illness or addiction." Defendants

1 assert that this section shields all defendants from the wrongful
2 death claim.

3 Plaintiffs' claim, however, is not premised on diagnosis or
4 failure to diagnose. Obviously the officers in this case are not
5 physicians and have no training sufficient to diagnose. The crux
6 of this claim is not a failure to diagnose, but rather a failure
7 to arrange for a properly credentialed person to diagnose. As
8 noted in this court's prior order, defendants may still be liable
9 for e.g., failing to obtain medical care for Lum if he was in
10 obvious need of it. Plaintiffs' complaint alleges that defendants'
11 breached a duty of care by "failing to give Decedent a medical or
12 psychiatric evaluation and/or treatment and by deciding to release
13 him alone six miles from home, without money, shoes, a cellular
14 phone, without means of transportation and without means or
15 wherewithal to get home, shelter, or assistance."

16 Curiously, a California court has held that immunity applies
17 when an arresting officer fails to relay information about an
18 arrestee's mental condition to jail personnel. See Johnson v.
19 County of Los Angeles, 143 Cal. App. 3d 298 (Cal. App. 2d Dist.
20 1983) (sheriff's officers' decisions the process of determining
21 whether to medicate a prisoner fall within the immunity established
22 by Section 855.8.) This court is bound by the decisions of the
23 California Supreme Court, Wainwright v. Goode, 464 U.S. 78, 84
24 (U.S. 1983). District courts are not bound by decisions of state
25 intermediate courts, Dimidowich v. Bell & Howell, 803 F.2d 1473
26 (9th Cir. 1986), but they are not free to disregard them in the

1 absence of other "persuasive data." West v. American Tel. & Tel.
2 Co., 311 U.S. 223, 61 S. Ct. 179, 85 L. Ed. 139 (1940). It appears
3 to this court that the plain language of the statute simply does
4 not support the intermediate court opinion. Thus, with respect to
5 the remaining portions of plaintiffs' wrongful death claim,
6 855.8(a) provides no immunity.

7 In their opposition to the motion for summary judgment,
8 plaintiffs attribute Lum's death to Officer Mendoza's failure to
9 provide medical treatment to Lum despite knowing that Lum was
10 bi-polar and that he should have been on medications. Opp'n 26.
11 Officer Mendoza's conduct appears to have violated numerous
12 internal policies with respect to the treatment of arrestees
13 with mental health issues, not to mention common decency. The
14 question, however, is whether those failures resulted in Jeremy
15 Lum's death. The plaintiffs have provided no direct evidence of
16 the immediate circumstances of his death. Thus, the question is
17 whether the totality of the circumstances that are known are
18 sufficient for a reasonable jury to draw an inference of causation.
19 It appears to this court that it is a close question, but one left
20 to a trier of fact, at least in the first instance.

21 **ii. False Arrest**

22 Plaintiffs' claim that the arresting officers arrested Lum
23 without probable cause, in violation of state tort law. For the
24 reasons discussed above, the court finds that there remains a
25 triable issue as to whether it was reasonable for the arresting
26 officers to arrest Lum for public intoxication. Accordingly,

1 defendants motion for summary judgment on this claim is DENIED.

2 **IV. Conclusion**

3 Defendants' Motion for Summary Judgment, ECF No. 71 is GRANTED
4 in part and DENIED in part.

5 [1] On plaintiffs' first claim for relief, summary judgment
6 is DENIED as to the arresting officers. The court will rule
7 on whether summary judgment should be granted as to the
8 municipal defendants after briefing from the parties, ordered
9 by this court on March 2, 2012.

10 [2] On plaintiffs' second claim for relief, summary judgment
11 is DENIED.

12 [3] On plaintiffs' third claim for relief, summary judgment
13 is GRANTED to defendants.

14 [4] On plaintiffs' fourth claim for relief, summary judgment
15 is GRANTED to defendants.

16 [5] On plaintiffs' fifth claim for relief, summary judgment
17 is DENIED.

18 [6] On plaintiffs sixth claim for relief, the court GRANTS
19 summary judgment to defendants who made the decision to
20 release LUM, and DENIES summary judgment to the arresting
21 officers and Officer Mendoza.

22 [7] On plaintiffs seventh claim for relief, the court DENIES
23 summary judgment.

24 IT IS SO ORDERED.

25 DATED: March 22, 2012.

26 
LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT