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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MATTHEW BISCOTTI, CHRISTIAN
BISCOTTI,

Plaintiffs,

v.

CITY OF YUBA CITY, a public
entity, OFFICER DAVID KRAUSE,
OFFICER DAVID SANTANNA, CHIEF
ROBERT D. LANDON,

Defendants.

No. 2:11-cv-01347-JAM-EFB

**ORDER DENYING PLAINTIFFS' MOTION
FOR LEAVE TO FILE A FIRST
AMENDED COMPLAINT AND DISMISSING
CASE**

Presently before the Court is Plaintiffs Matthew Biscotti and Christian Biscotti's ("Plaintiffs") Motion for Leave to File a First Amended Complaint (FAC) (Doc. #51). This case arises out of the fatal shooting of Plaintiffs' mother, Victoria (Matthews) Rogers-Vasselin ("Decedent"), by Yuba City Police Officers on May 20, 2010. Defendants City of Yuba City, Officer David Kraus, Officer David Santanna, and Chief Robert D. Landon ("Defendants") oppose this motion to amend (Doc. #55). Plaintiffs filed a reply brief in support of their motion (Doc. #57) but raised new arguments in this brief. The Court therefore permitted Defendants

1 to file a sur-reply brief (Doc. #61). Having carefully
2 considered the parties' arguments, the Court denies Plaintiffs'
3 motion for the reasons set forth below.¹

4
5 I. PROCEDURAL BACKGROUND

6 Plaintiffs filed this wrongful death lawsuit on May 18,
7 2011. The Complaint alleged the following four claims: (1)
8 violation of the Fourteenth Amendment's due process provision;
9 (2) violation of civil rights (Monell claim); (3) supervisory
10 liability; and (4) negligence. See Compl. On January 13, 2012,
11 the Court issued a Status (Pre-trial Scheduling) Order (PTSO)
12 (Doc. #11) which states: "No further joinder of parties or
13 amendments to pleadings is permitted except with leave of court,
14 good cause having been shown." The PTSO set a discovery
15 completion date of February 27, 2013.

16 On April 3, 2013, Defendants moved for summary judgment on
17 all of Plaintiffs' claims (Doc. #17), and on May 15, 2013, the
18 Court granted summary judgment in Defendants' favor on all claims
19 (Doc. #36). Plaintiffs appealed this decision to the Ninth
20 Circuit. On January 27, 2016, the Ninth Circuit, in an
21 unpublished opinion, affirmed in part and reversed in part this
22 Court's Order granting summary judgment for Defendants (Doc. #46)
23 and remanded only the negligence claim back to this Court for
24 jury trial. The mandate issued on February 23, 2016. (Doc. #47)

25 Nearly three months later, on May 13, 2016, Plaintiffs filed
26

27 ¹ This motion was determined to be suitable for decision without
28 oral argument. E.D. Cal. L.R. 230(g). The hearing was
scheduled for July 19, 2016.

1 this Motion to Amend the Complaint seeking to add a claim under
2 California's Bane Act, a battery claim, and a Fourth Amendment
3 excessive force claim. (Doc. #51) Plaintiffs' proposed amended
4 complaint named an additional defendant, Officer Wolfe, however,
5 in Plaintiffs' reply brief they agree to "withdraw all proposed
6 claims as stated against Officer Wolfe in the proposed First
7 Amended Complaint." Pls.' Reply 2:3-6 (Doc. #57) Plaintiffs'
8 new claims are based on the Decedent's alleged temporary post-
9 shooting survival. Plaintiffs thus seek to shift the primary
10 theory of their case from a wrongful death action to a survivor
11 action. Defendants oppose this motion arguing that Plaintiffs
12 have failed to and cannot demonstrate good cause and that they
13 will be unduly prejudiced if Plaintiffs' motion is granted.

14 15 I. OPINION

16 A. Legal Standard

17 In their motion, Plaintiffs rely on the standard set out in
18 Federal Rule of Civil Procedure ("Rule") 15(a)(2), which
19 provides: "[A] party may amend its pleading only with the
20 opposing party's written consent or the court's leave. The court
21 should freely give leave when justice so requires." Fed. R. Civ.
22 P. 15(a)(2). However, the Court has already issued a PTSO in
23 this matter specifying amendments to the pleadings require a
24 showing of good cause.

25 Although Rule "15(a) liberally allows for amendments to
26 pleadings," Coleman v. Quaker Oats Co., 232 F.3d 1271, 1294 (9th
27 Cir. 2000), this policy does not apply after a district court has
28 issued "a pretrial scheduling order that established a timetable

1 for amending the pleadings, and the deadline ha[s] expired." Id.
2 Rather, parties seeking to amend their pleadings "must show good
3 cause for not having amended their complaints before the time
4 specified in the scheduling order expired." Id. "This standard
5 'primarily considers the diligence of the party seeking the
6 amendment.'" Id. (quoting Johnson v. Mammoth Recreations, Inc.,
7 975 F.2d 604, 609 (9th Cir. 1992)).

8 If good cause exists, parties next must satisfy Rule 15(a).
9 Cf. Johnson, 975 F.2d at 608. As stated, Rule 15(a)(2) makes
10 clear that courts should "freely give leave when justice so
11 requires," Fed. R. Civ. P. 15(a)(2), and the Ninth Circuit has
12 noted that the policy is one "to be applied with extreme
13 liberality," Morongo Band of Mission Indians v. Rose, 893 F.2d
14 1074, 1079 (9th Cir. 1990). In exercising their discretion to
15 permit or deny a party to amend its pleading, Ninth Circuit
16 courts consider five factors: (1) whether the amendment was
17 filed with undue delay; (2) whether the movant has requested the
18 amendment in bad faith or as a dilatory tactic; (3) whether the
19 movant was allowed to make previous amendments which failed to
20 correct deficiencies in the complaint; (4) whether the amendment
21 will unduly prejudice the opposing party; and (5) whether the
22 amendment would be futile. Foman v. Davis, 371 U.S. 178, 182
23 (1962). Whether amendment will unduly prejudice the opposing
24 party is the most important factor in a court's analysis under
25 Rule 15(a). Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d
26 1048, 1052 (9th Cir. 2003).

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1 B. Analysis

2 1. Rule 16

3 In Plaintiffs' opening brief in support of their motion,
4 they completely fail to acknowledge that the proposed amendment
5 is brought after the Court's amendment deadline and is subject to
6 Rule 16's good cause requirement. Recognizing this error (after
7 receiving Defendants' opposition brief), Plaintiffs acknowledge
8 in their reply brief that their request to amend is subject to
9 Rule 16's good cause requirement. Plaintiffs contend that they
10 have satisfied the good cause requirement because "there was
11 insufficient evidence then possessed to state the proposed causes
12 of action in the original [c]omplaint." Reply 2:27-3:1.
13 Plaintiffs further argue that "during the course of litigation,
14 evidence was discovered that ultimately led Plaintiffs and their
15 counsel to conclude that these additional causes of action were
16 in fact meritorious." Id. at 3:2-3. Due to the timing of the
17 discovery of evidence and the summary judgment hearing, "[i]t was
18 only after the matter came back before this Court that Plaintiffs
19 were able to take the next step by filing the present [m]otion."
20 Id. at 3:8-9. Plaintiffs also claim that:

21 [A]fter the Court granted summary judgment and while
22 the appeal was pending, the Ninth Circuit decided
23 Chaudhry v. City of Los Angeles, 751 F.3d 1096, 1103-05
24 (9th Cir. 2014). In that opinion, the Ninth Circuit
25 conclusively determined for the first time that the
26 then existing "prohibition against pre-death pain and
27 suffering damages limits recovery too severely to be
28 consistent with § 1983's deterrence policy." Chaudhry,
at 1105. Federal law had been silent on this point
until this case was decided. Id. at 1103. Therefore,
the proposed cause of action pursuant to § 1983 was not
viable until this decision was handed down during the
pendency of the appeal in this case, further
establishing good cause for allowing amendment.

1 Id. at 3:10-17.

2 In response to these arguments Defendants contend that
3 "Plaintiffs cannot establish that they reasonably and diligently
4 sought leave to amend their complaint." Opp'n 6:3-4. Defendants
5 argue that Plaintiffs' contentions that "they were unaware of the
6 facts and the new proposed causes of action until they conducted
7 discovery, and after the appellate process was complete" "are
8 belied by the contents of their [October 15, 2010] tort claim
9 presented to the City of Yuba City nearly six years ago and the
10 procedural history of this case." Id. at 6:6-7. "Plaintiffs
11 knew of these claims [and] knew of the facts supporting those
12 claims" Id. at 6:8-9. In their sur-reply Defendants
13 also point out that Plaintiffs' reply brief "fails to identify by
14 type, source, or content the new evidence of survival
15 [Plaintiffs] purportedly located at the end of discovery, nor
16 does the reply say why that evidence wasn't earlier found, nor is
17 there a corresponding declaration of counsel." Defs.' Sur-reply
18 2:24-26, ECF No. 61. Finally, in response to Plaintiffs'
19 argument regarding Chaudry, Defendants contend that:

20 [B]efore Chaudry, [P]laintiffs could and did assert
21 § 1983 survival claims in district court -
22 [Plaintiffs'] counsel could have noted the split and
23 attempt[ed] to convince this Court the more liberal
24 view was correct, which is precisely what the estate in
25 Chaudry did. . . . Even if this Court had determined
26 the § 1983 survival claim [was] barred, as occurred in
27 Chaudry when the district court set aside the verdict
28 for the estate, the issue would have been preserved for
29 appeal.

30 Sur-reply 4:15-21.

31 The Court finds Defendants' arguments to be persuasive and
32 legally compelling. The record in this case demonstrates that

1 Plaintiffs have known about the additional claims they now seek
2 to add since 2010 yet they chose not to include such claims in
3 the original complaint. Tactical decisions not to name certain
4 defendants or allege certain claims "do not merit good cause."
5 Carbajal v. Dorn, No. CV09-00283-PHX-DGC, 2010 WL 1489978, at *4
6 (D. Ariz. April 13, 2010); see also In re W. States Wholesale
7 Natural Gas Antitrust Litig., 715 F.3d 716, 737-38 (9th Cir.
8 2013) (upholding district court's denial of motion to amend
9 because the moving parties had been aware of the facts and
10 theories supporting the amendment since the inception of the
11 case). Plaintiffs' counsels' failure to submit a declaration
12 identifying the alleged new evidence obtained in discovery which
13 motivated them to seek to amend their complaint prevents this
14 Court from finding that Plaintiffs have met Rule 16's good cause
15 requirement. See e.g. (Bahamas) Ltd. v. Hempel, A/S, 2008 WL
16 205267, at *2 (N.D. Cal. 2008) (denying under Rule 16 motion for
17 leave to amend answer where motion unsupported by evidence for
18 its assertions). As Defendants argue, the record in this case
19 belies the existence of such new evidence.

20 As to Plaintiffs' change in case-law contention, in
21 Chaudhry, the Ninth Circuit considered whether California's
22 denial of "pre-death pain and suffering damages is inconsistent
23 with § 1983 in cases where an alleged violation of federal law
24 caused the victims death." 751 F.3d at 1103. The Ninth Circuit
25 noted that the Eastern District had in the past found that the
26 law was consistent and thus acted as a prohibition on the
27 recovery of pre-death pain and suffering damages. Id. (citing
28 Venerable v. City of Sacramento, 185 F. Supp. 2d 1128, 1132-33

1 (E.D. Cal. 2002)). The Ninth Circuit panel reasoned that “[t]he
2 practical effect of [the California provision] is to reduce, and
3 often to eliminate, compensatory damage awards for the survivors
4 of people killed by violations of federal law.” Id. at 1104.

5 The Ninth Circuit thus held that “California’s prohibition
6 against pre-death pain and suffering damages limits recovery too
7 severely to be consistent with § 1983’s deterrence policy[, and]
8 therefore does not apply to § 1983 claims where the decedent’s
9 death was caused by the violation of federal law.” Id. at 1105.

10 Chaudhry was decided while Plaintiffs’ appeal was pending.

11 The Chaudhry decision strengthened the viability of a
12 survival action for pain and suffering resulting from a Fourth
13 Amendment violation. However, prior to Chaudhry, there was no
14 binding authority preventing Plaintiffs from requesting pre-death
15 pain and suffering damages for Fourth Amendment violations.
16 While Venerable, 185 F. Supp. 2d at 1132-33, held that such
17 damages were not recoverable, district courts are not bound by
18 other district court decisions. Further the Northern District of
19 California had previously held that such damages were
20 recoverable. Guyton v. Phillips, 532 F. Supp. 1154, 1166-67
21 (N.D. Cal. 1981) rev’d of on other grounds Peraza v. Delameter,
22 722 F.2d 1455 (9th Cir. 1984). Thus, Plaintiffs could have
23 brought the claims they now seek to add and raised the argument
24 that the Court should permit such damages. Instead, Plaintiffs
25 made a tactical decision not to bring a Fourth Amendment survivor
26 claim seeking pre-death pain and suffering damages, and as a
27 substitute framed the case as a wrongful death case focusing on
28 loss of companionship. As stated above, tactical decisions do

1 not warrant good cause. See Carbajal, 2010 WL 1489978, at *4; In
2 re W. States Wholesale Natural Gas Antitrust Litig., 715 F.3d at
3 737-38. Plaintiffs are thus denied leave to amend for failure to
4 meet Rule 16's good cause requirement and the Court need not
5 reach the Rule 15 issues raised by this motion to amend.

6 2. Supplemental Jurisdiction

7 The claims over which this Court had original jurisdiction,
8 Plaintiffs' § 1983 claims, have been summarily adjudicated in
9 Defendants favor. The only remaining matter before this Court,
10 Plaintiffs' negligence claim, is a state law claim.

11 The Court therefore considers *sua sponte* whether to continue
12 exercising supplemental jurisdiction over the remaining state law
13 negligence claim. See Acri v. Varian Assocs., Inc., 114 F.3d
14 999, 1001 n.3 (9th Cir.1997) (suggesting that a district court
15 may decide *sua sponte* whether to continue exercising supplemental
16 jurisdiction under 28 U.S.C. § 1367(c)(3) once all federal law
17 claims have been dismissed); Retail Prop. Trust v. United Bhd. of
18 Carpenters & Joiners of Am., 768 F.3d 938, 962 (9th Cir. 2014)
19 ("In as much as only state claims remain, the district court may
20 decide whether to continue to exercise supplemental jurisdiction
21 over the state claims or send them back to state court, as
22 appropriate.").

23 Under 28 U.S.C. § 1367(c)(3), a district court "may decline
24 to exercise supplemental jurisdiction over a [state] claim"
25 following dismissal of "all claims over which it has original
26 jurisdiction" The decision whether to decline exercising
27 supplemental jurisdiction under 28 U.S.C. § 1367(c)(3) should be
28 informed by the values of economy, convenience, fairness, and

1 comity as delineated by the Supreme Court in United Mine Workers
2 of America v. Gibbs, 383 U.S. 715, 726 (1996). “The Supreme
3 Court has stated, and [the Ninth Circuit has] often repeated,
4 that in the usual case in which all federal-law claims are
5 eliminated before trial, the balance of factors . . . will point
6 toward declining to exercise jurisdiction over the remaining
7 state-law claims.” See Acri, 114 F.3d at 1001 (quotation marks
8 and citation omitted); Curriel v. Barclays Capital Real Estate
9 Inc., No. S-09-3074 FCD/KJM, 2010 WL 729499, at *1 (E.D. Cal.
10 2010) (stating “primary responsibility for developing and
11 applying state law rests with the state courts” and declining to
12 exercise supplemental jurisdiction after dismissal of the federal
13 claims).

14 The Court finds judicial economy would not be promoted by
15 continuing to exercise supplemental jurisdiction over the
16 negligence claim. See Otto v. Heckler, 802 F.2d 337, 338 (9th
17 Cir.1986) (stating that “[t]he district court, of course, has the
18 discretion to determine whether its investment of judicial energy
19 justifies retention of jurisdiction”). Furthermore, the Court
20 finds no compelling convenience or fairness factors weigh in
21 favor of exercising supplemental jurisdiction. The Court
22 therefore declines to continue exercising supplemental
23 jurisdiction over the remaining state claim under 28 U.S.C. §
24 1367(c)(3), and this matter is dismissed without prejudice.

25 26 II. ORDER

27 For the reasons set forth above, the Court DENIES
28 Plaintiff’s Motion for Leave to File a FAC. The Court declines

1 to exercise supplemental jurisdiction over Plaintiffs' remaining
2 negligence claim and the case is dismissed without prejudice.

3 IT IS SO ORDERED.

4 Dated: July 29, 2016

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6 JOHN A. MENDEZ,
7 UNITED STATES DISTRICT JUDGE
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