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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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GUILLERMO BONILLA-CHIRINOS
and SANDRA HERNANDEZ,
individually and as guardians
ad litem of J.B., a minor,

Plaintiffs,

v.

CITY OF WEST SACRAMENTO and
police officers KENNETH
FELLOWS, MICHELLE TATE,
ANTHONY HERRERA, THOMAS
MAGGIANO, JENNIFER GRILLAT,
ERIC ANGLE, MATTHEW LUIZ, and
DAVID STALLIONS, in their
individual and official
capacities,

Defendants.

Civ. No. 2:15-2564 WBS EFB

MEMORANDUM AND ORDER RE: MOTION
FOR SUMMARY JUDGMENT

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Plaintiffs Guillermo Bonilla-Chirinos and Sandra
Hernandez, individually and on behalf of their son J.B., brought
this action against defendants the City of West Sacramento ("the
City") and several West Sacramento police officers alleging,

1 among other things, that defendants used excessive force in
2 arresting them and violated their Fourteenth Amendment right to
3 familial association. After the court's Order of July 26, 2017
4 ("Summ. J. Order" (Docket No. 40)), which granted summary
5 judgment in whole or in part as to several claims and defendants,
6 the only claims remaining are plaintiffs' excessive force claims
7 against Kenneth Fellows, Michelle Tate, and Anthony Herrera, and
8 plaintiffs' Fourteenth Amendment familial association claims
9 against Tate and Thomas Maggiano. Before the court is
10 defendants' second Motion for summary judgment filed November 28,
11 2017, which seeks dismissal of plaintiffs' familial association
12 claim. (Docket No. 57.)

13 Notwithstanding any prior characterizations of
14 plaintiffs' familial association claim, plaintiffs now represent
15 that this claim is asserted by all three plaintiffs and is based
16 on (1) Maggiano's threat to Hernandez during the arrest to call
17 Child Protective Services ("CPS") to have J.B. taken away if
18 Hernandez did not cooperate; (2) Maggiano's and Tate's refusal of
19 Hernandez's requests to be allowed to call a family member to
20 pick up J.B., in violation of department policy and state law;
21 (3) Fellows' failure to enforce this policy; and (4) the failure
22 of Fellows, Maggiano, and Tate to follow department policy
23 requiring the arrest of Bonilla-Chirinos and Hernandez outside
24 the presence of J.B. to minimize the trauma of a child seeing his
25 parents arrested. The court will address these claims below.

26 I. Claim Against Fellows

27 The court previously granted summary judgment to
28 Fellows and certain other defendants on the familial association

1 claim because "plaintiffs conceded at oral argument [on July 24,
2 2017] that there is no evidence currently before the court
3 supporting the liability of those defendants for deprivation of
4 parental rights." (Summ. J. Order 16.) Plaintiffs did not seek
5 reconsideration of this order, and only sought to reassert their
6 familial association claim against Fellows after several months.
7 Although plaintiffs attempt to present new theories under which
8 they seek to hold Fellows liable on their familial association
9 claim, they cannot reassert a cause of action after that cause of
10 action was dismissed on summary judgment. Thus, the court will
11 not revisit its prior decision dismissing the familial
12 association claim as to Fellows.

13 II. Maggiano's Threat to Hernandez

14 While it is conceivable that a threat to call CPS
15 during an arrest might form the basis of a tort under state law,
16 plaintiffs have not explained how such a threat violates either
17 the child's or the parents' Fourteenth Amendment rights to
18 familial association under clearly established law. Verbal
19 harassment, verbal abuse, or threats are generally insufficient
20 to state a constitutional deprivation under § 1983. See, e.g.,
21 Oltarzewski v. Ruggiero, 830 F.2d 136, 139 (9th Cir. 1987); Gaut
22 v. Sunn, 810 F.2d 923, 925 (9th Cir. 1987); Martin v. Sargent,
23 780 F.2d 1334, 1338 (8th Cir. 1985); McFadden v. Lucas, 713 F.2d
24 143, 146 (5th Cir. 1983).

25 Plaintiffs cite no authority holding, and the court is
26 unaware of any, that this rule does not apply in the context of a
27 Fourteenth Amendment familial association claim, even though
28 plaintiffs' claim relates tangentially to the parents' right to

1 make decisions concerning J.B.'s care, custody, or control.
2 Moreover, given the lack of authority stating a plaintiff has a
3 right under the Fourteenth Amendment to be free from threats with
4 respect to familial association, any such right was not clearly
5 established at the time the threat was made, and qualified
6 immunity applies. See, e.g., Cousins v. Lockyer, 568 F.3d 1063,
7 1069-70 (9th Cir. 2009) ("Qualified immunity protects government
8 officials from civil liability if their conduct does not violate
9 clearly established statutory or constitutional rights of which a
10 reasonable person would have known.") (citation and internal
11 punctuation omitted). Thus, the court will grant summary
12 judgment to defendants on the familial association claim to the
13 extent it is based on Maggiano's threat to call CPS if Hernandez
14 did not cooperate during the arrest.¹

15 III. Denial of Hernandez's Requests to Call Family Member

16 The court previously denied summary judgment for
17 Maggiano and Tate on the familial association claim, finding that
18 Tate's and Maggiano's alleged refusal to allow Hernandez to call
19 a relative to pick up J.B. from the residence during the arrest
20 raised a triable issue as to whether Tate and Maggiano unlawfully
21 deprived Bonilla-Chirinos and Hernandez of their Fourteenth
22 Amendment right to the care, custody, and control of J.B.² The

23 ¹ Moreover, it is unclear how Tate could be liable for
24 Maggiano's alleged threat, and the court will grant summary
25 judgment for Tate on plaintiffs' familial association claim to
26 the extent it is based on Maggiano's threat on this alternate
basis.

27 ² It is undisputed that J.B. and Hernandez were taken
28 together in Fellow's police car and transported to the West
Sacramento Police Department. At the Department, a social worker

1 court further explained that there was no evidence of imminent
2 danger or due process that would appear to justify denial of that
3 request, and that the right to care, custody, and control of
4 one's child was clearly established before 2013. (Summ. J. Order
5 14-16 (citing, inter alia, Ram v. Rubin, 118 F.3d 1306, 1310 (9th
6 Cir. 1997); Bhatti v. Cty. of Sacramento, 281 F. App'x 764, 766
7 (9th Cir. 2008) (holding that "no objective social worker could
8 have believed" that depriving a parent custody and control of his
9 son without emergency or due process was lawful, even though the
10 son remained in the presence of the mother, and even though the
11 father was accused of abuse).)

12 Plaintiffs now add the additional contention that
13 failure to allow Hernandez to make a telephone call to arrange
14 for someone to pick up J.B. violated department policy and state
15 law. Specifically, plaintiffs contend that Tate's and Maggiano's
16 alleged refusal to allow Hernandez her requested phone call
17 violated California Penal Code § 851.5(c), which provides that:

18 As soon as practicable upon being arrested but,
19 except where physically impossible, no later than
20 three hours after arrest, the arresting or
21 booking officer shall inquire as to whether the
22 arrested person is a custodial parent with
23 responsibility for a minor child. The arresting
or booking officer shall notify the arrested
person who is a custodial parent with
responsibility for a minor child that he or she
is entitled to, and may request to, make two

24 met with Hernandez and J.B., and Hernandez gave the social worker
25 the names and contact information for three relatives that lived
26 nearby, so that J.B. could be placed with someone while Hernandez
and Bonilla-Chirinos were in custody. The social worker was
eventually able to reach J.B.'s uncle via telephone, and after
27 performing a background check, the social worker transported J.B.
to his uncle's home. J.B. was then returned to the custody of
28 Hernandez and Bonilla-Chirinos after their release from jail.

1 additional telephone calls at no expense if the
2 telephone calls are completed to telephone
3 numbers within the local calling area, or at his
4 or her own expense if outside the local calling
5 area, to a relative or other person for the
6 purpose of arranging for the care of the minor
7 child or children in the parent's absence.

8 Cal. Penal Code § 851.5(c).

9 For the reasons set forth in this court's Order of July
10 26, 2017, summary judgment for Maggiano and Tate on the familial
11 association claim to the extent it is based on Maggiano's and
12 Tate's refusal to allow Hernandez to make a phone call at the
13 scene of the arrest to have someone pick up J.B. will be denied.

14 IV. Arrest of Bonilla-Chirinos and Hernandez in J.B.'s Presence

15 Plaintiffs' last basis for their familial association
16 claim is that Maggiano and Tate violated department policy by
17 arresting J.B.'s parents in his presence, causing J.B. trauma due
18 to his witnessing of the arrest. However, even assuming this
19 theory was properly pled in the Amended Complaint or properly
20 disclosed in the course of this litigation, it is unclear how
21 arresting parents in the presence of a child violates either the
22 child's or the parents' Fourteenth Amendment right of familial
23 association, much less that such right was clearly established at
24 the time of the arrest. See, e.g., Cousins, 568 F.3d at 1070
25 (violation of state departmental regulations do not establish a
26 federal constitutional violation). Accordingly, the court will
27 grant summary judgment to defendants on the familial association
28 claim to the extent it is based on the arrest of Bonilla-Chirinos
and Hernandez in J.B.'s presence.

IT IS THEREFORE ORDERED that defendants' Motion for
summary judgment (Docket No. 57) be, and the same hereby is,

1 GRANTED IN PART. Summary judgment is GRANTED in favor of
2 defendants Tate and Maggiano on plaintiffs' fifth cause of action
3 to the extent the cause of action is based on Maggiano's alleged
4 threat to Hernandez and the arrest of Bonilla-Chirinos and
5 Hernandez in J.B.'s presence. Summary judgment is DENIED on
6 plaintiffs' fifth cause of action to the extent the cause of
7 action is based on Tate's and Maggiano's denial of Hernandez's
8 request to make a phone call to arrange for someone to pick up
9 J.B. at the scene of the arrest.

10 Dated: January 12, 2018



11 WILLIAM B. SHUBB
12 UNITED STATES DISTRICT JUDGE
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