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6 **UNITED STATES DISTRICT COURT**
7 **SOUTHERN DISTRICT OF CALIFORNIA**
8

9 MAYRA PAREDES NINO,
10 Individually and as Wife of Decedent
11 Jose Alfredo Yanez Reyes; JY and RY,
12 Minors by MAYRA
13 PAREDES NINO, their Guardian ad
14 Litem.

15 Plaintiffs,

16 vs.

17 UNITED STATES OF AMERICA,
18 and DOES 1 through 25, inclusive,

19 Defendants.

CASE NO. 13cv0469 WQH
(BGS)

ORDER

20 HAYES, Judge:

21 The matter before the Court is the Motion to Dismiss Plaintiffs' Second Amended
22 Complaint (ECF No. 43) filed by Defendant United States of America.

23 **I. Background**

24 On February 27, 2013, Plaintiffs Mayra Paredes Nino ("Nino"), individually and
25 as wife of Decedent Jose Alfredo Yanez Reyes ("Yanez"); and JY and RY, minors by
26 Plaintiff Nino, their Guardian *ad Litem*, initiated this action by filing the Complaint.
27 (ECF No. 1). On April 14, 2014, Plaintiffs filed the Second Amended Complaint
28 ("SAC"), which is the operative pleading in this case. (ECF No. 33). The SAC names
the United States as a Defendant and asserts the following claims for relief: (1) violation
of the law of nations under the Alien Tort Statute ("ATS"); (2) wrongful death under
the Federal Tort Claims Act ("FTCA") and California Code of Civil Procedure section

1 377.60-62; and (3) emotional distress under the FTCA and California Common Law.
2 On April 28, 2014, Defendant United States filed a motion to dismiss the SAC pursuant
3 to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). (ECF No. 34).

4 On October 6, 2014, the Court issued an Order granting in part and denying in
5 part Defendant's motion to dismiss. (ECF No. 37). The Court dismissed Plaintiffs'
6 violation of the law of nations claim and Plaintiffs' requests for injunctive relief,
7 declaratory relief, and attorneys' fees. The Court denied Defendant's motion to the
8 extent Defendant sought dismissal for lack of subject matter jurisdiction based on the
9 Federal Tort Claims Act's ("FTCA") foreign country exception.¹ The Court found that
10 the foreign country exception contentions had "not been properly raised in the present
11 motion to dismiss" and that Defendant "raises no contentions specific to the SAC, the
12 operative pleading." *Id.* at 14.

13 On December 16, 2014, Defendant filed the Motion to Dismiss Plaintiffs' Second
14 Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1). (ECF No.
15 43). On January 3, 2015, Plaintiffs filed an opposition, wherein Plaintiffs requested a
16 continuance and opportunity to counter evidence submitted by Defendant. (ECF No.
17 44). On January 11, 2015, Defendants filed a reply. (ECF No. 46).

18 On January 16, 2015, the Court issued an Order, allowing Plaintiffs' to file an
19 opposition with supporting evidence. (ECF No. 47). On February 2, 2015, Plaintiffs
20 filed a supplemental opposition. (ECF No. 48). On February 9, 2015, Defendant filed
21 a reply with evidence (ECF No. 49), accompanied by a request to submit evidence with
22 the reply brief (ECF No. 50). On February 27, 2015, the Court heard oral argument on
23 the Motion to Dismiss Plaintiffs' Second Amended Complaint. (ECF No. 52).

24 On March 6, 2015, the Court issued an Order granting in part and denying in part
25 the Motion to Dismiss Plaintiffs' Second Amended Complaint. (ECF No. 53). The
26 Court denied Defendant's motion to the extent Defendant sought dismissal of Plaintiff

27
28 ¹ The FTCA's foreign country exception provides: "The provisions of this chapter and section 1346(b) of this title shall not apply to ... [a]ny claim arising in a foreign country." 28 U.S.C. § 2680(k).

1 Nino’s claims as an individual or guardian *at litem* to Plaintiffs JY and RY. The Court
2 dismissed the SAC to the extent Plaintiff Nino asserted claims as legal wife of Yanez.
3 The Court granted Plaintiffs thirty days to file a motion for leave to amend the SAC.
4 The docket reflects that Plaintiffs have not filed a motion for leave to amend the SAC
5 to date.

6 The Court deferred ruling on issues related to the foreign country exception. The
7 Court granted the parties ninety days of jurisdictional discovery “in order to address
8 factual issues relevant to jurisdiction in light of the foreign country exception to the
9 FTCA.” *Id.* at 9. The Court requested that jurisdictional discovery be followed by
10 supplemental briefing on the following issues: (1) application of the foreign country
11 exception in this case; (2) whether the jurisdictional issues related to the foreign country
12 exception are intertwined with factual issues going to the merits; (3) what standard
13 applies if the facts are intertwined; and (4) what standard applies if the facts are not
14 intertwined.

15 On June 22, 2015, Defendant filed a supplemental brief in support of the motion
16 to dismiss. (ECF No. 54). On July 14, 2015, Plaintiffs filed a response to Defendant’s
17 supplemental brief. (ECF No. 56). On July 30, 2015, Defendant filed a reply in support
18 of its supplemental brief. (ECF No. 60).

19 **II. Allegations of the SAC**

20 At dusk on June 21, 2011, Yanez and Jose Ibarra-Murrieta (“Murrieta”) crossed
21 the border from Mexico to the United States together. (ECF No. 33 at 4). Yanez and
22 Murrieta entered the United States through a hole in the primary border fence abutting
23 Mexico, and “emerged into a dried-out concrete culvert between the primary border
24 fence (the corrugated solid metal fence closest to Mexico) and the secondary border
25 fence (the high-tech chain link fence closest to the United States). The culvert runs
26 north from the primary fence to Stuart’s Bridge, which abuts the secondary fence.” *Id.*

27 Murrieta led the pair and traversed the length of the culvert and climbed out at
28 Stuart’s Bridge. *Id.* at 5. Murrieta encountered Agent Nelson at Stuart’s Bridge. *Id.*

1 “Murrieta leapt back into the culvert and began scaling a pole up the side of Stuart’s
2 Bridge.” *Id.* “Agent Nelson, who had chased Murrieta into the culvert, yelled to Agent
3 Diaz, who was already at the top of Stuart’s Bridge, to cut off Murrieta’s escape.” *Id.*

4 Yanez, who had stayed in the culvert, escaped back into Mexico through the hole
5 in the primary border fence. Murrieta “evaded Agent Nelson and ran south toward the
6 primary fence where Yanez had just escaped.” *Id.* Agent Nelson caught Murrieta in
7 the culvert near the primary border fence. Murrieta and Agent Nelson “grappl[ed] for
8 a short time.” *Id.* Murrieta escaped Agent Nelson’s hold and in attempting to evade
9 Agent Nelson, Murrieta tripped and fell to the ground. “Murrieta and Agent Nelson
10 began grappling again in the dirt road, and Agent Nelson swept Murrieta’s legs and
11 wrestled him to the ground.” *Id.* “Meanwhile, Yanez climbed into a tree that leaned
12 against the southern side of the primary fence near where Agent Nelson and Murrieta
13 were grappling ... Yanez was over United States Territory as he was peering over the
14 fence to observe those events.” *Id.* at 5-6.

15 From this point forward, the FAC recounts both the Agents’ and Murrieta’s
16 versions of the events. “The Agents assert that during Nelson’s struggle with Murrieta,
17 Yanez threw two rocks (per Agent Nelson) or one or possibly two rocks (per Agent
18 Diaz) at Agent Nelson.” *Id.* at 6. Agents Nelson and Diaz “assert that while Agent
19 Nelson and Murrieta struggled on the ground, Yanez threw a nail-studded board that
20 struck Agent Nelson in the head, glancing off his hat.” *Id.* “According to Agent
21 Nelson, at about the time that Yanez allegedly threw the board, Diaz arrived to help
22 subdue Murrieta. Agent Diaz allegedly told Yanez to get off the fence, and then began
23 helping Agent Nelson get control of Murietta.” *Id.*

24 Agent Nelson acknowledges that then, without any warning and any
25 further alleged throwing of a rock or a board by Yanez, Agent Nelson
26 pulled away from the scuffle with Murrieta. Agent Diaz removed his
27 sidearm from its holster, uttered not a single additional word, and shot
28 Yanez in the head ... Yanez fell out of the tree, dead or dying, on the
southern side of the primary fence, but at any event ... always within
United States Territory.

Id.

1 Murrieta’s account “differs markedly from those of the Agents.” *Id.* at 7.

2 Murrieta asserts that Yanez never through [sic] anything at Nelson or
3 anyone else. Indeed, the shape and height of the tree, the height of the
4 primary border fence, and the distance of the tree and the fence from
Agent Nelson made it impossible for Yanez (or any person) to throw rocks
or wood at the agent with lethal force or accuracy.

5 *Id.* “Instead, both Agent Nelson and Agent Diaz had Murrieta down on the ground and
6 were beating him.” *Id.* at 8. “In an effort to stop the attack, Yanez yelled that he was
7 going to use his cellphone to take video and pictures of the beating.” *Id.* “Upon
8 hearing Yanez’s threat to record the Agents’ attack on Murietta, Agent Diaz stopped
9 beating Murietta, stood up, and, without warning or provocation, shot Yanez in the
10 head.” *Id.*

11 “Although Yanez was shot while a portion of his body was located on the
12 southern side of the primary fence, his entire body was well within United States’
13 territory when he was killed. The international boundary passes just a few feet south
14 of where Yanez was located when the fatal bullet struck him; the primary fence and the
15 tree in which Yanez was standing were located just north of the international
16 boundary.” *Id.* at 29. “Yanez’ wife was pregnant with their second child and witnessed
17 the event from a very close distance while she was against the border fence near her
18 husband. She was holding her eldest son, who also witnessed the shooting.” *Id.* at 28.
19 “Plaintiff Mayra and her children were also within the United States boundary at the
20 time that Yanez were [sic] killed. They witnessed the horrific scene while standing upon
21 ‘U.S. Soil’.” *Id.* at 29.

22 **III. Discussion**

23 Defendant moves to dismiss this action pursuant to Federal Rule of Civil
24 Procedure 12(b)(1) on the ground that Plaintiffs’ claims arise in Mexico and the foreign
25 country exception bars Plaintiffs’ claims. Defendant contends that Plaintiffs’ “wrongful
26 death claims” are barred by the foreign country exception because Yanez died on
27 Mexican soil. (ECF No. 43-1 at 10). Defendant contends that “any claims by Plaintiffs
28 under a bystander theory” are barred by the foreign country exception because Plaintiffs

1 did not witness Yanez’s death while standing on United States soil. *Id.* at 13. Plaintiffs
2 contend that Yanez was killed on American soil and assert that they witnessed Yanez’s
3 death from American soil.

4 **A. 12(b)(1) Standard**

5 Rule 12(b)(1) of the Federal Rules of Civil Procedure allows a defendant to move
6 for dismissal on grounds that the court lacks jurisdiction over the subject matter. Fed.
7 R. Civ. P. 12(b)(1). The burden is on the plaintiff to establish that the court has subject
8 matter jurisdiction over an action. *Assoc. of Med. Colls. v. United States*, 217 F.3d 770,
9 778-779 (9th Cir. 2000).

10 “A Rule 12(b)(1) jurisdictional attack may be facial or factual. In a facial attack,
11 the challenger asserts that the allegations contained in a complaint are insufficient on
12 their face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger
13 disputes the truth of the allegations that, by themselves, would otherwise invoke federal
14 jurisdiction.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In
15 a factual attack, “[o]nce the moving party has converted the motion to dismiss into a
16 factual motion by presenting affidavits or other evidence properly brought before the
17 court, the party opposing the motion must furnish affidavits or other evidence necessary
18 to satisfy its burden of establishing subject matter jurisdiction.” *Savage v. Glendale*
19 *Union High Sch.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003); *see also Commodity Trend*
20 *Serv., Inc. v. Commodity Futures Trading Comm’n*, 149 F.3d 679, 686 (7th Cir. 1998)
21 (“The presumption of correctness that we accord to a complaint’s allegations falls away
22 on the jurisdictional issue once a defendant proffers evidence that calls the court’s
23 jurisdiction into question. At that point, a court need not close its eyes to demonstrated
24 jurisdictional deficiencies in a plaintiff’s case and accord a plaintiff’s unproven
25 allegations greater weight than substantive evidence to the contrary.”).

26 “[I]f a plaintiff’s proof (of jurisdictional facts) is limited to written materials, it
27 is necessary only for these materials to demonstrate facts which support a finding of
28 jurisdiction in order to avoid a motion to dismiss.” *Societe de Conditionnement en*

1 *Aluminium v. Hunter Eng'g Co., Inc.*, 655 F.2d 938, 942 (9th Cir. 1981) (quoting *Data*
2 *Disc, Inc. v. Systems Tech. Assocs., Inc.*, 557 F.3d 1280, 1285 (9th Cir. 1977)).² The
3 Ninth Circuit has described this standard as equivalent to the summary judgment
4 standard. *See Trentacosta v. Frontier Pac. Aircraft Indus., Inc.*, 813 F.2d 1553, 1559
5 (9th Cir. 1987) (“The requirement that the nonmoving party present evidence outside
6 his pleadings in opposition to a motion to dismiss for lack of subject matter jurisdiction
7 is the same as that required under Rule 56(e) that the nonmoving party to a motion for
8 summary judgment must set forth specific facts, beyond his pleadings, to show that a
9 genuine issue of material fact exists.”) (citations omitted). Generally, a court has
10 discretion to resolve factual disputes on a factual motion to dismiss for lack of subject
11 matter jurisdiction. *See St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989)
12 (“The district court obviously does not abuse its discretion by looking to this extra-
13 pleading material in deciding the issue, even if it becomes necessary to resolve factual
14 disputes.”).

15 However, where factual jurisdictional issues are intertwined with factual
16 questions going to the merits, a court may not decide those factual issues on a Rule
17 12(b)(1) motion. *See Sun Valley Gasoline, Inc. v. Ernst Enters., Inc.*, 711 F.2d 138,
18 140-41 (9th Cir. 1983) (holding that the district court erred in making a factual finding
19 and dismissing a claim under Rule 12(b)(1), where the factual jurisdictional issue was
20 intertwined with the merits). “The question of jurisdiction and the merits of an action
21 are intertwined where ‘a statute provides the basis for both the subject matter
22 jurisdiction of the federal court and the plaintiff's substantive claim for relief.’” *Safe*
23 *Air for Everyone*, 373 F.3d at 1039 (citation omitted). Jurisdiction and the merits are
24 also intertwined where the factual jurisdictional issue goes to an element of the

26 ² *Data Disc* established the standard for factual Rule 12(b)(2) motions to dismiss
27 for lack of personal jurisdiction. In *Data Disc*, the Court of Appeals further held that
28 a district judge need not weigh conflicting affidavits on a 12(b)(2) motion because “the
district judge [generally] has no basis for a determination of credibility.” *Data Disc*,
557 F.3d at 1284. *Hunter Engineering* extended this standard to factual Rule 12(b)(1)
motions.

1 plaintiff's claim. *See Leite v. Crane Co.*, 749 F.3d 1117, 1122 (9th Cir. 2014) (“The
2 caveat is that a court must leave to resolution of material factual disputes to the trier of
3 fact when the issue of subject-matter jurisdiction is intertwined *with an element* of the
4 merits of the plaintiff's claim.”) (emphasis added).

5 **B. Wrongful Death Claim**

6 **i. The Relevant Injury**

7 Defendant contends that Plaintiffs' wrongful death claim is barred by the foreign
8 country exception because Yanez died in Mexico.

9 Plaintiffs contend that Yanez died in the United States. Plaintiffs further contend
10 that the foreign country exception does not apply because the negligent hiring,
11 supervision, and training that caused Yanez's death occurred in the United States.

12 “Section 1346(b) grants the federal district courts jurisdiction over a certain
13 category of claims for which the United States has waived its sovereign immunity and
14 “rendere[ed]” itself liable.” *F.D.I.C. v. Meyer*, 510 U.S. 471, 477 (1994) (citing
15 *Richards v. United States*, 369 U.S. 1, 6 (1962)). “The United States shall be liable,
16 respecting the provisions of this title relating to tort claims, in the same manner and to
17 the same extent as a private individual under like circumstances, but shall not be liable
18 for interest prior to judgment for punitive damages.” 28 U.S.C. § 2674. “The
19 provisions of this chapter and section 1346(b) of this title shall not apply to ... [a]ny
20 claim arising in a foreign country.” 28 U.S.C. § 2680(k). “[T]he FTCA's foreign
21 country exception bars all claims based on any injury suffered in a foreign country,
22 regardless of where the tortious act or omission occurred.” *Sosa v. Alvarez-Machain*,
23 542 U.S. 692, 712 (2004).

24 Plaintiffs' second claim is based on California Code of Civil Procedure section
25 377.60, which provides:

26 A cause of action for the death of a person caused by the wrongful act or
27 neglect of another may be asserted by any of the following persons or by
28 the decedent's personal representative on their behalf: (a) The decedent's
surviving spouse, domestic partner, children, and issue of deceased
children, or, if there is no surviving issue of the decedent, the persons,
including the surviving spouse or domestic partner, who would be entitled

1 to the property of the decedent by intestate succession.
2 Cal. Code Civ. Proc. § 377.60(a). “Unlike some jurisdictions wherein wrongful death
3 actions are derivative, Code of Civil Procedure section 377.60 ‘creates a new cause of
4 action in favor of the heirs as beneficiaries, based upon their own independent
5 pecuniary injury suffered by *loss of a relative*, and distinct from any the deceased might
6 have maintained had he survived.’” *Horwich v. Superior Court*, 21 Cal. 4th 272, 283
7 (1999) (emphasis added) (citation omitted). The Court concludes that the relevant
8 injury for the purposes of the foreign country exception is the location of Yanez at the
9 time of his death.

10 The location of Yanez at the time of his death is not an element of Plaintiffs’
11 underlying wrongful death claim. The resolution of this factual issue does not require
12 the Court to determine facts related to whether Yanez’s death was wrongfully caused
13 by an agent of the United States. *See Leite*, 749 F.3d at 1122. After reviewing the
14 submissions of the parties and their supporting evidence, the Court concludes that the
15 location of Yanez at the time of his death is not intertwined with the merits of Plaintiffs’
16 wrongful death claim. The Court therefore has discretion to make factual findings with
17 respect to the location of Yanez at the moment of his death. *See Kingman Reef Atoll*
18 *Invs., L.L.C. v. United States*, 541 F.3d 1189, 1196-97 (9th Cir. 2008) (“In general, a
19 district court is *permitted* to resolve disputed factual issues bearing upon subject matter
20 jurisdiction in the context of a Rule 12(b)(1) motion unless ‘the jurisdictional issue and
21 the substantive issues are so intermeshed that the question of jurisdiction is dependent
22 on decision of the merits.’”) (emphasis added) (quoting *Thornhill Publ’g Co. v. Gen.*
23 *Tel. & Elecs. Corp.*, 594 F.2d 730, 735 (9th Cir. 1979)).

24 **ii. Analysis**

25 Defendant contends that Yanez did not die immediately after being shot in the
26 tree abutting the United States-Mexico primary border fence. Defendant contends that
27 “the amount of time it would have taken for his heart to stop beating and all his vital
28 signs to fully extinguish certainly exceeded the second or two it took for him to fall

1 from the tree or fence to his ultimate resting place on the ground[,]” and “the majority
2 of his body was in Mexico upon death.” (ECF No. 43-1 at 10). Defendant submits
3 numerous exhibits and declarations in support of its position. First, Defendant submits
4 a series of five photographs, one purporting to show Yanez’s body lying on the south
5 side of the United States-Mexico primary border fence and four purporting to show the
6 area on the south side of the United States-Mexico primary border fence after Yanez’s
7 body was removed.³ Second, Defendant submits Administrative Tort Claims that were
8 submitted in relation to this case and *Perez v. United States*, Southern District of
9 California Case Number 13-cv-1417. One Administrative Tort Claim states that “Mr.
10 Yanez fell back into Mexico and died at the scene.” (ECF No. 43-5 at 6). Another states
11 that Yanez “was shot by a US Border Patrol agent while in his home country of
12 Mexico.” (ECF No. 43-5 at 9). Third, Defendant submits two newspaper articles
13 stating that Yanez’s death occurred in Mexico.

14 Fourth, Defendant submits the Declaration and survey report of Robert Reese, a
15 land surveyor, in order to establish the location of the United States-Mexico border line.
16 Robert Reese’s survey report contains a photograph which purports to depict the
17 location of Yanez’s body at the time of his death. The photograph purports to show
18 Yanez lying south of the United States-Mexico primary border fence, with his head
19 facing southward. A drawn yellow line, which purportedly represents the United
20 States-Mexico Border, runs directly through Yanez’s waistline.⁴

21 Finally, Defendant submits the declarations of two experts who opine that Yanez
22 did not die until after he fell out of the tree and landed on the ground. Vincent Di Maio,
23 M.D. concludes that “Mr. Yanez’ death on June 21, 2011 was not instantaneous.” (ECF
24

25 ³ Defendant submits the declarations of two Supervisory Border Patrol Agents
26 of the United States Border Patrol in order to authenticate these five photographs. (ECF
27 Nos. 43-3, 43-4).

28 ⁴ This photograph is not the same photograph authenticated by the Supervisory
Border Patrol Agents, and Defendant does not authenticate this photograph.

1 No. 55 at 5). “Rather, it took many seconds and possibly minutes for Mr. Yanez to die
2 and I believe his death occurred after he landed on the ground in Mexico.” *Id.* Michael
3 Lobatz, M.D., opines that “the death of Jose Yanez Reyes in this case would not have
4 been instantaneous.” (ECF No. 55-1 at 4). Michael Lobatz concludes that “it is my
5 opinion to a reasonable degree of medical certainty that the decedent expired while on
6 the ground, and in the position noted in the photographs and international border
7 survey.”⁵ *Id.* at 5.

8 Plaintiffs contend that “the homicide occurred entirely within the United States.”
9 (ECF No. 44 at 7). Plaintiffs contend that Defendant’s own evidence demonstrates that
10 Yanez’s body was discovered on U.S. soil. Plaintiffs assert that Yanez was shot while
11 standing in a tree located entirely on U.S. soil, and that he died instantly. Plaintiffs
12 assert that Yanez fell from the tree onto the primary border fence, and that he was
13 caught just below chest level. Plaintiffs assert that moments later, Yanez fell to the
14 ground on the south side of the primary border fence, lying right against the south side
15 of the fence and not extended from it. Plaintiffs submit the declarations of Plaintiff
16 Paredes Nino, Gene Bobroff, M.D., and Suzy Kim, M.D.

17 Plaintiff Paredes Nino states that “[m]y son and I witnessed my husband being
18 shot in the head.” (ECF No. 48-1 at 3). Plaintiff Paredes Nino states:

19 At the time that Yanez was shot and fell from the tree, he was caught
20 just below chest level at the top of the fence. He lay there motionless on
21 the fence for many moments. His legs dangled tightly against our side of
22 the fence.

23 I know my husband after years of being together with him. He was my
24 soul mate. I know for a fact that he was dead on the top of that fence as
25 my heart and soul felt it. At the time that he slipped down on the side of
26 the fence where we stood in shock, he was already dead.

27 (ECF No. 48-1 at 3).

28 Gene Bobroff, M.D. states, in pertinent part:

27 ⁵ Michael Lobatz also opines that one of Plaintiff’s experts, Gene Bobroff, M.D.,
28 “is not qualified to render opinions relating to projectile (gunshot) wounds, traumatic
brain injuries, or the time of death of the decedent in this case.” *Id.*

1 Because instant injuries, such as the one that I have examined, create
2 irreversible damage to parts of the brain that send and receive signals,
instant brain death is quite likely.

3 ...

4 In this case, had a physician been present at the scene, he could have
5 properly declared the victim as “dead” at virtually any time after the
6 mortal wound was incurred. By all indications, he was certainly dead at
the time he came to rest upon and/or against the fence. As such, if
Plaintiff’s allegations are to be believed, his death did – in fact – occur in
the United States.

7 (ECF No. 48-3 at 2-3).

8 Suzy Kim, M.D. states, in pertinent part:

9 Upon review of the autopsy report, it is not only possible that brain
10 death occurred “instantly” upon the bullet entering the eye socket of
defendant JOSE ALFREDO YANEZ REYES, it is likely to a point of
certainty.

11 ...

12 Such a devastating head injury could not reasonably have been
13 survived for even sparse moments. Death was instantaneous.

14 (ECF No. 56-6 at 2-3).⁶

15 In this case, it is undisputed that Yanez was shot while in a tree abutting the
16 United States-Mexico primary border fence and positioned north of the United States-
17 Mexico Border. Plaintiffs have presented evidence tending to show that Yanez died
18 while still in the tree. (ECF No. 56-6). Plaintiffs have presented evidence tending to
19 show that, even if it took some time for Yanez to die after being shot, it also took some
20 time for Yanez to land on the ground on the south side of the United States-Mexico

21
22 ⁶ Defendant has not filed an objection to the declaration of Suzy Kim or moved
23 to exclude the declaration of Dr. Suzy Kim. However, Defendant contends that Suzy
Kim “is unqualified to render an opinion on Yanez’s time of death under Federal Rule
of Evidence 702.” (ECF No. 60 at 3).

24 Federal Rule of Evidence 702 requires that an expert witness be “qualified as an
25 expert by knowledge, skill, experience, training, or education....” Fed. R. Evid. 702.
26 Dr. Suzy Kim’s declaration provides detailed information on her medical education and
27 experience, including working with brain injuries. The Court finds that Dr. Suzy Kim
is qualified to provide an opinion on the timing of Yanez’s death, resulting from a bullet
wound to the brain. To the extent Defendant contends that its own experts are better
28 qualified, any disparity in qualifications goes to the weight, rather than the
admissibility, of the experts’ conflicting opinions.

1 primary border fence. Plaintiff Paredes Nino states that Yanez first fell onto the
2 primary border fence before sliding off and onto the ground. (ECF No. 48-1 at 3). The
3 Court finds that Plaintiffs have come forward with sufficient evidence to support a
4 finding that Yanez died while located on United States soil.

5 The Court concludes that Plaintiffs have met their burden to come forward with
6 sufficient evidence to support a finding that the foreign country exception does not bar
7 Plaintiffs' wrongful death claim. Plaintiffs have met their burden to overcome a factual
8 jurisdictional attack brought pursuant to Rule 12(b)(1). *Hunter Eng'g*, 655 F.2d at 942.
9 Plaintiffs will have the burden of proving all necessary jurisdictional facts at trial.

10 Defendant's motion to dismiss Plaintiffs' second claim for wrongful death is
11 denied.

12 **C. Emotional Distress Claim**

13 **i. The Relevant Injury**

14 Plaintiffs' third claim alleges that Plaintiffs witnessed Yanez's death and suffered
15 "serious and severe emotional distress." (ECF No. 33 at 30). Plaintiffs' third claim
16 proceeds on a bystander negligent infliction of emotional distress ("NIED") theory,
17 which requires that the plaintiffs: (1) are "closely related to the injury victim"; (2) are
18 "present at the scene of the injury-producing event at the time it occurs and are then
19 aware that it is causing injury to the victim"; and (3) "as a result suffer emotional
20 distress beyond that which would be anticipated in a disinterested witness." *Thing v.*
21 *La Chusa*, 48 Cal. 3d 644, 647 (1989). "It is the traumatic effect of the perception of
22 the infliction of injury on a closely related person ... that is actionable..." *Ra v.*
23 *Superior Court.*, 154 Cal. App. 4th 142, 152 (2007). Because the plaintiff "may recover
24 only for the emotional distressed suffered as a result of [the] plaintiff's presence at the
25 injury-producing event and the contemporaneous awareness that the injury was being
26 suffered[,] ... the cause of action accrues at the time of the injury-producing event."
27 *Campanano v. Cal. Med. Ctr.*, 38 Cal. App. 4th 1322, 1328-29 (1995). The Court
28 concludes that the relevant injury for the purposes of the foreign country exception is

1 Plaintiffs’ alleged severe emotional distress resulting from observing Yanez’s injury,
2 and occurring at the time of Yanez’s injury.

3 Plaintiffs’ location at the time of Yanez’s death is essential to determine whether
4 the foreign country exception bars Plaintiffs’ bystander NIED claim. Plaintiffs’
5 location at the time of Yanez’s death is also essential to determine whether Plaintiffs’
6 may recover on a bystander NIED claim. *See Thing*, 48 Cal. 3d at 647 (requiring that
7 a bystander NIED plaintiff be “present at the scene of the injury-producing event at the
8 time it occurs”). The Court concludes that the jurisdictional question of Plaintiffs’
9 location is intertwined with the merits of Plaintiffs’ bystander NIED claim. In resolving
10 this motion to dismiss, the Court is precluded from making factual findings with respect
11 to the respective locations of Plaintiffs.

12 **ii. Analysis**

13 Defendant contend that there is no evidence that Plaintiffs witnessed Yanez’s
14 death. Defendant contends that “no negligent bystander claim can survive for Ms.
15 Nino’s youngest son as he was not even born at the time of the incident and therefore
16 could not have witnessed the event.” (ECF No. 54 at 11).

17 Plaintiffs assert that they not only witnessed Yanez’s death, but witnessed his
18 death while standing in the two foot section south of the United States-Mexico primary
19 border fence that is on United States soil. Plaintiffs submit the Declaration of Plaintiff
20 Paredes Nino, who states:

21 On the early evening of June 21, 2011, I accompanied Yanez and Jose
22 Ibarra-Murrieta (‘Murrieta’) in the Castillo neighborhood of Ciudad
23 Tijuana where we regularly visited. My oldest son and I embraced Yanez
24 just before he went through a hole in the fence in order to get to the United
25 States. This is a solid metal fence, which I later learned is entirely in
26 United States Territory. It has no barbed wire at the top.

27 ...

28 I leaned against the fence within safe distance from the events. I was
worried for Yanez but was equally worried about my young son and was
afraid somehow that he might be in danger. I leaned both of us tightly
against the metal fence within clear view of my husband but in a place
where I believed we would be safest.

...

1 My son and I were always against the border fence at the time we
2 witnessed the killing.

3 (ECF No. 48-1 at 2-3). Plaintiff Paredes Nino further states: “My youngest child was
4 with me as well. Although unborn at the time as I was in my last term of pregnancy,
5 I firmly believe that he perceived his father’s death.” *Id.* at 2.

6 Defendant submits a United States Border Patrol report containing Plaintiff
7 Paredes Nino’s sworn statement. According to the United States Border Patrol report,
8 Plaintiff Paredes Nino stated that she and Yanez separated at a “cemetery on Calle
9 Segunda” and “agreed to meet at the gas distributorship located in Colonia Castillo.”
10 (ECF No. 49-3 at 11). Plaintiff Paredes Nino stated that when she arrived at Colonia
11 Castillo, a man told her that her “husband had suffered an accident on Internacional
12 [avenue].” *Id.* Plaintiff Paredes Nino stated that when she arrived at Calle
13 Internacional, she was informed that Yanez was “deceased.” *Id.* at 11-12.

14 Plaintiffs have submitted evidence tending to show that they witnessed Yanez’s
15 death from a vantage point on United States soil. The Court concludes that Plaintiffs
16 have met their burden to come forward with sufficient evidence to support a finding that
17 the foreign country exception does not bar Plaintiffs’ emotional distress claim. Plaintiffs
18 have met their burden to overcome a factual jurisdictional attack brought pursuant to
19 Rule 12(b)(1).⁷ *Hunter Eng’g*, 655 F.2d at 942. Plaintiffs will have the burden of
20 proving all necessary jurisdictional facts at trial.


21 Defendant’s motion to dismiss Plaintiffs’ emotional distress claim is denied.

22 ⁷ Defendant’s contention—that Plaintiff Paredes Nino’s youngest son cannot
23 bring a bystander emotional distress claim because he was only present at the scene of
24 Yanez’s death as a fetus—is not a jurisdictional contention. Federal Rule of Civil
25 Procedure 12(g)(2) provides: “Except as provided in Rule 12(h)(2) or (3), a party that
26 makes a motion under this rule must not make another motion under this rule raising
27 a defense or objection that was available to the party but omitted from its earlier
28 motion.” Fed. R. Civ. P. 12(g)(2). Federal Rule 12(h)(2) provides: “Failure to state a
claim upon which relief can be granted ... may be raised: (A) in any pleading allowed
or ordered under Rule 7(a); (B) by a motion under Rule 12(c); or (C) at trial.” Fed. R.
Civ. P. 12(h)(2). Defendant could have raised this issue in its motion to dismiss the
SAC for failure to state a claim. *See* ECF No. 34. The pending motion is not brought
pursuant to Rule 12(c). Accordingly, the Court expresses no opinion on whether a
person may bring a bystander emotional distress claim under California law.

1 **IV. Conclusion**

2 IT IS HEREBY ORDERED that the remaining portion of Defendant's Motion
3 to Dismiss Plaintiffs' Second Amended Complaint (ECF No. 43), related to the foreign
4 country exception of the FTCA, is DENIED.

5 DATED: August 25, 2015

6 
7 **WILLIAM Q. HAYES**
8 United States District Judge

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