IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

LAKEDA DIXON, individually, and as The Next Friend and Mother of Jayleon and Kyla Dixon, and as Special Administrator of the Estate of Jerome Dixon, deceased,	)	
Plaintiff,	)	
v.	)	**Case No. 13-1033-RDR**
CITY OF WICHITA, KANSAS; CITY OF WICHITA POLICE DEPARTMENT OFFICERS MYKE BROWN, BADGE #C2207, a/k/a John Doe Officer #1, and KEVIN MCKENNA, #C2221, a/k/a/ John Doe Officer #2,	)	
Defendants.	)	

MEMORANDUM AND ORDER

Plaintiff brings this action against City of Wichita and two Wichita police officers for damages arising from the shooting of her husband, Jerome Dixon, by the officers on November 5, 2010. Plaintiff brings this action individually and as the next friend and mother of Jayleon Dixon and Kyla Dixon and as the special administrator of the estate of Jerome Dixon. This matter is presently before the court upon defendants' motion to dismiss for failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6).

I.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)(quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544,

570 (2007)). "[T]he mere metaphysical possibility that some plaintiff could prove some set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that this plaintiff has a reasonable likelihood of mustering factual support for these claims." Ridge at Red Hawk, L.L.C. v. Schneider, 493 F.3d 1174, 1177 (10th Cir. 2007). "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." Dubbs v. Head Start, Inc., 336 F.3d 1194, 1201 (10th Cir. 2003). In determining whether a claim is facially plausible, the court must draw on its judicial experience and common sense. Iqbal, 556 U.S. at 678. All well-pleaded facts in the complaint are assumed to be true and are viewed in the light most favorable to the plaintiff. See Zinermon v. Burch, 494 U.S. 113, 118 (1990); Swanson v. Bixler, 750 F.2d 810, 813 (10th Cir. 1984). Allegations that merely state legal conclusions, however, need not be accepted as true. See Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991).

II.

In her amended complaint, plaintiff alleges that two law enforcement officers shot and killed her husband as he stood in the doorway of their apartment. She asserts that the officers did so

without warning and without valid reason to suspect that he had committed, or was committing, a crime at the time. She further alleges she and her daughters were then illegally detained at the police station for a lengthy period. The complaint contains eight counts.

The defendants challenge various aspects of six counts of plaintiff's amended complaint. The defendants contend that (1) Count 1 should be dismissed to the extent that it asserts a claim under the Fourteenth Amendment; (2) Counts 2 and 3 against the City of Wichita should be dismissed for failure to state a claim under 42 U.S.C. § 1983; (3) Count 5, which asserts a state law claim of false imprisonment, should be dismissed because it is barred by the statute of limitations; (4) plaintiff's claims against the individual officers in their official capacities should be dismissed as redundant; (5) Count 7 should be dismissed for failure to state a claim of negligent infliction of emotional distress; and (6) Count 8, which states in part a claim of intentional infliction of emotional distress based on the City's failure to release the identities of the officers, should be dismissed because it fails to state a claim. Finally, the City asserts that any claim made by the plaintiff against it for punitive damages must be dismissed.

Plaintiff has agreed with several of the arguments raised by the defendants. Plaintiff concurs that (1) her state law claim of

false imprisonment is barred by the statute of limitations; (2) her claims against the officers in their official capacities should be dismissed as redundant; and (3) her claim of intentional infliction of emotional distress based upon the City's failure to identify the officers is now moot and should be dismissed. She further states that she had no intention of seeking punitive damages from the City. She notes that her amended complaint only seek punitive damages "as warranted" and she recognizes that municipalities are immune from the imposition of punitive damages under 42 U.S.C. § 1983.

With these concessions, the court shall grant defendants' motion in the following ways: (1) plaintiff's state law claim of false imprisonment is barred by the statute of limitations; (2) plaintiff's claims against the individual officers in their official capacities are dismissed; (3) plaintiff's claim of intentional infliction of emotional distress based upon the City's failure to identify the officers is dismissed; and (4) any claim of punitive damages against the City, to the extent that one was even asserted, is dismissed. The court will now consider the remaining issues raised by the defendants' motion.

III.

The defendants contend that Count 1 of plaintiff's amended complaint must be dismissed to the extent that attempts to assert a claim under the Fourteenth Amendment. The defendants assert that

since plaintiff has alleged that her husband was "seized" by the officers, then her claim must be analyzed under the Fourth Amendment. Plaintiff counters that she understands that the claim alleged in Count 1 of her amended complaint should be analyzed under the Fourth Amendment. However, she states that Count 1 included a reference to the Fourteenth Amendment only because the due process rights of the Fourteenth Amendment allow her to enforce the prohibitions found in the Fourth Amendment.

A. Count 1--Fourteenth Amendment

The court understands the arguments raised by the parties. There does not appear too much in dispute. Both sides appear to agree that Fourth Amendment legal standard governs plaintiff's excessive force claim. As such, the court sees no need to dismiss the allegation of the Fourteenth Amendment in Count 1. The Fourteenth Amendment governs both excessive force claims occurring during a "seizure" within the meaning of the Fourth Amendment, because the Fourth Amendment is incorporated against the states through the Fourteenth, see Wolf v. Colorado, 338 U.S. 25, 27–28 (1949), and excessive force claims that occur outside of the scope of a "seizure" effected by law enforcement, see County of Sacramento v. Lewis, 523 U.S. 833, 843–45 (1998); see also Graham v. Connor, 490 U.S. 386, 388 (1989)(the Fourth Amendment governs "claim[s] that law enforcement officials used excessive force in the course of making an arrest,

investigatory stop, or other 'seizure' of his person"). The parties agree that the Fourth Amendment standard, as incorporated against the states in the Fourteenth Amendment, governs plaintiff's claim because the plaintiff alleges that the officers were using intentional means to "seize" Mr. Jones' person. See Lewis, 523 U.S. at 844 ("[A] Fourth Amendment seizure. . .occur[s]. . .only when there is a governmental termination of freedom of movement through means intentionally applied.")(quotation omitted). Accordingly, the court sees no need at this time to dismiss the Fourteenth Amendment allegation contained in Count 1.

B. Counts 2 and 3–Liability of City of Wichita under 42 U.S.C. § 1983

The City next contends that plaintiff's claims against it under 42 U.S.C. § 1983 in Counts 2 and 3 should be dismissed for failure to allege sufficient facts that the City acted pursuant to a policy or custom. The City suggests that plaintiff has failed to adequately allege in Count 2 that the officers acted pursuant to a policy or custom "to detain innocent witnesses for hours at a time under the cloak of authority of its officers." The City also argues that plaintiff has failed to sufficiently allege in Count 3 that (1) the officers acted pursuant to a de facto policy of deadly force; and (2) the City failed to adequately train the officers in the use of force.

Section 1983 states, in relevant part, that "[e]very person who, under color of [law], subjects, or causes to be subjected, any citizen. . .to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured." 42 U.S.C. § 1983. A municipality may be sued as a "person" under § 1983. Monell v. Dept. of Soc. Services of City of New York, 436 U.S. 658, 690 (1978). A municipality, however, will not be held liable merely for the actions of its employees. Smith v. City of Oklahoma City, 696 F.2d 784, 786 (10th Cir. 1983)(citing Monell, 436 U.S. at 690–91). A plaintiff must establish that it was the municipality's policy or custom that caused the constitutional deprivation. Id. A plaintiff may show that such policy or custom exists through (1) formal regulations; (2) widespread practice so permanent that it constitutes a custom; (3) decisions made by employees with final policymaking authority that are relied upon by subordinates; or (4) a failure to train or supervise employees that results from a deliberate indifference to the injuries caused. Brammer–Hoelter v. Twin Peaks Charter Acad., 602 F.3d 1175, 1188–89 (10th Cir. 2010).

Plaintiff has implicitly agreed in her response that she has failed to adequately assert claims against the City in Counts 2 and 3. She has made no argument that her claims against the City sufficiently allege a policy or custom for the purposes of § 1983.

Rather, she suggests that (1) she should be allowed to conduct discovery on these claims to "better establish" them or, in the alternative, (2) they should be dismissed without prejudice so they may be re-filed at a later date "if additional evidence becomes available that will allow [her] to better pursue those claims."

The court finds that the claims asserted by the plaintiff in Counts 2 and 3 of the amended complaint fail to state a claim against the City under § 1983. The amended complaint fails to state a plausible claim of municipal liability. In Count 2, plaintiff alleges only a conclusory allegation that a formal policy of the City existed to "detain innocent witnesses for hours at a time under the cloak of authority of its officers." In Count 3, plaintiff fails to allege support for her conclusory allegation that a "de facto policy of shoot first and ask questions later" existed. She points to no prior incidents involving similar conduct. Accordingly, the court shall at this time dismiss these claims without prejudice. Plaintiff may re-assert them in the future if discovery reveals some support for them.

C. Count 7--Negligent Infliction of Emotional Distress

The defendants contend that plaintiff has failed to state a claim for negligent infliction of emotional distress in Count 7 of her amended complaint. Specifically, the defendants argue that plaintiff has made an insufficient allegation of physical injury.

Under Kansas law "there can be no recovery for emotional distress suffered by the plaintiff which is caused by the negligence of the defendant unless it is accompanied by or results in physical injury to the plaintiff." Hoard v. Shawnee Mission Med. Ctr., 233 Kan. 267, 662 P.2d 1214, 1219–20 (1983).

The court finds that plaintiff has adequately stated a claim of negligent infliction of emotional distress. Plaintiff has alleged that she and her children suffered "mental pain, fear, nervousness, uncertainty and humiliation." It is plausible that such claims encompass "physical injury." The cases cited by defendants are unpersuasive because they involved claims in which the plaintiff made no showing of physical injury at summary judgment. See Anderson v. Scheffler, 242 Kan. 857, 752 P.2d 667 (1988) and Reynolds v. Highland Manor Inc., 24 Kan.App.2d 859, 954 P.2d 11 (1998). While this claim may not survive summary judgment, the court is persuaded that a plausible claim has been stated at this stage of the litigation.

IT IS THEREFORE ORDERED that defendants' motion to dismiss be hereby granted in part and denied in part. The following claims are hereby dismissed for the reasons stated in this memorandum: (1) state law claim of false imprisonment in Count 5; (2) claims against the individual officers in their official capacities; (3) intentional infliction of emotional distress based upon the City's

failure to identify the officers in Count 8; (4) claim against the City of Wichita in Count 2; (5) the claim in Count 3; and (6) any claim of punitive damages against the City. The remainder of the defendants' motion to dismiss is denied.

IT IS SO ORDERED.

Dated this 31st day of May, 2013, at Topeka, Kansas.

s/Richard D. Rogers
United States District Judge