IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

TAYLA GREENE	CIVIL ACTION: 3:20CV-00578
VERSUS	JUDGE DOUGHTY
DAKOTA DEMOSS, ET AL.	MAG. JUDGE HAYES

OBJECTION TO
MAGISTRATE JUDGE'S REPORT AND RECOMMENDATIONS

NOW INTO COURT, through undersigned counsel, come Defendants, Captain John Peters, Lieutenant John Clary, Seargent Floyd McElroy, and Master Trooper Kory York, who object to the Magistrate Judge's Report and Recommendation filed on December 11, 2020 (Doc. No. 46).

In accordance with Rule 72(b)(3) Defendants Peters, Clary, McElroy and York seek a *de novo* review of their Motion to Dismiss and, in the Alternative, for a More Definite Statement. (Doc. Nos. 22 and 30).

Defendants Peters, Clary, McElroy, and York object to the Report and Recommendation for the reasons set forth with more particularity in the Memorandum filed herewith and the previous Memoranda filed in support (Doc. Nos. 22, 30, and 43). Defendants Peters, Clary, McElroy and York adopt herein by reference the arguments and authorities contained in document numbers 22, 30 and 43.

WHEREFORE, Defendants Peters, Clary, McElroy, and York pray that the Court reverse the Magistrate Judge's Report and Recommendations denying in part their

Motion to Dismiss and, Alternatively, for a More Definite Statement.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF OBJECTIONS TO MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION BY DEFENDANTS PETERS, CLARY, MCELROY AND YORK

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I. INTRODUCTION

This suit arises out of an incident that occurred on May 10, 2019 in the Monroe, Louisiana area. Plaintiff is the administrator of the estate of Ronald Greene. She has named numerous defendants including Captain John Peters, Lieutenant John Clary, Sergeant Floyd McElroy and Master Trooper Kory York. Plaintiff has raised Section 1983 Civil Rights claims as well as State Law claims. The original complaint raised Section 1983 claims for excessive force and bystander liability. In the first amended complaint, Plaintiff added a Section 1983 claim for denial of access to courts. Defendants Peters, Clary, McElroy and York filed an original Motion to Dismiss to the original complaint and a Supplemental Motion to Dismiss to the First Amended Complaint.

A Report and Recommendation was issued by the Magistrate Judge which ruled on the motions to dismiss by these defendants as well as Trooper Dakota DeMoss. The Report and Recommendation granted the Motion to Dismiss as to the claim of denial of access to courts. The Motion to Dismiss was denied as to the other claims. (Doc. No. 46)

Captain John Peters, Lieutenant John Clary, Sergeant Floyd McElroy, and Master Trooper Kory York object to the Report and Recommendation as being contrary to law as to the denial of the Motion to Dismiss. This is a *de novo* review of the Magistrate Judge's Report and Recommendation by the District Court. FRCP 72(b)(2).

II. ARGUMENT

A. Standards of Review

1. FRCP 12(b)(6) Standard

While a complaint attacked by a Rule 12(b)(6) Motion to Dismiss does not require overly detailed factual allegations, the law "requires more than labels and conclusions,

and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corporation vs. Twombly.*[1] Legal conclusions are not entitled to an assumption of truth when considering a 12(b)(6) Motion. *Broussard v. Lafayette City-Parish Consolidated Government.*[2] The facts alleged in the complaint must be sufficient to cross the line "from conceivable to plausible" to defeat a 12(b)(6) motion. *Bell Atlantic Corporation, supra*[3]

2. Qualified Immunity Standard

Defendants Peters, Clary, McElroy and York have raised the defense of qualified immunity for all claims against them. Qualified immunity provides State officials with not only immunity from liability, but also immunity from suit. *Pearson v. Callahan.*[4] This defense is based upon the general cost of subjecting officials to the risk of trial, distracting them from their governmental duties, inhibiting them from discretionary action and deterring able people from public service. *Harlow v. Fitzgerald.*[5] By raising the defense of qualified immunity, these defendants have placed the burden on Plaintiff to rebut the defense by establishing that their allegedly wrongful conduct violated clearly established law. *Pierce v. Smith.*[6] A plaintiff seeking to avoid dismissal for qualified immunity must "plead specific facts . . . that defeat a qualified immunity defense . . .". *Backe v. LeBlanc.*[7] In evaluating the application of the qualified immunity defense, the Court must examine each individual defendant's entitlement to qualified immunity separately. *Meadours v. Ermel.*[8] Qualified immunity is designed to protect from civil

[1] 550 U.S. 544, 128 S.Ct. 1955, 1964-1965, 167 L.Ed. 2d 929 (2007).
[2] 45 F.Supp.3d 553, 565 (W.D. La. 9/5/14).
[3] 550 U.S. 544, 570.
[4] 555 U.S. 223, 231-232, 129 S.Ct. 808, 815, 172 L.Ed. 2d 565 (2009).
[5] 457 U.S. 800, 816, 102 S.Ct. 2727, 73 L.Ed. 2d 396 (1982).
[6] 117 F.3d 866, 871-872 (5th Cir. 1997).
[7] 691 F.3d 645, 648 (5th Cir. 2012).
[8] 483 F.3d 417, 421-422 (5th Cir. 2007).

liability all but the plainly incompetent or those who knowingly violate the law. *Malley v. Briggs*.[9]

B. 1983 Claims

1. Excessive Force Claim

When a claim involves allegations that law enforcement officers used excessive force in violation of the Fourth Amendment, the question is whether the officer's actions were "objectively reasonable" in light of the facts and circumstances. *Graham v. Connor*.[10] The plaintiff has the burden of alleging specific facts showing (1) injury, (2) which resulted directly or only from a use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable. *Defrates v. Podany*.[11] "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split second judgments – in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation." *Graham*.[12]

The Plaintiff in this case has made multiple allegations that the defendant law enforcement officers collectively and without justification committed excessive force. For example, Plaintiff alleges that the defendant law enforcement officers "beat, smothered, and choked Mr. Greene" despite Mr. Greene's lack of resistance and surrender. (Doc. No. 25 ¶ 39, 40-45). By breaking the original *en globo* allegation paragraphs into separate identical paragraphs for each law enforcement officer, Plaintiff has not satisfied the 12(b)(6) and qualified immunity standards. Plaintiff cannot assert that each and every

[9] 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed. 2d 271 (1986).
[10] 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed. 2d 443 (1989).
[11] 789 F.App'x 427, 432 (5th Cir. 2019).
[12] 490 U.S. at 396-397.

one of the seven law enforcement defendants engaged in identical simultaneous conduct. These collective allegations do not satisfy the requirements for an independent evaluation of the qualified immunity defense for each under *Meadours v. Ermel.*[13] To allow these collective allegations to defeat a qualified immunity defense at the pleading stage would be contrary to the jurisprudence on the importance of the qualified immunity defense in shielding public officials from suit and discovery unless Plaintiff has properly alleged a claim under the law. *Mitchell v. Forsythe.*[14] The Report and Recommendation is contrary to the law on this point.

The collective allegations against the law enforcement defendants also fail to meet the plausibility standard. The allegations in the Complaint must be sufficient to place them in the category of plausible to defeat a 12(b)(6) Motion. *Bell Atlantic Corporation.*[15] It is inconceivable that all seven law enforcement officers simultaneously committed the same conduct to "beat, smother and choke" Mr. Greene. How can all seven defendant law enforcement officers simultaneously inflict blows upon Mr. Greene in and restrict his breathing to the point of choking? Such allegations of simultaneous and identical conduct is not plausible. These allegations fail to meet the pleading standards under 12(b)(6) and to defeat the qualified immunity defense. The Report and Recommendation fails to follow this case law in its evaluation and is contrary to law.

2. Bystander Liability Claim

Plaintiff has alleged that all of the law enforcement defendants are guilty of bystander liability. To establish bystander liability, a plaintiff must allege specific facts showing that the officer (1) knows that a fellow officer is violating an individual's

[13] 483 F.3d 417 (5th Cir. 2007).
[14] 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed. 2d 411 (1985).
[15] 550 U.S. 544, 570, 128 S.Ct. 1955, 167 L.Ed. 2d 929 (2007).

constitutional rights; (2) has a reasonable opportunity to prevent harm; and (3) chooses not to act." *Kitchen v. Dallas County*.[16] In order to make a valid bystander liability claim against an officer, the plaintiff must plead specific facts showing that the officer was present at the scene involving another officer's use of excessive force. *Hale v. Townley*.[17]

The Plaintiff in this case makes collective allegations that each and every defendant law enforcement officer was guilty of the exact same conduct giving rise to bystander liability. As indicated above, Plaintiff made similar collective allegations against the officers with regard to their use of excessive force. Plaintiff goes on to allege that, while the officers were performing the identical simultaneous conduct of excessive force, they were also guilty of identical and simultaneous conduct that triggers bystander liability. That is simply not plausible and fails to meet the pleading requirements and the qualified immunity defense requirements.

The Report and Recommendation includes the following language:

> Furthermore, because each officer allegedly participated in the use of excessive force against Greene, this means that each officer necessarily was close enough to Greene that he could have opted to cease harming Greene himself, and instead intervene to protect Greene from the actions of the other officers. Of course, DeMoss, Peters, Clary, McElroy, and York simply watched the other officers beat, smother, choke, and use electronic controlled devices against Greene without intervening. (Doc. No. 46, p. 17).

It is respectfully submitted that this passage reflects a failure to evaluate the pleading under F.R.C.P. 8 and the standards for overcoming the qualified immunity defense. This Plaintiff has failed to allege specific facts showing that Defendants Peters, Clary, McElroy and York were in the vicinity of Greene at the relevant time to have had a reasonable

[16] 759 F.3d 468, 480 (5th Cir. 2014).
[17] 45 F.3d 914, 919 (5th Cir. 1999).

opportunity to intervene. *Prothro v. City of Garland*.[18] There is nothing in the Complaint or the Report and Recommendation to satisfy the temporal requirement of proximity necessary for an officer to possess a reasonable opportunity to intervene. Plaintiff simply alleges that all the law enforcement defendants were guilty of identical simultaneous conduct of excessive force and bystander liability without sufficient particularity to state a cause of action against each defendant under either theory. The Complaint contains no specific allegations against Defendants Peters, Clary, McElroy and York alleging any forewarning of any other officer's actions. *See Washington v. Tubbs.*[19] Plaintiff is required to include specific allegations against Captain Peters, Lieutenant Clary, Sergeant McElroy and Master Trooper Kory York specifying their proximity to the excessive force by others and that they had a forewarning of excessive force by the others. Absent those specific allegations, it cannot be said that Plaintiff has sufficiently alleged that any of these four Defendants could or should have prevented the actions of each other or the other Defendants.

Plaintiff has failed to make sufficient allegations to defeat the qualified immunity defense on the bystander liability claim. The First Amended Complaint and the Report and Recommendation fail to identify any existing precedent or analogous case law establishing that Captain Peters, Lieutenant Clary, Sergeant McElroy or Master Trooper Kory York possessed a reasonable opportunity to prevent harm. *Joseph v. Bartlett*.[20] The allegations of the Amended Complaint with regard to a bystander liability cause of action fail to satisfy the requirements to overcome the qualified immunity defense. Defendants

[18] 234 F.3d 706 (5th Cir. 2000).
[19] 2014 WL 2462536 (W.D. La. 6/2/14).
[20] 981 F.3d 319 (5th Cir. 2020).

object to the Report and Recommendation to the extent that it fails to follow these requirements.

C. State Law Claims

Plaintiff has alleged claims under Louisiana state law for wrongful death, survival action, and battery. The allegations against the various law enforcement defendants are in the same conclusory language for the state law claims. There are no particularized factual allegations against Captain Peters, Lieutenant Clary, Sergeant McElroy or Master Trooper Kory York to allow the Court to evaluate the state law claims against them. The allegations lack the specificity and plausibility to burden these Defendants with filing answers, discovery, and trial. Plaintiff basically alleges that all of the law enforcement defendants caused the death of Ronald Greene and caused him to suffer pre-death damage. The allegations amount to legal conclusions which are not satisfactory for alleging a cause of action. The Report and Recommendation fails to properly evaulate the state law claims and dismissed them.

D. More Definite Statement

In the alternative, Captain Peters, Lieutenant Clary, Sergeant McElroy and Master Trooper York have alleged the Plaintiff should be ordered to further amend the Complaint to make a more definite statement under F.R.C.P. 12(e). This would allow these defendants to fairly frame a response without prejudice. *Swierkiewicz v. Sorema N.A.*.[21] The Report and Recommendation seems to rely upon two factors that do not justify the denial of the request for a more definite statement:

[21] 534 U.S. 506, 514, 122 S.Ct. 992, 152 L.Ed. 2nd 1 (2002).

1. the fact that co-defendant Christopher Harpin managed to file an Answer to the first amended complaint;

2. the fact that the defendants should be able to draw upon their own memory as well as their knowledge of their own records.

The fact that counsel for Defendant Harpin elected to include a qualified immunity defense in an answer without raising a F.R.C.P. 12(b)(6) Motion to Dismiss does not indicate that the allegations of the first amended complaint are adequate for these defendants to prepare a defense. The qualified immunity defense is an important one and these defendants should not be penalized in asserting the defense in a Motion to Dismiss simply because counsel for another defendant elected to waive the Motion to Dismiss procedure. The qualified immunity defense should be asserted and evaluated as early in the proceeding as possible. It would be speculative for the Court to assume that Captain Peters, Lieutenant Clary, Sergeant McElroy and Master Trooper York should be able to file an answer based upon "their knowledge of their own records. . . as well as their operations" as quoted from the *Mitchell* case. Captain Peters, Lieutenant Clary, Sergeant McElroy and Master Trooper York are individual State Troopers. The undersigned represents these individual State Troopers and not the Louisiana State Police, the Louisiana Department of Public Safety or the State of Louisiana. If the standard for a request for a more definite statement was for the defendant to rely upon his own memory, then there would be no need for F.R.C.P. 12(e). There would also be no reason for the pleading specifity requirements of F.R.C.P. 8 if the memory of the defendant was the only criteria needed to respond to a complaint.

In the event that the Court finds that the First Amended Complaint lacked sufficient specificity to state a claim for relief, then Defendants Peters, Clary, McElroy and

York assert their right to move for an Order compelling a more definite statement. Defendants object to the Report and Recommendation to the extent that it denies the FRCP 12(e) Motion.

IV. ADOPTION OF ARGUMENTS

Defendants Peters, Clary, McElroy and York hereby adopt by reference the substantive arguments and authorities by Defendant Demoss in his objection to the Report and Recommendation, except insofar as it may not be applicable to Peters, Clary, McElroy or York.

V. CONCLUSION

Captain Peters, Lieutenant Clary, Sergeant McElroy and Master Trooper York respectfully submit that the original and First Amended Complaints fail to state a cause of action and fail to defeat the qualified immunity defense that they have raised. To the extent that it denied the Supplemental Motion to Dismiss by Defendants Peters, Clary, McElroy, and York, the Report and Recommendation should be reversed. The claims of Plaintiff should be dismissed with prejudice for the reasons set forth herein.

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CERTIFICATE OF SERVICE

I do hereby certify that on the 28th day of December, 2020, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system, which will send a notice of electronic filing to all participating counsel of record.

/s/Brian D. Smith
Brian D. Smith

IN THE UNITED STATES DISTRICT COURT
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MONROE DIVISION

TAYLA GREENE	CIVIL ACTION: 3:20CV-00578
VERSUS	JUDGE DOUGHTY
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ORDER

The Supplemental Motion to Dismiss filed on behalf of Defendants Peters, Clary, McElroy and York having been considered:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Motion to Dismiss by Defendants, Peters, Clary, McElroy, and York is hereby granted dismissing the claims of Plaintiff, with prejudice, and/or

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff file an amended complaint within _____ days of this Order to plead with specificity the allegations against Defendants Peters, Clary McElroy, and York.

THUS DONE AND SIGNED this _____ day of _____, 2021, in Monroe, Louisiana.

_____
HON. TERRY A. DOUGHTY, DISTRICT JUDGE