IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

DOUGLAS WINSTON, *et al.*,	)	CASE NO. 1:14CV02670
	)	
Plaintiffs,	)	JUDGE SOLOMON OLIVER, JR.
	)	
vs.	)	**JOINT MOTION OF OFFICER LOEHMAN AND GARMBACK FOR PARTIAL JUDGMENT ON THE PLEADINGS OF THE SECOND AMENDED COMPLAINT**
	)	
CITY OF CLEVELAND, *et al.*,	)	
	)	
Defendants.	)	
	)	

Now come the Defendants, Officers Timothy Loehmann and Frank Garmback, by and through counsel, and pursuant to Federal Civil Rule 12, move for Partial Judgment on the Pleadings on the Second Amended Complaint of Plaintiffs Winston, Rice, and T.R. on certain claims for failure to state a claim upon which relief can be granted.

INTRODUCTION

All Plaintiffs filed an Amended Complaint asserting various claims against the City, Officer Loehmann, and Officer Garmback. ECF 14. Officers Loehmann and Garmback filed a Motion for Partial Judgment on the Pleadings, which remains pending. ECF 56.

Plaintiffs Winston, Samaria Rice, and T.R. have now filed a Second Amended

Complaint repeating many of the same claims that should be dismissed. ECF 72-1.

LAW AND ARGUMENT

I. Standard for Motion for Judgment on the Pleadings

The Civil Rules allow that the defense of failure to state a claim can be raised in a Rule 12(c) Motion. Fed.R.Civ.P. 12(h)(2). When a Motion for Judgment on the Pleadings is based on a Rule 12(b)(6) failure to state a claim, the court must apply the standards for considering a Rule 12(b)(6) motion. *Morgan v. Church's Fried Chicken*, 829 F.2d 10, (6th Cir. 1987) (citations omitted).

When a motion to dismiss for failure to state a claim under Rule 12(b)(6) is filed, the trial court considers the Amended Complaint to determine if it meets the requirements of Fed. R. Civ. P. 8(a)(2) which require that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." A proper complaint alleges enough facts, that, if accepted as true, "raise the right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555 (2007). "In reviewing a motion to dismiss, [the Court will] construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Directv, Inc. v. Treesh*, 487 F.3d 471,476 (6th Cir. 2007).

II. Count IV entitled Survivorship is not viable.

A. Samaria Rice

Count IV, entitled Survivorship is brought by Douglas Winston, as

Administrator of the Estate, and by Samaria Rice. Ms. Rice has no capacity to bring a survivorship claim. Only the decedent's administrator may bring such a claim. *Wingrove v. Forshey*, 230 F.Supp.2d 808, 826 (S.D. Ohio 2002); *Klinger v. Corrections Corp. of America, Inc.*, Not Reported in F.Supp.2d (N.D. Ohio 2012) 2012 WL 6200393, adopted at 2012 WL 6200386.

Here, the only party with capacity to make a survivorship claim is the Administer of the Estate. Therefore, Count IV as it relates to Ms. Rice, should be dismissed.

B. Estate

The Estate also attempts to state a claim for survivorship. However, survivorship claims are not a distinct cause of action but a means by which an Estate can "assert the same cause of action that the decedent would have asserted on his own behalf had he survived." *Wingrove*, 230 F. Supp. 2d at 826. Here, the Estate is already separately asserting the claims that the decedent could have asserted, i.e. §1983, assault and battery, reckless conduct, reckless hiring. ECF 72-1. In addition, a survivorship claim allows the Estate to recover for those damages the decedent could have claimed, not for funeral expenses which are part of the wrongful death claim (Count III), pursuant to R.C. 2125.02. Count IV is duplicative of the other Counts asserted by the Estate and should be dismissed.

III. Plaintiff's claim for deliberate indifference to medical needs is not viable. (Count V)

The Estate has brought a §1983 claim for deliberate indifference to medical needs.

(Count V) Specifically, Plaintiff states "by denying medical care to Tamir Rice and by filing to provide medical care or assistance to Tamir Rice, Defendants Loehmann, Garmback, Cunningham, and John Does #1-5 deprived Tamir Rice of the rights, remedies, priviliges, and immunities guaranteed to every citizen of the United States, in violation of 42 U.S.C. §1983." ECF 72-1, ¶183.

While there is a cause of action for deliberate indifference to medical needs, it does not create liability here. The court in *Goza v. City Of Ellisville* summarized various courts' analyses of similar claims. Slip Copy (E.D. Mo. 2015), 2015 WL 4920796. "In *Maddox,* the Ninth Circuit held the district court did not err in instructing the jury that any failure by the defendant officers to personally render cardiopulmonary resuscitation to the plaintiff's decedent was not a violation of the decedent's constitutional rights, where they took him to the hospital. . . In *Tagstrom,* the Eighth Circuit held that a police officer 'was in no way deliberately indifferent to [the detainee's] medical needs' where he promptly called an ambulance upon finding a suspect injured after a high-speed motorcycle chase, instead of personally rendering medical assistance such as CPR. *Tagstrom,* 857 F.2d at 503–04 (stating the officer 'properly performed his duty by immediately calling an ambulance'). More recently, this Court stated that a police officer's obligation to provide medical care under the Fourteenth Amendment 'is fulfilled ... by promptly 'summoning the necessary medical help or by taking the injured detainee to the hospital.'"*Goza,* 2015 WL 4920796 (citing *Maddox v. City of Los Angeles,* 792 F.2d 1408, 1415 (9th Cir.1986); *Tagstrom v. Enockson,*

857 F.2d 502, 504 (8th Cir.1988); *Teasley v. Forler,* 548 F.Supp.2d 694, 709 (E.D.Mo.2008)). *See also Martin v. Somerset Cty.,* 387 F.Supp.2d 65, 80 (D.Me.2005) (no deliberate indifference where prison guards who found hanging inmate did not perform CPR); *Estate of Cartwright v. Concord,* 618 F.Supp. 722, 729-730 (N.D.Cal.1985) (finding prison guards not deliberately indifferent to suicide victim when they reacted immediately, attempted aid, and got emergency help to him, although they did not perform CPR); *Clinton v. York*, 893 F.Supp. 581, 586-587 (D.S.C.1995) (failure to provide CPR was, at most, negligence).

Here, it is evident from the Second Amended Complaint that the shooting had been reported and there was no delay in obtaining medical treatment. Another Cleveland Officer and an FBI agent were on scene within 4 minutes of the shooting. ECF 72-1, ¶67. The FBI agent rendered first aid. EMS was on the scene "approximately twelve minutes" after the shooting. ECF 72-1, ¶75. The officers did not show a deliberate indifference to medical needs as the appropriate aid had been summoned.

In addition, there is no allegation that either officer had any training that would render him able to provide any medical care to Tamir whose injuries were complicated. ECF 72-1, ¶68. Finally, there is no allegation that the failure of the officers to personally perform first aid caused any additional injury. *See generally* ECF 72-1.

As assistance had been called and, in fact, arrived promptly, he claim for deliberate indifference to medical needs fails as a matter of law. Therefore, Count V should be dismissed.

IV. Plaintiff Ms. Rice's claims for intentional infliction of emotional distress are not viable. (Count XIII)

Ms. Rice asserts an intentional infliction of emotional distress claim in Counts XIII. ECF 72-1, ¶221-227.

To prevail on an intentional infliction of emotional distress claim, a plaintiff must establish "(1) That the actor either intended to cause emotional distress or knew or should have known that actions taken would result in serious emotional distress to the plaintiff; (2) That the actor's conduct was so extreme and outrageous as to go 'beyond all possible bounds of decency' . . .; (3) That the actor's actions were the proximate cause of plaintiff's psychic injury; and, (4) That the mental anguish suffered by plaintiff is serious and of a nature that 'no reasonable man could be expected to endure it.'" *Retuerto v. Berea Moving Storage & Logistics*, 8th Dist. No. 102116, 2015-Ohio-2404, ¶64. According to the Amended Complaint itself herein, the alleged outrageous conduct described was directed toward her children and not Ms. Rice personally. ECF 72-1, 222. *See e.g. Hartwig v. NBC,* 863 F.Supp. 558, 562 (N.D. Ohio 1994) (finding that the defendant could not be liable to the decedent's family since the conduct was not directed towards them).

Ms. Rice wants to recategorize the relevant events to argue that the Defendants acted intentionally to cause her distress. There is no fact asserted that the Defendants put her in a difficult position; rather the totality of the circumstances put her in a terrible position.

Thus, Ms. Rice's claim for intentional infliction of emotional distress (Count XIII) fails to state a claim upon which relief can be granted as it relates to her personally and thus must be dismissed.

V. Count XV which a §1983 violation on behalf of Ms. Rice is not viable.

According to the Second Amended Complaint, Ms. Rice had a "liberty interest in [her son's] familial companionship and society." ECF 72-1, ¶235. She then states that the Defendants deprived her of that interest without due process of law. *Id.* at ¶236.

As this Court recently summarized in *Jones v. City of Cleveland,* "42 U.S.C. § 1983 creates a federal cause of action against '[e]very person who, under color of [law,] . . . subjects . . . any citizen . . . to the deprivation of any rights . . . secured by the Constitution.' In the Sixth Circuit, civil rights claims under § 1983 are 'entirely personal to the direct victim of the alleged constitutional tort.' *Claybrook v. Birchwell,* 199 F.3d 350, 357 (6th Cir. 2000). Therefore, 'only the purported victim, or his estate's representative(s), may prosecute a section 1983 claim.' *Id.*; *see also Foos v. City of Delaware*, 492 F. App'x 582, 592–93 (6th Cir. 2012); *Garret v. Belmont Cnty. Sheriff's Dep't*, 374 F. App'x 612, 615 (6th Cir. 2010). Courts have held that '[f]amily members [acting individually], however personally affected or aggrieved, may not recover for the violation of their loved ones' civil rights under 42 U.S.C. § 1983.' *Craft v. Ohio Dep't of Rehab.*, No. 1:14CV1682, 2015 WL 2250667 at *2 (N.D. Ohio May 13, 2015)." Case No. 1:15CV00007, June 30, 2015 Order. Nor can a family member bring a claim under §1983 for the loss of a loved one "any other consequent collateral injuries allegedly suffered

personally by the victim's family members." *Claybrook*, 199 F.3d at 357(citations omitted). In addition, the "Sixth Circuit [has] held that parents do not have a protected liberty interested in their relationship with any children, adult or not." *Jones v. Las Vegan Metropolitan Police*, 2014 WL 5793853 (D.Nev.). Ms. Rice's §1983 claim (Count XXV) is not a recognized claim in the Sixth Circuit, as §1983 claims must be brought by the Estate.

As shown, Count XV fails as a matter of law and should be dismissed.

CONCLUSION

As the Plaintiffs have asserted causes of action that fail to state a claim upon which relief can be granted, the Defendants request that the claims for survivorship (Count IV), the §1983 claim for deliberate indifference to medical needs (Count V), intentional infliction of emotional distress of Ms. Rice, individually (Count XIII), and the claim of Ms. Rice asserting her own personal §1983 claim (Counts XV) be dismissed and the Motion for Partial Judgment on the Pleadings be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of October, 2015, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Kathryn M. Miley
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City/Winston/judgment on pleadings 2d amended