

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TENNESSEE AT CHATTANOOGA**

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JAMES L. MARINE AND MARGIE MARINE, individually  
and as parents of ALONZO HEYWARD, deceased, and on  
behalf of the wrongful death beneficiaries of  
ALONZO HEYWARD, deceased, NEKA WELLS  
as mother and next friend of AH  
AND AH, JR. and TANISHA JOHNSON  
as mother and next friend of AH,

Plaintiffs,

v.

Civil Action No. 1:09-cv-219  
Jury Demanded

CITY OF CHATTANOOGA, TENNESSEE;  
CHATTANOOGA POLICE DEPARTMENT,

LAUREN BACHA, individually and in her official  
capacity as an officer of the CHATTANOOGA POLICE DEPARTMENT,

DEBORAH DENNISON, individually and in her official  
capacity as an officer of the CHATTANOOGA POLICE DEPARTMENT,

ZACHERY MOODY, individually and in his official  
capacity as an officer of the CHATTANOOGA POLICE DEPARTMENT,

GEORGE ROMERO, individually and in his official  
capacity as an officer of the CHATTANOOGA POLICE DEPARTMENT,

WILLIAM SALYERS, individually and in his official  
capacity as an officer of the CHATTANOOGA POLICE DEPARTMENT, AND

BRYAN WOOD, individually and in his official  
capacity as an officer of the CHATTANOOGA POLICE DEPARTMENT,

Defendants.

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**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS OR IN  
THE ALTERNATIVE MOTON FOR LEAVE TO FILE AMENDED COMPLAINT**

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Plaintiffs file the following Memorandum in Opposition to Motion to the Dismiss filed by Defendant City of Chattanooga & Chattanooga Police Department and respectfully state to the Court as follows:

This case arises as a result of an incident that occurred on July 18, 2009. The deceased, Alonzo Heyward, was shot some 43 times by six police officers with the Chattanooga Police Department. In the Complaint previously filed, the Plaintiffs' alleged that Mr. Heyward's civil rights were violated pursuant to 42 U.S.C. §1983 & 1988; and that the Plaintiffs are entitled to damages for the wrongful death of Mr. Heyward under Tennessee state law.

Defendants City of Chattanooga and Chattanooga Police Department have filed a Motion to Dismiss the Complaint alleging that the Complaint failed to state a claim for which relief can be granted. The Defendant police officers have joined in this motion.

Defendants argue that the Plaintiffs lack standing to bring both federal and state claims. However, a careful review of Tennessee law clearly shows that the Plaintiffs have standing to bring both set of claims. While in § 1983 cases, the cause of action is entirely personal to the direct victim of the alleged constitutional tort see, *Jaco v. Bloechle*, 739 F.2d 239,241 (6<sup>th</sup> Cir. 1984), the United States Supreme Court has recognized federal law is unclear on survival of § 1983 actions upon the death of an alleged injured individual. *Robertson v. Wegmann*, 439 U.S. 584, 587, 589. Therefore, Plaintiffs contend that this Court should use the survivorship rule for civil actions of the state where the action is brought. 42 U.S.C. § 1988(a); *Jaco*, 739 F. 2d at 241.

In Tennessee no "right of action ... based on the wrongful act or omission of another ... be abated by the death of the party wronged; but the right of action shall pass in like manner as the right of action described § 20-5-106." Tenn. Code Ann. § 20-5-102. The Tennessee wrongful death statute provides:

The right of action which a person, who dies from injuries received from another, or whose death is caused by the wrongful act, omission, or killing by another, would

have had against the wrongdoer, in case death had not ensued, shall not abate or be extinguished by the person's death but shall pass to the person's surviving spouse and, in case there is no surviving spouse, to the person's children or next of kin; or to the person's personal representative, for the benefit of the person surviving spouse or next of kin...

Id. § 20-5-106(a). Under this statute if there is no surviving spouse the children of the deceased have priority to bring the action. *Foster v. Jefferys*, 813 S.W. 2d 449, (Tenn. Ct. App. 1991).

In this case there is no spouse and the children of the decedent are minors. It is undisputed that under Tennessee law a parent can bring a claim on behalf of his or her minor child. This is precisely what happened in this case. The mothers for all of the minor children, Tanisha Johnson and Neka Wells, have brought suit on behalf of their minor children.

Likewise, the decedent's parents, James L. Marine and Margie Marine, have standing to bring this suit. Tennessee law clearly gives a decedent's parents and siblings standing to assert loss of consortium claims. *Jordan v. Baptist Three Rivers Hosp.*, 984 S.W. 2d 593, 601 (Tenn.1999) (recognizing parental consortium and also holding "[t]he age of the child does not, in and of itself, preclude consideration of parental consortium damages); *Hancock v. Chattanooga-Hamilton County Hosp. Auth.*, 54 S.W. 3d 234, 236 (Tenn. 2001) (interpreting Tenn. Code Ann. § 20-5-113 to include consortium damages). This court can hear a state law claim alongside a § 1983 claim if both arise from the same set of facts. *Kinzer v. Metro. Gov't of Nashville*, 451 F. Supp. 2d 931, 947 (M.D. Tenn. 2006). As for wrongful death actions, Tennessee provides "survivors of the deceased may recover damages for their losses as a result of the death as well as damages sustained by the deceased from the time of injury to the time of death." *Jordan*, 984 S.W.2d at 598 (citing Tenn. Code Ann. § 20-5-113). Loss of consortium is "one component" of a wrongful death action. *Kline ex re. Kline v. Eyrich*, 69S.W. 3d 197, 207-08 (Tenn. 2002).

As the Court in *Kinzer* stated: "The law in that area though complex, because it involves the intersection between state and federal law is also fairly clear and well established: wrongful death

actions if authorized by state law, may be brought in conjunction with § 1983 actions and may provide for damages to a decedent's family members including loss of consortium type damages. *Id.* at 933 (emphasis added). A wrongful death action is clearly authorized by Tennessee state law and can be brought in conjunction with Plaintiffs' § 1983 action. Consortium is one element of the damages the Plaintiffs may recover.

In this case, the Complaint clearly asserts claim for loss of consortium and other wrongful death related damages arising out of the same set of facts given rise to the § 1983 claim. Parents, like the Marines, asserting these state law claims have standing pursuant to the case law cited above. As this Court decided earlier this year in *Spears v. Cooper*, 209 U.S. Dist. LEXIS 28762 (E.D. Tenn. April 20, 2009) where state claims brought by a Plaintiff asserted loss of consortium and other wrongful death related torts arose from the same set of facts giving rise to a § 1983 action, the Plaintiffs asserting those state law claims have standing.

In the alternative even if the Court should believe that additional parties should be brought into the suit, the interests of judicial economy and efficiency favor allowing the Plaintiffs sufficient time to amend their Complaint to add the party or parties the court deems appropriate rather than dismissing the case.

Because a careful review of Tennessee law clearly shows that the mothers of decedent's minor children have a right to file a lawsuit on behalf of the children for injuries and damages caused to their father and because Tennessee law clearly allows a parent of a decedent to recover consortium and other wrongful death related damages, these Plaintiffs clearly have standing in this action. For the foregoing reason, Defendants' Motion for Dismiss should be denied.

Respectfully submitted,

**THE COCHRAN FIRM - MEMPHIS**

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was electronically filed on October 8, 2009 with the Clerk of the Court for the Eastern District of Tennessee via the CM/CT system and served through the CM/ECF system to the following:

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/s/ Archie Sanders, III  
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