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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ESTATE OF OTTO ZEHM,
deceased, and ANN ZEHM,
in her personal capacity and as
representative of the Estate of
Otto Zehm,

Plaintiffs,

v.

CITY OF SPOKANE, et al.,

Defendants.

NO. CV-09-080-LRS

**ORDER GRANTING
CITY OF SPOKANE'S
MOTION TO DISMISS,
IN PART, *INTER ALIA***

BEFORE THE COURT is Defendant City of Spokane's Motion To Dismiss State Causes Of Action Pursuant To Fed. R. Civ. P. 12 (Ct. Rec. 86). This motion was heard with oral argument on January 13, 2010. Jeffry K. Finer, Esq., argued for Plaintiffs Estate of Otto Zehm and Ann Zehm. Rocco N. Treppiedi, Esq., argued for Defendant City of Spokane.

I. INTRODUCTION

This motion is specifically directed at the "State-Based Claims For Relief" set forth in Plaintiffs' (first) Amended Complaint (Paragraphs 4.10 - 4.14) filed June 9, 2009 (Ct. Rec. 11). These claims are asserted only against the City of Spokane based on *respondeat superior* and are not asserted against any individual

1 defendants. (Ct. Rec. 11 at Paragraph 4.14).

3 **II. DISCUSSION**

4 A Fed. R. Civ. P. 12(b)(6) dismissal is proper only where there is either a
5 "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under
6 a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699
7 (9th Cir. 1990). In reviewing a 12(b)(6) motion, the court must accept as true all
8 material allegations in the complaint, as well as reasonable inferences to be drawn
9 from such allegations. *Mendocino Environmental Center v. Mendocino County*,
10 14 F.3d 457, 460 (9th Cir. 1994); *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898
11 (9th Cir. 1986). The complaint must be construed in the light most favorable to
12 the plaintiff. *Parks School of Business, Inc. v. Symington*, 51 F.3d 1480, 1484 (9th
13 Cir. 1995). The sole issue raised by a 12(b)(6) motion is whether the facts
14 pleaded, if established, would support a claim for relief; therefore, no matter how
15 improbable those facts alleged are, they must be accepted as true for purposes of
16 the motion. *Neitzke v. Williams*, 490 U.S. 319, 326-27, 109 S.Ct. 1827 (1989).
17 The court need not, however, accept as true conclusory allegations or legal
18 characterizations, nor need it accept unreasonable inferences or unwarranted
19 deductions of fact. *In re Stac Electronics Securities Litigation*, 89 F.3d 1399,
20 1403 (9th Cir. 1996).

22 **A. Contempt**

23 One of the state causes of action alleged in Plaintiffs' Amended Complaint
24 is that "Defendants (Jim) Nicks and City of Spokane's conduct intentionally
25 violated a lawful order of a court of competent jurisdiction pursuant to RCW 7.21
26 et seq." (Paragraph 4.13 of Amended Complaint). This cause of action alleges a

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1 violation of a mutual non-disclosure order entered on May 30, 2006 in Spokane
2 County Superior Court. Plaintiffs claim that at a subsequent press conference,
3 Nicks released privileged and confidential information in violation of the order.
4 (Paragraphs 3.100 to 3.102).

5 Plaintiffs acknowledge that per the plain language of RCW 7.21.020,
6 contempt for violation of an order entered by a state court judge cannot be
7 exercised by a federal court. Accordingly, the contempt claim alleged in the First
8 Amended Complaint must be dismissed.

9
10 **B. Negligent Investigation, Spoliation of Evidence, Assault and**
11 **Defamation**

12 Plaintiffs state their (first) Amended Complaint asserts no claims for
13 negligent investigation, spoliation of evidence, assault, and defamation. With that
14 understanding, there is no basis for dismissal of claims which do not exist.
15 Defendant's motion is moot in this respect.

16
17 **C. Negligence**

18 Although not asserting a negligent investigation claim, Plaintiffs state they
19 are asserting a common law negligence claim against the City of Spokane.
20 According to Plaintiffs, "assuming [Zehm's] death was an unintended
21 consequence, . . . the responding officers' failure to use due care in subduing and
22 monitoring Mr. Zehm led to his unintended death." Negligence is not cognizable
23 in a federal 42 U.S.C. Section 1983 cause of action. *Davidson v. Cannon*, 474
24 U.S. 344, 106 S.Ct. 668 (1986). Plaintiffs say their common law negligence claim
25 is pled as an alternative to their Section 1983 cause of action which does allege
26 that Plaintiff's death was intended by the officers, or a result of their recklessness

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28 **MOTION TO DISMISS, IN PART - 3**

1 (willful and wanton disregard for the safety of others).

2 Defendant takes issue with this, contending Plaintiffs “cannot avoid the
3 impact of a statute of limitation by simply characterizing the tort as one covered by
4 a three-year statute of limitation- such as negligence- when the operative facts in
5 the complaint make it clear that the tort is covered by a two-year statute of
6 limitation- such as assault and battery.”¹ In other words, because the “operative
7 facts” of the Amended Complaint allege an intentional use of force, the common
8 law alternative cause of action has to be assault and battery², not negligence.

9 The court concludes that certain facts alleged in the Amended Complaint
10 could support either a Section 1983 claim or a common law negligence claim.

11
12 ¹ Common law assault and battery claims are subject to a two-year
13 limitation period, RCW 4.16.100, and would be time-barred considering those
14 claims arose in March 2006, and the initial complaint was filed in this case in
15 March 2009. (Ct. Rec. 1). This is also the case with regard to any common law
16 false arrest claim, although Plaintiffs do not contend they are asserting any such
17 claim.

18 ²Assault is an attempt, with unlawful force, to inflict bodily injuries upon
19 another with the apparent present ability to give effect to the attempt if not
20 prevented. *Brower v. Ackerley*, 88 Wn.App. 87, 92, 943 P.2d 1141 (1997). The
21 gist of a cause of action for civil assault is “the victim’s apprehension of imminent
22 physical violence caused by the perpetrator’s action or threat.” *Id.*, quoting *St.*
23 *Michelle v. Robinson*, 52 Wn.App. 309, 313, 759 P.2d 467 (1988). Battery occurs
24 where a tortfeasor intends harmful or offensive physical contact with another,
25 there is such contact, and the Plaintiff did not consent to the same. *Bundrick v.*
26 *Stewart*, 128 Wn.App. 11, 18, 114 P.3d 1204 (2005).

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1 Plaintiffs' (first) Amended Complaint alleges the Spokane Police Department has
2 a policy that detainees who are placed in a "four- point restraint" are to be put
3 "onto their sides or in a sitting position to reduce the risk of detainees suffering
4 respiratory distress, including death." (Paragraph 3.71). The Amended Complaint
5 alleges the officers who restrained Zehm did not follow this policy, and their
6 training pursuant to that policy, and that Zehm was instead positioned on his
7 stomach ("prone"). (Paragraphs 3.72-3.75). The Amended Complaint alleges the
8 officers then put a "non-rebreather mask" over Zehm's nose and mouth, but this
9 mask was not connected to any oxygen and air was only available through a
10 nickle-sized hole in the mask. (Paragraphs 3.79-3.80). It is alleged the mask is
11 not designed for use without an oxygen hose connected to it with flowing oxygen,
12 nor is it designed for use with the wearer in a prone position. (Paragraph 3.82). It
13 is alleged that use of the "non-rebreather mask without oxygen is not part of the
14 training and policy of the Spokane Police Department, nor are members of the
15 Department told that medical responders are trained to use the mask in this
16 fashion." (Paragraph 3.85). It is alleged the officers did not seek advice from the
17 fire department team concerning use of the mask as a spit barrier. (Paragraph
18 3.86).

19 A common law negligence claim based on these particular facts is
20 cognizable. The allegation appears to be that Zehm was already restrained- that

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1 force had already intentionally been used upon him to restrain him³- and that the
2 officers then failed to follow policy and training by not putting Zehm on his side
3 or into a sitting position. The problem was then compounded by placement of a
4 non-rebreather mask over Zehm's nose and mouth without any oxygen flowing to
5 the mask. These particular alleged facts do not necessarily have to constitute an
6 assault and battery, although they conceivably could if there is proof the officers
7 deliberately left Zehm on his stomach despite knowing they were not supposed to
8 do that, and/or used the non-rebreather mask without oxygen in deliberate
9 indifference to Zehm's safety (Paragraph 3.86 alleges "deliberate indifference").

10 Assuming Plaintiffs' common law negligence claim is limited to these
11 particular facts, it is properly pled as an alternative to a federal Section 1983
12 excessive force claim. The court finds nothing in either state or federal law
13 indicating that negligence cannot be pled as an alternative to an excessive force
14 claim, provided the facts alleged leave open the possibility that the injury to the
15 plaintiff was the result of negligence, rather than intent.

16 In *Boyles v. Kennewick*, 62 Wn.App. 174, 178, 813 P.2d 180 (1991), the
17

18 ³ It is not disputed that the force used upon Zehm by Officer Thompson
19 (and any other officers) prior to Zehm being restrained cannot be considered
20 negligence. It is simply excessive force or it is not. It is either excessive force
21 under Section 1983 and assault and battery under common law, or it is not. No
22 common law claims of assault and/or battery are alleged in Plaintiffs' (first)
23 Amended Complaint, presumably in recognition of the two-year statute of
24 limitations that applies to such claims. The federal Section 1983 excessive force
25 claim is timely since the three-year limitation period specified in RCW
26 4.16.080(2) pertains to that claim. *Rose v. Rinaldi*, 654 F.2d 546 (9th Cir. 1981).

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1 Washington Court of Appeals observed “there are no Washington cases mandating
2 a claim of assault and battery for all injuries inflicted during or after an arrest.”
3 The problem for the plaintiff in *Boyles* was the factual allegations in her complaint
4 did not raise a negligence claim against the police officer. Instead, all that was
5 alleged was an assault and battery claim (excessive force), subject to a two year
6 statute of limitations (RCW 4.16.100). Accordingly, dismissal of the complaint
7 was required. *Id.* at 177-78.

8 In *O’Donoghue v. Riggs*, 73 Wn.2d 814, 440 P.2d 823 (1968), the plaintiff,
9 who was a patient at a hospital, claimed she had been pushed by a nurse who was
10 attempting to force plaintiff to take her place in a line of patients going to their
11 evening meal, and that as a result, plaintiff fell and broke her leg. In her
12 complaint, the plaintiff claimed the acts attributable to the nurse constituted
13 negligence, and the trial court submitted the case to the jury as an action based on
14 negligence. The defendant nurse asserted this was an error because if the acts
15 attributed to her were actionable, they were actionable as a civil action for
16 “assault” (actually, battery⁴), and not for negligence. The Washington Supreme
17 Court disagreed:

18 Mrs. O’Donoghue’s testimony . . . is the only direct
19 evidence in the case stating the manner in which the
20 incident occurred. Mrs. Riggs denies there was any
21 such incident. If the incident occurred, as the jury had
22 a right to believe, then Mrs. Riggs’ conduct would
23 constitute negligence if she unintentionally but
24 carelessly used excessive force in placing Mrs.
O’Donoghue in the line of patients going to dinner.
Under such circumstances as we have here, the
intention with which Mrs. Riggs acted would be the
primary question in determining whether her act
should be deemed negligent or whether it would
constitute battery.

25
26 ⁴ 73 Wn.2d at 819, fn. 1.

1 . . .

2 An act cannot . . . be considered a battery unless
3 the actor intended to cause a harmful or offensive
4 contact with another person.

4 *Id.* at 819.

5 The state supreme court concluded the trial court could have properly
6 submitted to the jury the alternate theory requested by defendant (negligence), and
7 could have properly permitted the jury to determine whether the nurse's conduct,
8 if they believed the incident occurred, constituted either negligence or battery. *Id.*
9 at 820.

10 The same is true here. If the evidence presented at trial permits it, the jury
11 will be allowed to determine whether the officers, in deliberate disregard of their
12 training, left Zehm in a prone position without oxygen flowing to the non-
13 rebreather mask, intending harmful consequences to him; or if they instead
14 carelessly failed to follow their training, resulting in harmful consequences to
15 Zehm which were not intended; or that they acted neither intentionally or
16 negligently. An appropriate special verdict form will insure the jury does not
17 render inconsistent decisions.

18
19 **D. RCW 68.50.105**

20 Plaintiffs assert a cause of action under this statute which is related to their
21 allegation that Defendant Nicks disclosed privileged portions of Zehm's Autopsy
22 Report to the public. (Amended Complaint at Paragraphs 3.98 to 3.107). One of
23 Plaintiffs' state-based claims for relief is that "Defendants' wrongful conduct
24 deprived Otto Zehm and his Estate of statutory privacy and dignitary rights of the
25 deceased under RCW 68.50.105."

26 RCW 68.50.105 provides that "[r]eports and records of autopsies or post

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1 mortems shall be confidential.” At the outset, the question is whether a statutory
2 cause of action is even authorized. The court is aware of no such authority. What
3 has been recognized by Washington courts is that a common law cause of action
4 for invasion of privacy arises out of a violation of RCW 68.50.105 because, by
5 virtue of that statute, immediate relatives of a decedent have a protectable privacy
6 interest in the autopsy records of the decedent. *Reid v. Pierce County*, 136 Wn.2d
7 195, 212, 961 P.2d 333 (1998).

8 In *Eastwood v. Cascade Broadcasting Co., Inc.*, 106 Wn.2d 466, 474, 722
9 P.2d 1295 (1986), the Washington Supreme Court held the two-year statute of
10 limitations codified in RCW 4.16.100 applies to “false light” invasion of privacy
11 claims. A “false light” claim arises when someone publicizes a matter that places
12 another in a false light if: (a) the false light would be highly offensive to a
13 reasonable person; and (b) the actor knew of or recklessly disregarded the falsity
14 of the publication and the false light in which the other would be placed. *Id.* at
15 470-71.⁵ There are four distinct types of invasion of privacy: 1) intrusion; 2)
16 disclosure; 3) false light; and 4) appropriation. *Id.* at 469. This court is unaware
17 of any authority holding that anything other than the two-year statute of limitations
18 specified in RCW 4.16.100 is applicable to all types of invasion of privacy
19 claims.⁶

20 In the absence of a cognizable statutory cause of action under RCW 68.50,
21 what remains is a common law cause of action for invasion of privacy to which a
22

23 ⁵ “False light” is alleged at Paragraphs 3.104 and 3.105 of the (first)
24 Amended Complaint.

25 ⁶ Washington’s catch-all statute of limitations, RCW 4.16.130, is two years.
26 “Invasion of privacy” is not specifically referred to in RCW 4.16.100.

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28 **MOTION TO DISMISS, IN PART - 9**

1 two-year statute of limitations clearly applies. Assuming, however, that a
2 statutory cause of action exists, Plaintiffs contend a three-year statute of
3 limitations applies to RCW 68.50.105 because it “involves a claim for personal
4 injury and, in particular, a claim against the City’s chief law enforcement officer.”⁷
5 In particular, Plaintiffs rely on RCW 4.16.080(5) which provides for a three-year
6 statute of limitations regarding “[a]n action against a sheriff, coroner, or **constable**
7 upon a liability incurred by the doing of an act in his official capacity and by
8 virtue of his office, or by omission of an official duty” (Emphasis added).

9 RCW 68.50.015 provides for judicial review of a coroner’s determination.
10 In *Thompson v. Wilson*, 142 Wn.App. 803, 812 175 P.3d 1149 (2008), the
11 Washington Court of Appeals held that the two-year statute of limitations
12 provided in RCW 4.16.130 applies to judicial review of a coroner’s determination.
13 According to the court, “[b]ecause RCW 68.50.015 does not contemplate an action
14 resulting in liability, RCW 4.16.080(5), by its plain language, does not apply,” and
15 “the three-year limitation period cited in RCW 4.16.080(5) is . . . inapplicable.”
16 Here, Plaintiffs contend that unlike judicial review of a coroner’s determination
17 under RCW 68.50.015, their cause of action under RCW 68.50.105 does
18 “contemplate an action resulting in liability,” and therefore, RCW 4.16.080(5) and
19 its three-year limitation period applies.

20 The court has difficulty with Plaintiffs’ argument. First, as mentioned, no
21 court has held that a cause of action under RCW 68.50.105 exists separate and
22 apart from a common law invasion of privacy cause of action for which it is
23 undisputed that a two-year limitations period applies. Secondly, although it is true
24 that RCW 4.16.080(5) refers to “an action . . . upon a liability,” the two-year

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26 ⁷ Nicks was the Acting Police Chief when this incident occurred.

1 limitations period set forth in RCW 4.16.100 clearly pertains to liability actions
2 (libel, slander, assault, assault and battery, or false imprisonment), and the two-
3 year “catch-all” limitations period makes no distinction between liability and non-
4 liability actions. Accordingly, this court finds that Plaintiffs’ cause of action is in
5 fact one in common law for an invasion of privacy (whether that be false light
6 and/or disclosure and/or intrusion⁸) and that a two-year limitations period applies,
7 whether that be pursuant to RCW4.16.100 or RCW 4.16.130.

8 The next question is whether Plaintiffs’ cause of action is barred by the two-
9 year limitations period. There is no dispute that Plaintiffs’ invasion of privacy
10 claim arose in 2006 and it was not until 2009 that they filed their claim for
11 damages with the city, and subsequently their complaint in this court. Plaintiffs
12 assert, however, that there has been a “continuing violation” of their privacy rights
13 such that their claim has yet to even accrue. The “continuing violation” doctrine is
14 an equitable exception to the statute of limitations in circumstances where the
15 wrongful conduct of the defendant is ongoing. *Milligan v. Thompson*, 90
16 Wn.App. 586, 595, 953 P.2d 112 (1998). According to Plaintiffs, the City
17 continues to maintain a website disclosing portions of the autopsy in violation of
18 RCW 68.50.105. (See Ct. Rec. 97, Declaration of Frank Delaney attached to
19 Declaration of Jeffry Finer). The City does not respond to this contention. As
20 such, the court will not dismiss Plaintiffs’ invasion of privacy claim. Instead, if
21 necessary, the “continuing violation” issue can be addressed in another 12(b)(6)
22 motion to dismiss, or in a Rule 56 summary judgment motion.

23
24 ⁸ See Paragraphs 3.100-3.102 re alleged improper disclosure by Defendant
25 Nicks, and Paragraphs 3.108-3.113 re alleged improper intrusion by Defendant
26 Ferguson.

1 E. Vicarious Liability

2 Paragraph 4.14 of the (first) Amended Complaint states:

3 The State-based claims for relief are brought only against
4 Defendant City of Spokane, which is liable for all the acts
5 of individual defendants and other agents and employees
6 acting within the scope of their duties under the doctrine
7 of *respondeat superior*.

8 The City has potential vicarious liability with respect to the negligence and
9 invasion of privacy causes of action. Vicarious liability, otherwise known as the
10 doctrine of *respondeat superior*, imposes liability on an employer for the torts of
11 an employee who is acting on the employer's behalf. Where the employee steps
12 aside from the employer's purpose to pursue a personal objective of the employee,
13 the employer is not vicariously liable. The scope of employment limits the
14 employer's vicarious liability, but is not a limit on the employer's liability for
15 breach of its own duty of care. *Niece v. Elmview Group Home*, 131 Wn.2d 39, 48,
16 929 P.2d 420 (1997).

17 Based on the alleged facts set forth in the (first) Amended Complaint
18 relating to negligence and invasion of privacy, there is a potential basis for finding
19 the City vicariously liable for those torts if they were in fact committed by city
20 police officers. In other words, the facts alleged indicate those officers potentially
21 acted within the scope of their employment with the city.

22 III. CONCLUSION

23 Plaintiffs' contempt claim pursuant to RCW 7.21 is **DISMISSED with**
24 **prejudice**. To that extent, Defendant's Motion To Dismiss (Ct. Rec. 86) is
25 **GRANTED**.

26 The balance of Defendant's Motion To Dismiss (Ct. Rec. 86) is **DENIED**
27 with the understanding that: 1) Plaintiffs are not asserting common law claims for

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1 negligent investigation, spoliation of evidence, assault, defamation, and false
2 arrest; 2) Plaintiffs are asserting an alternative common law negligence claim
3 based on a particular set of facts pertaining to an alleged violation of training and
4 policy concerning positioning of individuals who have already been placed into a
5 four-point restraint, and/or concerning use of a non-rebreather mask; and 3)
6 Plaintiffs are asserting a common law cause of action for invasion of privacy based
7 either on false light and/or disclosure and/or intrusion, that a two-year limitations
8 period applies to that cause of action, and there remains a question regarding
9 application of the “continuing violation” doctrine to preclude this cause of action
10 from being time-barred.

11 Resolution of Plaintiffs’ Motion To File Second Amended Complaint (Ct.
12 Rec. 89) was deferred pending resolution of Defendant’s Motion To Dismiss. At
13 the request of counsel for Plaintiffs, the court will further defer resolution of the
14 Motion To File Second Amended Complaint pending Plaintiffs’ submission of a
15 new proposed Second Amended Complaint. **No later than January 29, 2010,**
16 Plaintiffs will submit a new proposed Second Amended Complaint along with a
17 supplemental memorandum of authorities in support of the proposed amendment.
18 Defendants will serve and file any response no later than **February 12, 2010,** and
19 Plaintiffs will serve and file any reply no later than **February 19, 2010.** Hearing
20 on the motion, without oral argument, is re-noted for **February 26, 2010.**

21 **IT IS SO ORDERED.** The District Court Executive is directed to enter
22 this order and to provide copies to counsel of record.

23 **DATED** this 22nd day of January, 2010.

24 *s/Lonny R. Suko*

25 _____
26 LONNY R. SUKO
27 Chief U. S. District Court Judge

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