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**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON**

ESTATE OF OTTO ZEHM,)	
deceased, and ANN ZEHM, in her)	Case No.: CV
personal capacity and as)	
representative of the Estate of)	
Otto Zehm,)	COMPLAINT FOR DAMAGES
)	FOR VIOLATION OF CIVIL
Plaintiffs,)	RIGHTS
)	
vs.)	JURY DEMANDED
)	
CITY OF SPOKANE, JIM)	
NICKS, KARL THOMPSON,)	
STEVEN BRAUN, ZACK)	
DAHLE, ERIN RALEIGH, DAN)	
TOROK, RON VOELLER,)	
JASON UBERAGA, and)	
THERESA FERGUSON, each in)	
their personal and representative)	
capacities.)	
)	
Defendants.)	

I. PARTIES

1.1 Plaintiff ESTATE OF OTTO ZEHM was created on April 17, 2006. Prior to his death Otto Zehm was at all times pertinent to this litigation a resident of

1 Spokane County. ANN ZEHM was appointed personal representative of the Estate
2 of Otto Zehm on April 17, 2006, and her appointment was renewed on February
3 13, 2009.
4

5 1.2 Plaintiff ANN ZEHM is and has been at all times pertinent to this litigation
6 a resident of the State of Washington, residing in the Eastern District of
7 Washington. Plaintiff ANN ZEHM is the natural mother of Otto Zehm, deceased.
8 ANN ZEHM brings claims on behalf of the Estate of Otto Zehm and on her own
9 behalf.
10

11 1.3 Defendant CITY OF SPOKANE is a municipality in the State of
12 Washington and employer/principal of the individuals responsible for determining
13 custom and policy for its Police Department's use of force and investigations.
14

15 1.4 Defendant JIM NICKS, at all times pertinent to this complaint was the
16 Acting Chief of Police for the City of Spokane and a municipal policy maker. Jim
17 Nicks is sued in his personal and representative capacity.
18

19 1.5 Defendant KARL THOMPSON, at all times pertinent to this complaint
20 was a law enforcement officer employed by the City of Spokane. Officer
21 Thompson is sued in his personal and representative capacity.
22

23 1.6 Defendant STEVEN BRAUN, at all times pertinent to this complaint was a
24 law enforcement officer employed by the City of Spokane. Officer Braun is sued in
25 his personal and representative capacity.

1 1.7 Defendant JASON UBERAGA at all times pertinent to this complaint was
2 a law enforcement officer employed by the City of Spokane. Officer Walker is
3 sued in his personal and representative capacities.
4

5 1.8 Defendant ZACK DAHLE at all times pertinent to this complaint was a
6 law enforcement officer employed by the City of Spokane. Officer Dahle is sued in
7 his personal and representative capacities
8

9 1.9 Defendant ERIN RALEIGH at all times pertinent to this complaint was a
10 law enforcement officer employed by the City of Spokane. Officer Raleigh is sued
11 in her personal and representative capacities.
12

13 1.10 Defendant DAN TOROK at all times pertinent to this complaint was a law
14 enforcement officer employed by the City of Spokane. Officer Torok is sued in his
15 personal and representative capacities.
16

17 1.11 Defendant RON VOELLER at all times pertinent to this complaint was a
18 law enforcement officer employed by the City of Spokane. Officer Voeller is sued
19 in his personal and representative capacities.
20

21 1.12 Defendant THERESA FERGUSON at all times pertinent to this complaint
22 was a law enforcement officer employed by the City of Spokane. Officer Ferguson
23 is sued in her personal and representative capacities.
24

25 II. JURISDICTION AND VENUE

2.1 All acts complained of occurred in the Eastern District of Washington.

1 2.2 Venue is proper in the United States District Court for the Eastern District
2 of Washington.

3
4 2.3 Jurisdiction is proper in the United States District Court pursuant to Title
5 42, United States Code § 1988; Title 28 USC § 1331; and 28 USC § 1343(a)(3).

6 2.4 This court has personal and subject matter jurisdiction.

7 **NO SUPPLEMENTAL JURISDICTION**

8
9 2.5 In this complaint, Plaintiffs do not request relief for state law claims and
10 do not seek supplemental jurisdiction.

11 2.6 Solely for the purpose of establishing predicate acts and circumstances in
12 support of their *federal* claims, Plaintiffs reference specific state-law violations
13 where applicable.
14

15 **RESERVATION OF RIGHT**
16 **TO AMEND FOR STATE-LAW CLAIMS**
17 **AND SUPPLEMENTAL JURISDICTION**

18 2.7 On February, 12, 2009, Plaintiffs presented a non-judicial notice of claim
19 to the City of Spokane alleging solely state-law claims.

20 2.8 Plaintiffs reserve the right to amend this complaint and include their state-
21 law claims upon the expiration of the 60-day statutory period.

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III. FACTS

Introduction: SPOKANE POLICE TRAINING & POLICIES

3.1 Spokane Police are trained to follow the Police Department's rules, regulations, and policies regarding seizure of suspects.

3.2 This training includes the proper use of force against individuals being seized.

3.3 The training requires proportionate responses and prohibits the use of disproportionate force.

3.4 The Spokane Police Department's use of force policy prohibits the use of weapons against passive resistance.

3.5 The Spokane Police Department's use of force policy prohibits the use of deadly force against passive resistance. Deadly force, in part, includes an officer using his or her baton to strike a detainee in the head.

3.6 Spokane Police are also given instruction — as part of their initial and on-going training — regarding the civil rights of individuals detained, seized and arrested.

3.7 Spokane Police are instructed that federal law prohibits police from unreasonable seizures of persons, including the unreasonable use of force to effectuate a seizure.

1 3.8 Spokane Police are instructed that an unreasonable seizure of a person
2 may subject them to civil and criminal liability.

3
4 3.9 Spokane Police are instructed that an unreasonable seizure of a person's
5 private papers, including their confidential medical records, may subject them to
6 civil and criminal liability.

7
8 3.10 The Spokane Police Department employs senior police officers to
9 conduct internal investigations of incidents involving questionable use of force by
10 a member of the Department. These officers have additional training in the
11 methods of investigation appropriate to internal reviews.

12
13 3.11 The City of Spokane has agreed to permit investigators from other law
14 enforcement agencies to investigate use of force incidents involving City of
15 Spokane Police Department Officers.

16
17 3.12 The Spokane Police Department had, at the time of the incidents
18 described below, written policies and procedures in place to reduce the risk of in-
19 custody death related to the condition known variously as "excited delirium"
20 "manic delirium", etc.

21
22 3.13 The Spokane Police Department had, at the time of the incidents
23 described below, written policies and procedures in place to reduce the risk of in-
24 custody death related to the use of four-point restraints.

1 **911 CALL, DISPATCH & POLICE RESPONSE**

2 3.14 On March 18, 2006, two women at an ATM located on North Division,
3 in Spokane, Washington, called 911 to report that they believed an unknown male
4 interrupted their transaction and may have removed money from their ATM
5 account. The 911 operator advised police dispatch who radioed to officers to
6 respond to a suspicious circumstance.
7

8
9 3.15 The 911 caller described the suspect's physical appearance. Based on the
10 copy of the 911 call released by the Spokane Police Department, the caller stated
11 that the suspect was "messing with [the ATM] forever" and "he had like a big wad
12 of something so I think it was money and then he put it in his jacket because when
13 we started driving to see where he was going, uh, he ran."
14

15 3.16 The female complaintant stated to the 911 operator that her companion
16 believed she had cancelled her ATM transaction.
17

18 3.17 The City of Spokane Police Dispatcher, whose identity at this time is
19 unknown, falsely advised responding officers that the complaintant thought the
20 suspect "appears to be high."
21

22 3.18 The City of Spokane Police Dispatcher erroneously stated that the
23 complaintants advised that they had left their card in the ATM machine and that
24 the suspect had their money. The 911 caller's only reference to the ATM card
25

1 specifically stated that her companion “has her card” but that they saw a wad in the
2 suspect’s hand and “I think it was money.”

3
4 3.19 At no time did the complaintants state that the card was left in the
5 machine.

6 3.20 At no time did the complaintants confirm that money was taken.

7
8 3.21 Officer Thompson heard the dispatch broadcasts, knew Officer Braun
9 declared he would respond, and chose to respond to the area ahead of Officer
10 Braun.

11 3.22 Officer Thompson observed Zehm enter the Zip Trip located at 1721
12 North N. Division, at approximately 18:25 and 57 seconds as shown on the Zip
13 Trip Surveillance recordings.

14
15 3.23 Thompson was able to observe Zehm before Zehm entered the store.
16 Thompson did not note Zehm behaving in a disoriented manner. Thompson did not
17 observe Zehm exhibiting the recognized signs of “excited delirium”, that is, Zehm
18 exhibited no hyper-thermic state, nor shed his clothing, nor moved with a
19 staggered gait, nor acted in a manner that showed gross agitation. Thompson had
20 no reason to believe that Zehm was blocking traffic. Thompson had no reason to
21 believe that Zehm posed any threat to himself or others. Thompson had no reason
22 to believe that Zehm was armed with a weapon.
23
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25

1 3.24 There were no objective signs that Otto Zehm was suffering from
2 “excited delirium” prior to Officer Thompson’s engaging Zehm.

3
4 3.25 Officer Thompson asked the City of Spokane Police Dispatch whether
5 the complaintants confirmed that Zehm had taken money. The City of Spokane
6 Police Dispatch advised Officer Thompson that the 911 complaintants confirmed
7 that Zehm had taken money.

8
9 3.26 Based on the 911 and dispatch tapes released by the Spokane Police
10 Department it does not appear that the complaints were asked by the 911 operator
11 to confirm the loss of money or that the complainants ever alleged that their money
12 was in fact taken.

13
14 3.27 Within moments of confirming that money was taken, the City of
15 Spokane Police Dispatch Officer alerted Officer Thompson and other responding
16 officers that the complaintants were “not entirely certain” that money was taken.

17
18 3.28 At the point in time that Officer Thompson stepped into the Zip Trip —
19 at 18:26 and 8 seconds, as shown on the Zip Trip surveillance recording — he had
20 reasonable suspicion that Zehm may have removed money from an ATM that
21 belonged to someone else’s account, that the complaining witness believed Zehm
22 was “high” and that he had run from the complaining witnesses after they began
23 following him.
24
25

1 3.29 Officer Thompson has stated that based on his training and experience
2 and under the circumstances known to him, Officer Thompson did not have
3 probable cause to arrest or seize Zehm when he confronted him in the store.
4

5 3.30 Officer Thompson, however, has admitted that he carries his baton in
6 hand or on his duty belt on most of the calls and contacts he has. Officer
7 Thompson considers himself proficient in the use of his baton and admits he has
8 had extensive training in its use, beginning in 1969, with the Los Angeles Police
9 Academy.
10

11 3.31 Based on his training and experience and under the circumstances known
12 to him, Officer Thompson believed that had the authority to detain Zehm in order
13 to investigate whether there was a basis to arrest Zehm.
14

15 3.32 Officer Thompson also knew that Officer Braun was in the area
16 responding to the same call. Officer Thompson did not wait for Braun's arrival but
17 entered the store alone.
18

19 3.33 As soon as Officer Thompson stepped inside the store he knew that there
20 were a number of customers in the store.

21 3.34 Based on his training and experience and under the circumstances known
22 to him, Officer Thompson knew that he was to consider the safety of his suspect,
23 the nearby customers, and his own safety in detaining Zehm.
24
25

1 3.35 In a later statement, Officer Thompson claimed that his intention on
2 entering the Zip Trip was to handcuff Zehm and detain him while he investigated
3 whether Zehm was subject to arrest.
4

5 3.36 Entering the Zip Trip, Officer Thompson knew the store was well lit.

6 3.37 Officer Thompson identified Zehm and accelerated his pace toward
7 Zehm, drawing his police baton from his left side and passing the baton to his right
8 hand.
9

10 3.38 Officer Thompson can be seen to raise his baton over his head in
11 preparation to strike Zehm after Zehm had selected a soda pop in a plastic bottle
12 with his back to the officer.
13

14 3.39 Zehm turned around and faced Officer Thompson and Officer Thompson
15 at 18:26 and 12 seconds on the Zip Trip video.
16

17 3.40 Officer Thompson has alleged in his reports that when Zehm turned to
18 face him, Zehm was holding a bottle of soda pop.
19

20 3.41 Officer Thompson has alleged in his reports that when he saw Zehm's
21 hands, he stopped his advance and ordered Zehm to drop the soda pop.
22

23 3.42 According to Officer Thompson, Zehm stated, "Why?."

24 3.43 Officer Thompson has stated that he issued a second forceful command
25 to drop the soda pop and that Zehm replied, "No."
26

1 3.44 Witnesses in the immediate area do not report hearing this alleged
2 exchange and on information and belief Plaintiffs allege that Officer Thompson did
3 not stop in his rush towards Zehm and did not issue two orders to Zehm to drop the
4 soda pop.
5

6 3.45 According to Officer Thompson's training — even if Zehm had queried
7 "Why?" and then responded, "No," — a verbal refusal to follow his command is
8 considered passive resistance.
9

10 3.46 According to Spokane Police policy and procedure, passive resistance
11 does *not* authorize an officer to use deadly force, nor use a weapon against the
12 passively resisting suspect. At the point Officer Thompson rounded the corner and
13 was in the rear aisle of the Zip Trip facing Zehm the following was known to
14 Officer Thompson:
15

- 16 a. Zehm was approximately 15 feet or more away;
- 17 b. Wearing clothing appropriate to the season;
- 18 c. in full view;
- 19 d. in the well-lit Zip Trip convenience store;
- 20 e. in the presence of a number of customers;
- 21 f. Officer Braun was responding to the scene;

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25 ///

1 g. there was no indication at the time Officer Thompson entered the Zip
2 Trip and saw Zehm in the southwest corner that Zehm was fleeing or
3 attempting to leave the scene;
4

5 h. there was no basis to believe that Zehm was armed with a weapon;
6 nor any information upon which a reasonable officer could conclude
7 that Zehm posed a safety risk to the public.
8

9 **FACTS RELATING TO OFFICER THOMPSON'S PRE-EMPTIVE**
10 **ASSAULT AND USE OF DEADLY FORCE**

11 3.47 Officer Thompson decided to respond to Zehm's alleged query, "Why"
12 and "No" with a pre-emptive physical attack and use a weapon to strike Zehm to
13 the ground.

14 3.48 Officer Thompson immediately rushed Zehm intending to strike him with
15 his baton.
16

17 3.49 On information and belief, Officer Thompson's purpose, namely to strike
18 Zehm to the ground, was not justified under the circumstances and facts known to
19 the officer but was substantially motivated by a purpose to punish or inflict
20 payback upon Zehm for his saying "Why?" and "No."
21

22 3.50 In the alternative, Office Thompson acted with deliberate indifference to
23 Zehm's rights in deciding to strike Zehm to the ground.
24
25

1 3.51 Apart from his purpose, Officer Thompson's conduct in deciding to
2 strike Zehm to the ground was done intentionally, wantonly, and without
3 justification.
4

5 3.52 Officer Thompson could see that Zehm was observing Officer Thompson
6 rush towards Zehm with his baton raised.

7 3.53 Officer Thompson could see Zehm back away.
8

9 3.54 Officer Thompson knew that Zehm was not actively resisting, knew that
10 Zehm was not threatening the officer verbally, knew that Zehm was not taking a
11 fighting stance, nor turning to run. Officer Thompson knew that Zehm was backing
12 away from Officer Thompson and from Thompson's brandished baton.
13

14 3.55 The attack by Thompson was not in compliance with Department training
15 and written policy regarding the use of weapons against passively resisting
16 suspects. Thompson's baton assault was not a proper response to Zehm's
17 indications of passive resistance under Departmental written policy or the Fourth
18 and/or First Amendments.
19

20 3.56 Officer Thompson, by his preemptive and unlawful attack, created the
21 risk that Zehm would lawfully defend himself.
22

23 3.57 But for Officer Thompson's preemptive and unlawful attack, Zehm
24 would not have needed to defend himself.
25

1 3.58 Officer Thompson knew or should have known that the settled law,
2 called the “danger creation” doctrine, holds officers liable for their unreasonable
3 acts as well as for the natural consequences of those misdeeds.
4

5 3.59 As Zehm backedpedaled away from Thompson’s charge and raised baton,
6 Zehm raised his hands to protect his face and head.

7 3.60 Zehm never threw the soda pop bottle at Officer Thompson but used the
8 bottle to protect his own face and head from Officer Thompson’s attack.
9

10 3.61 Officer Thompson struck Zehm’s leg with the police baton, intending
11 that the pain of the blow would bring Zehm to the ground.

12 3.62 A struggle followed during which Officer Thompson deployed his taser
13 against Zehm and struck Zehm with his police baton six or more times in rapid
14 succession.
15

16 3.63 Witnesses to Officer Thompson’s initial assault against Zehm have stated
17 to investigators that Officer Thompson struck Zehm in the head with his police
18 baton.
19

20 3.64 The county medical examiner’s findings regarding a wound above Otto
21 Zehm’s eye is consistent with a blow from an object the same shape as Officer
22 Thompson’s police baton.
23

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25 ///

1 3.65 The county medical examiner's findings regarding a wound under Otto
2 Zehm's scalp do not rule out the cause of that wound arising from a blow by
3 Officer Thompson's police baton.
4

5 3.66 Officer Thompson's training forbids the use of baton strikes to the head
6 except when deadly force is justified.
7

8 3.67 Officer Thompson's use of deadly force, i.e., striking Otto Zehm in the
9 head with his police baton, was unjustified by the officer's experience and training
10 and under the facts and circumstances known to the officer at the time.

11 3.68 Zehm reasonably defended himself, struggling to ward off Officer
12 Thompson's baton blows and regain his feet. Zehm's self-defense, lawful under
13 well-established rules governing the limits of legitimate police use of force, merely
14 resulted in Thompson's further escalation of force in retaliation.
15

16 **FACTS RELATING TO OFFICERS'**
17 **RESTRAINT OF ZEHM**

18 3.69 At 18:26 and 44 seconds, as shown on the Zip Trip surveillance cameras,
19 Officer Braun entered the store from the south door and joined the struggle, also
20 tasing Zehm. Within minutes of Braun's arrival, Officers Raleigh, Voeller,
21 Uberagua, Dahle and Torok came to the scene and they assisted one another to
22 restrain Zehm's arms behind his back.
23

24 3.70 Zehm's legs were restrained as well.
25

1 Officers attached the leg restraint to the wrist restraint per Spokane Police custom
2 and policy.

3
4 3.71 Spokane Police are trained to place detainees in four-point restraint, such
5 as Zehm was in, onto their sides or in a sitting position to reduce the risk of
6 detainees suffering respiratory distress, including death.

7 3.72 The officers restraining Zehm did not follow their training.

8
9 3.73 Spokane Police Department has a policy requiring that detainees in four-
10 point restraint, such as Zehm was in, be placed onto their sides or in a sitting
11 position to reduce the risk of detainees suffering respiratory distress, including
12 death.

13
14 3.74 The officers restraining Zehm did not follow the City's policy.

15 3.75 Contrary to policy, Zehm was positioned onto his stomach for the next 13
16 of 16 minutes during which time he ceased to struggle. Videos taken from the
17 store's surveillance cameras show that Zehm's feet, though strapped loosely to his
18 wrists, were periodically physically pinned back by an officer who was positioned
19 at Zehm knees, thus increasing the pressure on Zehm's diaphragm.

20
21 **FIRE DEPARTMENT CALLED TO SCENE**

22 3.76 Officers notified the City of Spokane Fire Department that Zehm had
23 been tasered and a team responded to the scene to remove the barbed taser darts
24
25

1 from Zehm's abdomen. The Fire Department team retrieved the darts, and removed
2 themselves from the immediate scene.

3 3.77 Officers had noted that during their struggle with Zehm he vomited.
4
5 Officers also noted blood coming from his mouth.

6 3.78 Defendant Erin Raleigh requested the medical responders to provide a
7 medical mask to cover Zehm's mouth. The Firefighter's notes reflect that the
8 police officer was concerned that Zehm "might" spit and that the mask was to
9 reduce the health risk of pathogens or bites.
10

11 3.79 Examination of the uniforms of each officer following the episode did
12 not reveal any residue showing that Zehm spat on an officer.
13

14 3.80 In any event, a non-rebreather mask was given to Officer Raleigh, who
15 placed it over Zehm's nose and mouth and secured the mask with straps behind
16 Zehm's head.
17

18 3.81 The mask was not connected to oxygen; air was only available through a
19 nickel-sized hole in the mask.

20 3.82 The hole, however, can be blocked or occluded by clothing or any
21 surface coming into contact with the mask.
22

23 3.83 This mask is not designed for use without an oxygen hose connected to it
24 with oxygen flowing, nor for use with the wearer in a prone position.
25

1 3.84 This mask is known to cause wearers, even in a hospital setting with
2 oxygen attached and flowing, to experience a sensation that their breathing is being
3 compromised and mask manufacturers routinely advise medical personnel to
4 reassure patients that the mask, properly used, will permit full breathing.
5

6 3.85 This mask is not designed to fully clear carbon dioxide from the space
7 trapped over the subject's nose and mouth if the hole is blocked.
8

9 3.86 The use of the non-rebreather mask without oxygen is not part of the
10 training and policy of the Spokane Police Department, nor are members of the
11 Department told that medical responders are trained to use the mask in this fashion.
12

13 3.87 Defendant Officers did not seek advice from the Fire Department team
14 on the use of the mask as a spit barrier. One or more of the officers simply directed
15 the Fire Department team to provide the mask.
16

17 3.88 No officer on the scene objected to the use of the mask.
18

19 3.89 No member of the Fire Department team monitored Zehm after the mask
20 was placed over his nose and mouth.
21

22 3.90 While restrained face-down with one or more officers placing their
23 weight on his neck, shoulders, abdomen and hips during his struggle with the
24 officers, Zehm's ability to breath was already compromised.
25

 3.91 His risk for heightened anxiety, suffocation, and/or cardio-pulmonary
arrest was increased by the placement of the unconnected non-rebreather mask

1 over Zehm's face as the mask can, when improperly used, cause carbon dioxide to
2 build up in the volume trapped against the wearer's face, resulting in acidosis or
3 other disorder, and elevating the risk of serious harm or death.
4

5 3.92 Zehm ceased breathing while in four-point restraint on his stomach with
6 the non-rebreather mask over his mouth and nose.

7 3.93 Officers, once they noticed that Zehm had stopped breathing, asked the
8 Fire Department team to return inside the Zip Trip and examine Zehm.
9

10 3.94 The Fire Department team was unable to revive him and he was
11 transported by ambulance to the hospital.

12 3.95 Otto Zehm died at a local hospital on March 20, 2006, at which point in
13 time his organs were recovered for transplantation.
14

15 3.96 His temperature at admission to the hospital was not elevated.

16 3.97 He had no pre-existing heart disease.

17 3.98 Photos disclose that Zehm had multiple bruises and bone fractures, taser
18 burns, and petechiae inside his eyelids.
19

20 3.99 The medical examiner concluded that "it is likely in this case, and in
21 similar cases, that restraint itself placed the decedent at risk for cardio-pulmonary
22 arrest." The examiner ruled that Otto Zehm's death was a homicide because it
23 would have been unlikely but for the prone restraint while in total appendage
24 restraint position.
25

1 3.100 Upon completion of the Autopsy Report by the Medical Examiner, the
2 City of Spokane arranged a press conference and Chief Nicks disclosed privileged
3 portions of the Autopsy Report and other privileged and private information to the
4 public.
5

6 3.101 Prior to the above disclosure, the City had requested that Plaintiff agree
7 to the entry of a mutual non-disclosure order that would have covered confidential
8 investigatory information in the possession of the police.
9

10 3.102 The City and Chief Nicks knew that when this non-disclosure order was
11 signed, prior to the news conference, it created its own set of rights in favor of the
12 Plaintiff in addition to rights established by statute.
13

14 3.103 In addition to releasing the privileged and/or confidential information,
15 Chief Nicks or subordinates in the Department's media relations position stated
16 that:
17

- 18 a. Zehm had lunged at Officer Thompson, and
- 19 b. Zehm had been kept on his side for the majority of the time he was
20 restrained.

21 3.104 Both statements are false.

22 3.105 Chief Nicks' false statements placed Zehm in a negative light.

23 3.106 Chief Nicks made the false statements after having viewed the security
24 camera videotape of Officer Thompson's confrontation with Zehm.
25

1 3.107 Chief Nicks made the false statements knowing them to be false.

2 3.108 Under Washington Law at the time of Zehm's death, all pre-conviction
3 criminal proceedings were abated *ab initio*.
4

5 3.109 A reasonable officer would know that a dead person cannot be charged
6 with a crime.

7 3.110 Despite Zehm's death, Officer Ferguson, acting under color of state law,
8 presented a sworn affidavit to a local magistrate requesting access to confidential
9 medical and employment records for the alleged purpose of investigating the crime
10 of third degree assault of a police officer.
11

12 3.111 A reasonably well-trained officer would know, and Officer Ferguson —
13 upon information and belief — did know that the warrant authorizing her seizure
14 of Zehm's private medical and employment papers was based on a wholly invalid
15 affidavit.
16

17 3.112 A reasonably well-trained officer would know, and Officer Ferguson did
18 know that her acquisition of private papers without proper authority was
19 unreasonable under federal and state law and an invasion of privacy.
20

21 3.113 Upon belief, the above invasion of privacy was substantially and/or
22 causally motivated in order to pre-emptively prepare against Zehm's estate for his
23 in-custody death and in retaliation for exercise of federal rights.
24
25

1 **FACTS RELATING TO RATIFICATION BY CITY**

2 3.114 The City of Spokane, through its Mayors and Police Chiefs, has, over the
3 past 2 years and 11 months, ratified the misconduct of the Defendants Officers,
4 agents and Defendant Chief Nicks.
5

6 3.115 The City of Spokane has publicly defended the individual officers' and
7 the Chief's violations of federal and state law and Departmental policies.
8

9 3.116 The City of Spokane has publicly defended the individual officers' and
10 the Chief's conduct that led to the deprivation of Otto Zehm's and his mother's
11 civil rights.
12

13 3.117 Where actions taken by the individual defendants in violating civil rights
14 were taken in accordance with the City's policies and procedures, the City is liable
15 for the actions of their agents — the individual Officers and the Chief — in
16 depriving Otto Zehm's and his mother of the federal civil rights.
17

18 3.118 Where actions taken by individual officers, agents and Chief Nicks
19 leading to the deprivation of Otto Zehm's and his mother's civil rights were taken
20 contrary to written policies and procedures, the City has ratified all such conduct
21 and is liable.
22

23 ///

24 ///

25 ///

1 **FACTS RELATING TO CONSPIRACY**

2 3.119 Tacitly or otherwise, one or more of the Defendants entered into an
3 agreement to violate Plaintiffs’ civil rights and committed an overt act in
4 furtherance of that agreement.
5

6 3.120 Initial police statements, including releases by both subordinates on
7 behalf of the Department and by acting Chief of Police Nicks, falsely portrayed
8 Otto Zehm as the aggressor. On multiple occasions officials for the Police stated
9 that Otto Zehm “lunged” at Officer Thompson, causing Thompson to justifiably
10 strike Zehm his with his baton.
11

12 3.121 Review of the surveillance video tape shows that Zehm never moved
13 toward Officer Thompson. Zehm’s movement was plainly a retreat from the
14 onrushing baton-brandishing officer.
15

16 3.122 Evidence from the scene included the non-rebreather mask placed over
17 Otto Zehm’s mouth and nose.
18

19 3.123 No officer at the scene, nor senior officer reviewing Zehm’s death,
20 advised the medical examiner that the non-rebreather mask was used.
21

22 3.124 The non-rebreather mask was not provided to the medical examiner for
23 her first review.
24

25 ///

1 3.125 Until the issue of the non-rebreather mask was raised by third parties, the
2 City, its Chief of Police, investigators, and the officers on the scene took no steps
3 to preserve the mask.
4

5 3.126 At least one internal interview of Officer Thompson was conducted off
6 the record. Following the initial interview Officer Thompson was interviewed by
7 Officer Ferguson on tape and lead through a series of questions oriented toward
8 exonerating his conduct.
9

10 3.127 Officer Ferguson prepared and submitted a facially invalid affidavit
11 seeking personal and privileged information for the purpose of investigating a dead
12 person for an unprosecutable crime.
13

14 **FACTS RELATING TO DAMAGES**

15 3.128 As a proximate cause of the Officers deprivation of Otto Zehm's federal
16 civil rights, Otto Zehm suffered substantial general damages in anticipation of
17 death, including pain and suffering in an amount to be proven at trial
18

19 3.129 As a proximate cause of Officers deprivation of Otto Zehm's federal civil
20 rights, his Estate suffered a loss of earnings in an amount to be proven at trial.
21

22 3.130 As a proximate cause of Officers deprivation of Otto Zehm's federal civil
23 rights, his Estate incurred medical and funeral expenses in an amount to be proven
24 at trial
25

1 3.131 Officers deprived Otto Zehm's and Ann Zehm's federal civil rights with
2 deliberate disregard of the rights of Otto Zehm and his family or for the purpose of
3 harming Plaintiffs without legal justification.
4

5 3.132 Accordingly, under the Fourteenth Amendment's due process clause,
6 Ann Zehm has suffered general damages related to the interference in the parent
7 child relationship, invasions of privacy in her son's records, release of confidential
8 information to the public and false allegations regarding her son and his death in an
9 amount to be proven at trial.
10

11 **FACTS RELATING TO OTTO ZEHM AND ANN ZEHM**

12 3.133 Otto Zehm was a gainfully employed, single male at the time of his
13 death, aged 36.
14

15 3.134 He was a financial provider for his disabled aged mother, Ann Zehm, to
16 whom he regularly contributed some of his earnings in the form of cash or specific
17 goods.
18

19 3.135 Other than his mental illness, Zehm was in good health.

20 3.136 Otto provided significant emotional support and enjoyment to his mother
21 in addition to financial support.
22

23 3.137 Co-workers and supervisors, as well as the medical personnel who knew
24 him, all relate that Otto Zehm was a sincere almost painfully shy individual whose
25

1 manner was submissive and never physically aggressive. When not taking his
2 medications, Zehm retreated further into his shyness.

3 **FEDERAL CLAIMS FOR RELIEF**

4 **Violations of Title 42, United States Code § 1983**

5
6 4.1 Defendants' conduct constitutes the deprivation of Otto Zehm's
7 federally protected rights under color of law, i.e., unreasonable seizure,
8 deadly force, and in-custody homicide of Otto Zehm in violation of the
9 Fourth Amendment to the Constitution of the United States. As a result of
10 this conduct Defendants caused Otto Zehm to experience fear, great physical
11 pain during his struggle with police, and ultimately loss of his life. This claim
12 is made on behalf of the Estate of Otto Zehm.
13
14

15 4.2 Defendants' conduct constitutes a conspiracy to deprive Otto Zehm
16 of his federally protected rights under color of law, i.e., a plan or agreement
17 between more than one person to violate Otto Zehm and Ann Zehm's civil
18 rights, with at least one overt act in furtherance of that plan. . As a result of
19 this conduct Defendants caused Otto Zehm to experience fear, great physical
20 pain during his struggle with police, and ultimately loss of his life. This claim
21 is made on behalf of the Estate of Otto Zehm.
22
23

24 4.3 Defendants' conduct constitutes a deprivation of federally protected
25 rights under color of law, i.e., unreasonable seizure, deadly force, and resulting

1 in-custody homicide of Otto Zehm in violation of the Fourth Amendment to the
2 Constitution of the United States. As a result of this conduct, Defendants caused
3 Plaintiff Ann Zehm to suffer the loss of financial and emotional support and
4 association of her son Otto Zehm. This claim is made on behalf of Ann Zehm
5 under the Fourteenth Amendment's due process clause.
6

7 4.4 Defendants' conduct deprived Otto Zehm and his Estate of federal
8 constitutional and statutory privacy rights regarding his medical condition and
9 treatment.
10

11 4.5 Defendants deprived Otto Zehm, his Estate, and his mother important
12 property/privacy interests secured by state law regarding confidential employment,
13 medical, autopsy and police investigatory records without due process of law
14 secured by the Fourteenth Amendment.
15

16 4.6 All of Defendants actions deprived Otto Zehm, his estate, and his mother
17 of their rights to liberty, privacy, the right to petition for governmental redress of
18 grievances and due process were made either intentionally, recklessly and/or with
19 deliberate indifference subjecting defendants to liability under 42 USC § 1983
20 and/or § 1985.
21

22 4.7 Defendants' actions in depriving or seeking to interfere with the rights set
23 forth in Paragraphs 4.1 through 4.6 were substantially motivated and/or caused by
24
25

1 Defendants' retaliatory motives that sought to punish or chill the exercise of said
2 rights by Plaintiff Otto Zehm and/or his mother Ann Zehm.

3
4 4.8 Defendants' actions in violating the federal civil rights set forth in
5 Paragraphs 4.1 through 4.6 were done intentionally, maliciously, wantonly,
6 oppressively, and/or with reckless indifference subjecting the non-municipal
7 defendants to liability for punitive damages in an amount to be proven at trial.

8
9 4.9 Defendants acted with a common purpose with knowledge of what they
10 were each doing and contributed to legal injuries that are often difficult to divide
11 and Defendants are therefore jointly and severally liable for all remedies except for
12 punitive damages.

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1 **PRAYER FOR RELIEF**

2 Plaintiffs respectfully demands a jury trial on all issues and further, that

3 Plaintiffs be awarded:
4

5 5.1 Economic and non-economic damages in an amount to be proven at trial;

6 5.2 Punitive damages to the extent authorized by law in an amount to be
7 proven at trial;

8 5.3 Plaintiffs' reasonable attorneys fees and costs, pursuant to 42 USC § 1988,
9 or as otherwise provided by law.
10

11 5.4 For such other and further relief as the court deems just and equitable.

12 DATED this 13th day of March, 2009.
13

14 s/Jeffry K. Finer

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