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8 UNITED STATES DISTRICT COURT
9 DISTRICT OF ARIZONA
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12 SHAY PENDLETON,

13 Plaintiff,

14 vs.

15 CITY OF GOODYEAR, *et al.*,

16 Defendants.
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2:09-cv-02213 JWS

ORDER AND OPINION

[Re: Motion at Docket 90]

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19 I. MOTION PRESENTED

20 At docket 90, defendants City of Goodyear (“the City”) and Brad Hardin (“Hardin”;
21 collectively “defendants”) move for summary judgment pursuant to Federal Rule of Civil
22 Procedure 56. Plaintiff Shay Pendleton (“plaintiff”) opposes the motion at docket 97.
23 Defendants’ reply is at docket 103. Oral argument was requested but would not assist
24 the court.

25 II. BACKGROUND

26 This lawsuit arises out of the death of Jered Pendleton (“Pendleton”). Plaintiff is
27 Pendleton’s mother. Pendleton was struck and killed by a vehicle in the early morning
28 hours of April 6, 2008. His body was discovered by Sergeant Troy Castillo (“Castillo”) of

1 the Goodyear Police Department at 4:33 a.m. Castillo was traveling eastbound on West
2 Yuma Road. Pendleton's body was in the middle of the road. Hardin was also a
3 Goodyear police officer. He had been traveling eastbound on West Yuma Road
4 approximately one minute before Castillo.

5 Castillo radioed dispatch for emergency assistance, and after hearing the call,
6 Hardin used his cell phone to call Castillo. As Castillo remembers the phone call,
7 Hardin told him "Hey Sarge, I was driving down that road and . . . I think I may have hit
8 that kid."¹ Hardin continued, "I was driving down the road and I felt like a pa-pump. I
9 looked in my rearview mirror and didn't see anything."² Hardin told Castillo that he was
10 looking at his dashboard computer screen at the time.

11 Hardin parked his vehicle at the intersection of Litchfield and Yuma to block
12 traffic. Castillo called Sergeant Deron Miller ("Miller"), the head of the accident
13 investigation team, and explained what Hardin had reported. Miller testified that he
14 immediately met with Hardin upon arriving at the scene.³ Miller stated that he was
15 informed that Hardin "felt a thump-thump" while driving through the scene and
16 accordingly, he inspected Hardin's vehicle.⁴ Miller described Hardin as "visibly
17 shaken."⁵ Miller determined that it did not look like Hardin's vehicle had hit anything,
18 although he also stated that he did not look at the tires.⁶ Miller did not document his
19 meeting with Hardin or his inspection of Hardin's vehicle.

20 Miller proceeded to the scene of the accident and assigned Officers Jeff Rogers
21 ("Rogers") and Richard Beck ("Beck") as lead investigators. Miller did not inform

22 ¹Doc. 99-4 at 79.

23 ²*Id.*

24 ³Doc. 99-9 at 346.

25 ⁴*Id.*

26 ⁵*Id.* at 347.

27 ⁶*Id.* at 348.

1 Rogers or Beck of Hardin's potential involvement. Rogers and Beck attended
2 Pendleton's autopsy and learned that Pendleton had no injuries to his lower body, which
3 indicated that Pendleton had not been standing when he was struck. Rogers and Beck
4 met with Commander Ralph McLaughlin ("McLaughlin"). McLaughlin asked them
5 something along the lines of "Do you think Hardin did it?"⁷ Rogers was "shocked" by
6 McLaughlin's comment.⁸

7 Rogers ultimately decided to impound Hardin's vehicle. Rogers contacted
8 Hardin, who told him that he thought he might have struck something, and that he had
9 reported it to Castillo and Miller. Rogers did not tell Hardin that they would be
10 impounding his vehicle. Hardin received a phone call from Detective Anna Ybarra, who
11 told him that investigators were going to inspect his vehicle. Investigators found a shoe
12 print on the driver-side rear tire of Hardin's vehicle and blood specks that were later
13 determined to be of non-human origin.

14 Rogers ultimately determined that Pendleton was struck by a westbound vehicle.
15 Rogers therefore ruled out Hardin as the cause of Pendleton's death. Defendants'
16 expert, Tim Leggett ("Leggett"), also concluded that Pendleton was struck by a
17 westbound vehicle. Leggett has opined that the bump that Hardin felt was Pendleton's
18 empty shoe. Plaintiff's expert, Edward Maciag, also concluded that Pendleton was
19 struck by a westbound driver.

20 Plaintiff filed suit in Arizona state court in August of 2009. The case was
21 removed to federal court in October 2009. Plaintiff has asserted claims against Hardin
22 and the City for wrongful death, negligence, conspiracy, aiding and abetting, and
23 violations of 42 U.S.C. § 1983. Plaintiff maintains that Hardin struck and killed
24 Pendleton and that the City, through officers of the Goodyear Police Department,
25 engaged in a "cover-up" to protect Hardin.

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27 ⁷Doc. 99-9 at 48.

28 ⁸*Id.*

III. STANDARD OF REVIEW

Summary judgment is appropriate where “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”⁹ The materiality requirement ensures that “only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.”¹⁰ Ultimately, “summary judgment will not lie if the . . . evidence is such that a reasonable jury could return a verdict for the nonmoving party.”¹¹ In resolving a motion for summary judgment, a court must view the evidence in the light most favorable to the non-moving party.¹² The reviewing court may not weigh evidence or assess the credibility of witnesses.¹³ The burden of persuasion is on the moving party.¹⁴

IV. DISCUSSION

A. Defendants’ “Undisputed” Facts

Defendants’ motion begins with a statement of “undisputed” facts, many of which are not only disputed, but inaccurate. For instance, defendants state that “Hardin contacted . . . Castillo to inform him that he felt a bump and that his cruiser could potentially have driven over Pendleton’s body.”¹⁵ According to Castillo, Hardin initially told him “I think I may have hit that kid . . . I was driving down the road and I felt like a pa-pump.”¹⁶ Hardin stated at his deposition that he “reported to [his superiors] that

⁹Fed. R. Civ. P. 56(a).

¹⁰*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

¹¹*Id.*

¹²*Lopez v. Smith*, 203 F.3d 1122 (9th Cir. 2000).

¹³*Dominguez-Curry v. Nevada Transp. Dept.*, 424 F.3d 1027, 1036 (9th Cir. 2005).

¹⁴*Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

¹⁵Doc. 90 at 4.

¹⁶Doc. 99-4 at 79.

1 there was a possibility [he] had hit Mr. Pendleton.”¹⁷ Similarly, whereas defendants
2 state that “Hardin notified a police dispatcher that he had felt a bump and expressed his
3 concerns about the possibility that he had potentially driven over Pendleton’s body,”¹⁸
4 Hardin actually told the dispatcher that investigators “might have to check my tires too”
5 for signs that he had struck Pendleton.¹⁹

6 As plaintiff points out in her response, a large portion of the “undisputed” facts
7 are based on internal investigations and a 2011 investigation conducted by the
8 Maricopa County Sheriff’s Office (“MCSO”). Plaintiff disputes the findings made in
9 those investigations, and their conclusions are not binding. Plaintiff also indicates that
10 she intends to challenge the admissibility of the bolt analysis in the MCSO report. Many
11 bases of defendants’ “undisputed” facts are therefore in dispute.

12 **B. Claims Against Hardin**

13 **1. Plaintiff’s State Law Claims**

14 Defendants argue that “there is no evidence that would allow a reasonable jury to
15 conclude that . . . Hardin caused Pendleton’s death.”²⁰ Plaintiff responds that Hardin
16 was “the only [person] who was in the vicinity at the time of Jered’s death; he admitted
17 hitting something with his car at that time; his car had physical evidence connecting him
18 to the scene; and he reported . . . that he believed he had struck . . . the ‘kid,’ even
19 though the initial call on the radio had only noted a dead body in the road.”²¹

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24 ¹⁷Doc. 99-10 at 40.

25 ¹⁸Doc. 90 at 4.

26 ¹⁹Doc. 93.

27 ²⁰Doc. 90 at 11.

28 ²¹Doc. 97 at 13.

1 The autopsy indicated that the cause of death was “some sort of . . .
2 compression to the head.”²² As plaintiff argues, Hardin was driving in the vicinity at the
3 time of Pendleton’s death, and he struck something—which he, at least initially, thought
4 to be a “kid.” From that evidence, a reasonable jury could potentially conclude that
5 Hardin struck Pendleton and caused his death.

6 Defendants argue that they have presented evidence conclusively excluding
7 Hardin’s vehicle. Defendants cite a report by Rogers, composed on April 9, 2008—the
8 day that Rogers discovered that Hardin had told Miller and the dispatcher that he had
9 struck something. The report says nothing of Hardin’s potential involvement.
10 Defendants also cite Rogers’ reconstruction report. Therein, Rogers states that he “can
11 not conclude that the acceleration marks [which suggest Pendleton was struck by a
12 westbound vehicle] are associated with this case.”²³ Rogers indicates in both the initial
13 report and the reconstruction that blood and tissue marks also suggest that Pendleton
14 was struck by a westbound driver. However, as plaintiff points out, even if the court
15 were to accept that Pendleton was struck by a westbound driver, that fact would not rule
16 out the possibility that Hardin turned his vehicle around at some point while on the road.
17 Finally, plaintiff maintains that the “Searle” formulas on which a good portion of Rogers’
18 reconstruction are based are not properly applied under the circumstances of the
19 accident. Defendants also point to their expert’s reconstruction. Leggett’s conclusion
20 that the bump that Hardin felt was Pendleton’s empty shoe can be evaluated by a jury.

21 Defendants argue that Hardin’s vehicle was impounded and that investigators
22 found no evidence that Hardin had struck Pendleton. However, Hardin’s vehicle was
23 not impounded until two days after the collision. Moreover, the shoe print found on
24 Hardin’s tire matched one of the shoes that Pendleton was wearing at the time of his
25 death.

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27 ²²See doc. 99-9 at 48.

28 ²³Doc. 91-1 at 80.

1 Defendants also argue that the MCSO's independent investigation conclusively
2 establishes that Hardin's vehicle did not cause Pendleton's death. Plaintiff indicates
3 that she intends to challenge the admissibility of the "bolt analysis" undertaken in that
4 report. Assuming its admissibility, the MCSO's report is not binding on the court and
5 can be evaluated by a jury.

6 In sum, viewed in the light most favorable to plaintiff, defendant's evidence does
7 not exclude Hardin's vehicle as the potential cause of Pendleton's death. There are
8 disputed issues of material fact that preclude summary judgment on plaintiff's state law
9 claims.

10 **2. Plaintiff's § 1983 Claims**

11 Defendants maintain that summary judgment in their favor on plaintiff's § 1983
12 claims is appropriate because plaintiff is unable to demonstrate causation or
13 recklessness. Defendants' causation argument fails for the reasons set out above.
14 Despite defendants' contention that no evidence suggests that Hardin acted with
15 recklessness, given the position of Pendleton's body in the middle of the road, a
16 reasonable jury could potentially conclude that Hardin was reckless.

17 **D. Claims Against the City**

18 **1. State Law Negligence Claims**

19 Defendants advance two theories in support of their argument that summary
20 judgment is appropriate on plaintiff's negligence claims against the City. First,
21 defendants maintain that there is no causal link between the City and Pendleton's
22 death. Second, defendants maintain that Arizona does not permit the family members
23 of a decedent to bring such claims.

24 To the extent the City is vicariously liable for Hardin's actions under Arizona law,
25 defendants' first argument fails. Defendants second argument is based on the
26 proposition that plaintiff's negligence claims against the city "amount to an attempt to
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1 hold the City liable because it has been unable to determine who killed Pendleton.”²⁴
2 The court disagrees with the defendants’ characterization. The discussion in the case
3 that defendants’ cite in support of their position involved “claims for wrongful handling of
4 a dead body and infliction of emotional distress based on alleged negligence in
5 inspecting or investigating [a crime] scene and related facts of the accident and the
6 person of [the decedent].”²⁵ Plaintiff has not asserted analogous claims. Similarly, in
7 that case, “the core of [the plaintiff’s] complaint [was] the failure to identify [the
8 decedent]—something the state and county had no duty to do.”²⁶ Here, the core of
9 plaintiff’s complaint is not a failure to identify the person that struck Pendleton; rather, it
10 is the allegation that Hardin struck and killed Pendleton.

11 **2. State Law Conspiracy and Aiding and Abetting Claims**

12 In Arizona, civil conspiracy “requires that two or more individuals agree and
13 thereupon accomplish an underlying tort which the alleged conspirators agreed to
14 commit.”²⁷ Defendants argue that plaintiff is unable to show either an agreement or an
15 underlying tort. Plaintiff responds that “[c]ontrary to the arguments advanced in
16 [d]efendants’ [m]otion, Arizona law also recognizes claims for conspiracy and aiding and
17 abetting, based on these facts.”²⁸ Plaintiff then cites a single case. The case cited
18 involved civil conspiracy to commit fraud.²⁹ Plaintiff has not identified what tort
19 defendants conspired to commit. As defendants point out, the conspiracy allegations
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21
22 ²⁴Doc. 90 at 13.

23 ²⁵*Vasquez v. State*, 206 P.3d 753, 760 (Ariz. Ct. App. 2009).

24 ²⁶*Id.* at 762.

25 ²⁷*Wells Fargo Bank v. Arizona Laborers, Teamsters & Cement Masons*, 38 P.3d 12, 36
26 (Ariz. 2002).

27 ²⁸Doc. 97 at 17.

28 ²⁹*Wells Fargo Bank*, 38 P.3d at 37.

1 relate to conduct that occurred after Pendleton's death. Consequently, Pendleton's
2 alleged wrongful death cannot form the basis for plaintiff's conspiracy claim.

3 Because plaintiff has not identified an underlying tort that defendants conspired
4 to commit, summary judgment in defendants' favor on plaintiff's state law conspiracy
5 claim is appropriate.

6 **3. § 1983 Claims**

7 Defendants maintain that plaintiff has not identified a city policy, custom, or
8 practice that caused plaintiff any injury and, therefore, summary judgment is appropriate
9 on plaintiff's § 1983 claim against the City. The court agrees. Plaintiff maintains that
10 "[a]s previously pled before the [c]ourt" in response to defendants' motion to dismiss,
11 "[p]laintiff has sufficient evidence" that the City is directly liable under *Monell*.³⁰
12 However, in plaintiff's response to defendants' motion to dismiss, she stated that "[i]f the
13 evidence obtained in discovery shows that . . . Hardin and other police officers were
14 acting pursuant to and in accordance with City policies when Jered was pursued, struck,
15 ignored, and then the police involvement covered-up, the City will be directly liable
16 under § 1983 for constitutional violations."³¹ Plaintiff fails to identify any such policy in
17 its response to defendants' motion for summary judgment. In fact, plaintiff's statement
18 that "[d]efendants' policymakers and command staff *adopted* a strategy to conceal or
19 suppress the truth about Hardin's involvement,"³² contradicts the notion that those
20 policymakers and command staff acted in accordance with an official policy or custom.

21 Plaintiff argues in the alternative that the City is indirectly liable under § 1983.
22 Plaintiff cites *Gibson v. County of Washoe*.³³ There, the Ninth Circuit described "a
23 second route to municipal liability" under § 1983, through which "a plaintiff can allege
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25 ³⁰Doc. 97 at 17; *Monell v. New York City Dept. of Soc. Svcs.*, 436 U.S. 658 (1978).

26 ³¹Doc. 9 at 14.

27 ³²Doc. 97 at 17 (emphasis added).

28 ³³290 F.3d 1175 (9th Cir. 2002).

1 that through its *omissions* the municipality is responsible for a constitutional violation
2 committed by one of its employees.”³⁴ In such a case, the “plaintiff must show that the
3 municipality’s deliberate indifference led to its omission and that the omission caused
4 the employee to commit the constitutional violation.”³⁵

5 Plaintiff has not identified what evidence supports deliberate indifference on the
6 part of the City. Nor has plaintiff identified the omission on which her theory is based or
7 the constitutional violation in question. Plaintiff mentions her constitutional right to
8 access to the justice system, but offers no citation and does not elaborate.

9 Finally, plaintiff infers that the City is also liable for a failure to adequately train its
10 employees, but does not identify what evidence, if any, supports her theory, or what
11 constitutional injury stemmed from the alleged failure to train.

12 **D. Procedural Arguments**

13 **1. Notice of Claim**

14 Arizona Revised Statute § 12-821.01(A) states that “[p]ersons who have claims
15 against a public entity or public employee shall file claims . . . within one hundred eighty
16 days after the cause of action accrues.”³⁶ Defendants argue that plaintiff’s claim
17 accrued on August 18, 2008, when she learned from Rogers that Hardin had been
18 investigated as a potential cause of Pendleton’s death. Because plaintiff’s notice of
19 claim was not filed within 180 days of that date, defendants argue that her claim is
20 barred. “[A] cause of action accrues when the damaged party realizes he or she has
21 been damaged and knows or reasonably should know the cause, source, act, event,
22 instrumentality which caused or contributed to the damage.”³⁷ The statute sets out an
23 objective standard, and the court concludes that a reasonable person would not meet

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25 ³⁴*Id.* at 1186.

26 ³⁵*Id.*

27 ³⁶A.R.S. § 12-821.01(A).

28 ³⁷*Id.* § 12-821.01(B).

1 the statutory criteria based on Rogers' statement to plaintiff "that one of its officers had
2 been investigated as a potential cause of her son's death."³⁸ Moreover, much of
3 plaintiff's complaint is based on information that came to light after August 18, 2008,
4 when Rogers provided that information to plaintiff.

5 **2. Statute of Limitations**

6 Defendants also argue that plaintiff's state law claims are barred under Arizona's
7 statute of limitations. Because defendants' argument is also erroneously premised on
8 plaintiff's cause of action having accrued on August 18, 2008, defendants' argument
9 fails.

10 **V. CONCLUSION**

11 For the reasons above, defendants' motion at docket 90 for summary judgment
12 pursuant to Rule 56 is **GRANTED** in part and **DENIED** in part as follows.

13 1) It is granted with respect to plaintiff's conspiracy claims and § 1983 claims
14 against the City. Those claims are **DISMISSED**.

15 2) It is denied with respect to all other claims.

16 DATED this 20th day of February 2012.

17
18 /s/
19 JOHN W. SEDWICK
20 UNITED STATES DISTRICT JUDGE
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28 ³⁸Doc. 90 at 17.