

1 **WO**

2
3
4 IN THE UNITED STATES DISTRICT COURT
5 FOR THE DISTRICT OF ARIZONA

6
7 Pedro Molera, et al.

8 Plaintiffs,

9 v.

10 City of Nogales, et al.,

11 Defendants.

No. CV-11-00097-TUC-JGZ

ORDER

12
13 Pending before the Court are two Motions for Summary Judgment.

14 Defendants City of Nogales, Assistant Chief Roy Bermudez, Captain Heriberto
15 Zuniga and Lieutenant Carlos Jimenez (“the Nogales Defendants”) filed a Motion for
16 Summary Judgment on October 16, 2012. (Doc. 69.) Plaintiffs Pedro and Blanca Molera
17 filed a Response on November 26, 2012. (Doc. 76.) The Nogales Defendants filed a
18 Reply on December 11, 2012. (Doc. 84.) The Nogales Defendants seek summary
19 judgment on Plaintiffs’ claims of violation of 42 U.S.C. § 1983, intentional infliction of
20 emotional distress, gross negligence and loss of consortium.

21 Defendant Sergeant Sergio Bon (“Sergeant Bon”) filed a Motion for Summary
22 Judgment on October 16, 2012. (Doc. 71.) Plaintiffs filed a response on November 26,
23 2012. (Doc. 77.) Sergeant Bon filed a reply on December 14, 2012. (Doc. 86.)
24 Sergeant Bon seeks summary judgment on Plaintiffs’ claims of violation of 42 U.S.C. §
25 1983, battery, false imprisonment, intentional infliction of emotional distress, gross
26 negligence and loss of consortium.

27

28

1 For the reasons stated herein, the Court will grant the Motions.¹

2 **FACTUAL / PROCEDURAL BACKGROUND**

3 At all times relevant to the instant action, Plaintiff Pedro Molera (“Officer
4 Molera”) was employed as a Nogales City Police Officer. (NDSOF 1; PNSOF 1.)² The
5 parties dispute the nature of Officer Molera’s working conditions as a member of the
6 Police Department’s “motor squad.” Officer Molera claims that his sergeant, Defendant
7 Bon, promoted an environment of pranks and “horseplay” among the motor squad which
8 the Nogales Police Department overlooked. (PNSOF P2-5.) The Nogales Defendants
9 claim that the motor squad lacked cohesion but that the Nogales Police Department took
10 active steps to improve the motor squad’s sense of camaraderie. (NRDSOF 21-28.) It is
11 undisputed that Sergeant Bon and Officer Molera engaged in frequent horseplay which
12 included joking, taunting and physically challenging each other as well as other officers.
13 (BDSOF 1; PBSOF 1.)

14 On February 8, 2010, Officer Molera entered Sergeant Bon’s office to turn in
15 citation paperwork. (NDSOF 1; PNSOF 1.) The parties dispute the manner in which
16 Molera placed the clipboard on Bon’s desk. (NDSOF 2; PNSOF 2.) A confrontation
17 developed between Officer Molera and Sergeant Bon; Sergeant Bon un-holstered his
18 department-issued Taser and removed the cartridge. (NDSOF 3; PNSOF 3.) Believing
19

20 ¹ The Court finds this case suitable for decision without oral argument. *See* L.R. Civ.
21 7.2(f).

22 ² The Nogales Defendants’ Statement of Facts in Support of Motion for Summary
23 Judgment (Doc. 70) is abbreviated as “NDSOF.” Plaintiffs’ Statement of Facts in Response to
24 the Nogales Defendants’ Motion for Summary Judgment (Docs. 78, 79, 81, 82) is abbreviated as
25 “PNSOF.” PNSOF was erroneously filed multiple times, with each filing including the same
26 allegations of fact but different attached exhibits. Accordingly, the Court has cited to PNSOF’s
27 Exhibits by document number and page number. The Nogales Defendants’ Statement of Facts in
28 Support of Reply to Response to City of Nogales Defendants’ Motion for Summary Judgment
(Doc. 85) is abbreviated as “NDRSOF.” NDRSOF fails to comply with LRCiv 56.1’s
requirement that each paragraph of the opposing party’s separate statement of facts correspond
by number to the moving party’s statement of facts. Accordingly, the Court is unable to discern
whether the Nogales Defendants dispute the additional facts alleged at pages 4-9 of PNSOF.
Defendant Bon’s “Separate Statement of Facts in Support of Their [sic] Motion for Summary
Judgment” (Doc. 72) is abbreviated as “BDSOF.” Plaintiffs’ Statement of Facts in Response to
Defendant Bon’s Motion for Summary Judgment (Doc. 80) is abbreviated as “PBSOF.”

1 Sergeant Bon to be joking, Officer Molera stepped toward Sergeant Bon's chair so that
2 he was standing over Sergeant Bon, and said something along the lines of "if you are
3 going to take it out, use it." (NDSOF 4; PNSOF 4.) Officer Molera claims that Sergeant
4 Bon pointed the Taser at Officer Molera's genitals; Sergeant Bon claims that he was
5 holding the Taser in his own lap and Officer Molera leaned into it as he stood over
6 Sergeant Bon. (NDSOF 5; PNSOF 5.) Despite feeling the Taser on his penis, Officer
7 Molera did not step back. (NDSOF 6; PNSOF 6.) Sergeant Bon intentionally turned the
8 Taser on and off, shocking Officer Molera on the penis. (NDSOF 7; PNSOF 7; BDSOF
9 21; PBSOF 21.) Sergeant Bon testified that he did not intend to cause Officer Molera
10 harm and that he was unaware of how close Officer Molera was to the Taser when he
11 turned it on. (Doc. 70-1, pg. 24.) According to Officer Molera, when he examined his
12 penis soon after, it was excessively red. (NDSOF 10; PNSOF 10.) Two other officers
13 were present during the tasing incident: Officer Gallego and Officer Aguirre. (NDSOF 9;
14 PNSOF 9.) Officer Gallego did not actually see the tasing. (*Id.*)

15 On February 11, 2010, Officer Molera reported the tasing incident to Lt. Jimenez,
16 the next in the chain of command. (NDSOF 12; PNSOF 12.) Chief of Police Kirkham
17 was also informed of the incident and immediately instructed Assistant Chief Bermudez
18 to begin an internal investigation. (NDSOF 14; PNSOF 14.) Sergeant Bon was placed
19 on administrative suspension pending the investigation. (NDSOF 15; PNSOF 15.) On
20 March 17, 2010, a memo was directed to Sergeant Bon informing him of Chief
21 Kirkham's intent to dismiss him from employment. (NDSOF 16; PNSOF 16.) Sergeant
22 Bon resigned on March 18, 2010. (NDSOF 17; PNSOF 17.)

23 On February 17, 2010, Officer Molera signed a workers' compensation claim form
24 describing the tasing incident. (Doc. 70-1, pg. 45.) Officer Molera accepted the benefits
25 paid to him as a result of the workers' compensation claim. (Doc. 701-, pg. 16.) Officer
26 Molera testified that he felt that his superiors at the Nogales Police Department "pushed
27 [him] into" filing out the workers' compensation claim. (Doc. 70-1, pg. 16.)
28

1 On February 7, 2011, Plaintiffs filed their Complaint in the instant action, alleging
2 the following claims: Count 1, violation of 42 U.S.C. § 1983 (all Defendants); Count 2,
3 battery (Defendant Bon); Count 3, false imprisonment (Defendant Bon); Count 4,
4 intentional infliction of emotional distress (all Defendants); Count 5, gross negligence (all
5 Defendants); and Count 6, loss of consortium (all Defendants). (Doc. 1.)

6 STANDARD OF REVIEW

7 In deciding a motion for summary judgment, the Court views the evidence and all
8 reasonable inferences therefrom in the light most favorable to the party opposing the
9 motion. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Eisenberg v.*
10 *Insurance Co. of North America*, 815 F.2d 1285, 1289 (9th Cir. 1987).

11 Summary judgment is appropriate if the pleadings and supporting documents
12 "show that there is no genuine issue as to any material fact and that the moving party is
13 entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*,
14 477 U.S. 317, 322 (1986). Material facts are those "that might affect the outcome of the
15 suit under the governing law." *Anderson*, 477 U.S. at 248. A genuine issue exists if "the
16 evidence is such that a reasonable jury could return a verdict for the nonmoving party."
17 *Id.*

18 A party moving for summary judgment initially must demonstrate the absence of a
19 genuine issue of material fact. *Celotex*, 477 U.S. at 325. The moving party merely needs
20 to point out to the Court the absence of evidence supporting its opponent's claim; it does
21 not need to disprove its opponent's claim. *Id.*; *see also* Fed. R. Civ. P. 56(c).

22 If a moving party has made this showing, the nonmoving party "may not rest upon
23 the mere allegations or denials of the adverse party's pleading, but . . . must set forth
24 specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). *See*
25 *also Anderson*, 477 U.S. at 256; *Brinson v. Linda Rose Joint Venture*, 53 F.3d 1044, 1049
26 (9th Cir. 1995). The nonmoving party may not "replace conclusory allegations of the
27 complaint or answer with conclusory allegations of an affidavit." *Lujan v. National*
28 *Wildlife Federation*, 497 U.S. 871, 888 (1990).

1 ANALYSIS

2 **I. Defendants are entitled to summary judgment on Plaintiffs’ claim for**
3 **violation of 42 U.S.C. § 1983.**

4 42 U.S.C. § 1983 (“§ 1983”) provides a civil remedy for the deprivation of any
5 rights, privileges, or immunities secured by the Constitution under color of state law.
6 Before considering Defendants’ arguments with respect to Plaintiffs’ § 1983 claim, the
7 Court first notes that some portions of the § 1983 claim alleged in Plaintiffs’ Complaint
8 have no legal support. In Count 1, Plaintiffs allege that Defendants violated the
9 following Constitutional rights: (1) the Fourth Amendment protection against
10 unreasonable search and seizure; (2) the Fourteenth Amendment guarantee of due
11 process; (3) the Fourteenth Amendment guarantee of equal protection; (4) the right to be
12 free from unlawful interference; (5) the right to be free from assault and bodily injury; (6)
13 the right to be free from false imprisonment; and (7) the right to be free from unlawful
14 detention. (Doc. 1, pgs. 4-5.) Only the first three of these “rights” are actually recognized
15 by the Constitution. Plaintiffs’ claim that the Constitution guarantees protection against
16 violation of common law concepts such as “unlawful interference,” “assault,” and “false
17 imprisonment” are without merit. In addition, there are no facts alleged in the Complaint
18 which support an inference that Plaintiff Blanca Molera’s constitutional rights were
19 infringed upon in any way. Accordingly, the Court will construe Count 1 of Plaintiffs’
20 Complaint as asserting that Defendants violated Officer Molera’s constitutional rights to
21 protection against unreasonable search and seizure, due process and equal protection.³
22 The Court concludes that Defendants are entitled to summary judgment on Plaintiffs’ §
23 1983 claim because: (1) Plaintiffs have failed to demonstrate that the City of Nogales
24 was deliberately indifferent to the need for supervision/training within the police

25 ³ Defendants’ Motions for Summary Judgment construe Plaintiffs’ Complaint as
26 asserting these three constitutional claims in Count 1. Defendant Bon argues that Officer
27 Molera’s alleged rights to be free from unlawful interference, assault and false imprisonment
28 either fail to state a constitutional claim or fall within his Fourth and Fourteenth Amendment
claims. (Doc. 71, pg. 10.) Plaintiffs’ response to this argument is unclear, but it appears that
Plaintiffs concede that their recitation of rights to be free from unlawful interference, assault and
false imprisonment fall within their Fourteenth Amendment due process claim. (Doc. 77, pg. 7.)

1 department; (2) Plaintiffs have failed to present evidence in support of their claim that
2 Officer Molera’s supervisors knew about but disregarded the inadequate officer training;
3 and (3) Sergeant Bon was not acting under color of state law at the time of the tasing.
4 Because the Court concludes that Plaintiffs have failed to establish that Defendants
5 engaged in unlawful conduct, it does not reach the issue of whether Plaintiffs have
6 demonstrated that Officer Molera was deprived of a cognizable constitutional right.

7
8 **A. Defendant City of Nogales is entitled to summary judgment on**
9 **Plaintiffs’ § 1983 claim because Plaintiffs have not identified a**
10 **municipal custom that led to any constitutional violation.**

11 In order to establish a violation of § 1983 against a municipality like the City of
12 Nogales, Plaintiffs must prove that the City of Nogales: (1) adopted an impermissible
13 policy which violated Officer Molera’s constitutional rights; or (2) was deliberately
14 indifferent to the need for action necessary to safeguard Officer Molera’s constitutional
15 rights, and Officer Molera’s rights were violated as a result. *Gibson v. County of*
16 *Washoe, Nev.*, 290 F.3d 1175, 1186 (9th Cir. 2002). While difficult to decipher,
17 Plaintiffs’ claim against the City of Nogales appears to fall within the second category:
18 Plaintiffs allege that the City of Nogales deliberately ignored a culture of horseplay
19 among its officers and inadequately supervised them, resulting in a deprivation of Officer
20 Molera’s constitutional rights.⁴

22 ⁴ Plaintiffs describe the City of Nogales as having a “policy of inadequately supervising
23 and/or training officers and of tolerating misconduct of officers.” (Doc. 76, pg. 10.) Although
24 Plaintiffs describe this as a “policy,” the Court construes this as a claim of deliberate
25 indifference. *See City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985) (noting that “it is
26 therefore difficult in one sense even to accept the submission that someone pursues a ‘policy’ of
27 ‘inadequate training,’ unless evidence be adduced which proves that the inadequacies resulted
28 from conscious choice—that is, proof that the policymakers deliberately chose a training
program which would prove inadequate.”) The Court declines to consider Plaintiffs’ one-
sentence contention that the City of Nogales violated Officer Molera’s constitutional rights when
it failed to train its employees regarding the right to refuse workers’ compensation, as that
argument is not alleged in the Complaint and Plaintiffs have failed to cite any legal authority
suggesting that such training is required and/or that failure to provide it amounts to a
constitutional deprivation.

1 To prove deliberate indifference, Plaintiffs must show that the City of Nogales
2 made a “conscious choice” to follow a course of action from among various alternatives.
3 *See City of Canton, Ohio v. Harris*, 489 U.S. 378, 388 (1989). In addition, Plaintiffs
4 must demonstrate that the City of Nogales was on actual or constructive notice that
5 failure to properly train and supervise its officers would likely result in a constitutional
6 violation. *See Gibson*, 290 F.3d at 1186. Plaintiffs have failed to demonstrate a material
7 issue of fact with respect to this prong of their § 1983 claim because the two pieces of
8 evidence presented by Plaintiffs do not support an inference of deliberate indifference on
9 the part of the City of Nogales.⁵ First, Plaintiffs claim that Officer Molera’s fellow
10 officer, Officer Sullivan, testified that the City of Nogales knew that improper horseplay
11 was occurring among the officers and the City of Nogales made a conscious choice not to
12 interfere. However, Officer Sullivan testified that while “lieutenants, commanders,
13 everybody knew ... that we got along roughly with each other,” that knowledge did “not
14 necessarily” include “the tasing and stuff” and that his supervisors “made comments to us
15 and addressed those issues.” (Doc. 72, Ex. D, pgs. 42-43.) Officer Sullivan also testified
16 that the City of Nogales brought in training programs on hostile work environments. (*Id.*,
17 pg. 48.) Second, Plaintiffs also claim that Assistant Chief Bermudez presented a
18 “cohesion project” addressing problems of cohesion among the officers, which Plaintiffs
19 characterize as proof of a workplace culture that tolerated improper horseplay. However,
20 while Bermudez’s presentation may be construed as evidence that some of Officer
21 Molera’s superiors knew there were problems within the motor squad, the presentation
22 also compels the conclusion that the supervisors actively attempted to take corrective
23 action. Accordingly, the cohesion project does not constitute evidence of deliberate

24
25 ⁵ Plaintiffs describe a third piece of “evidence,” *i.e.* that Officer Molera did not timely
26 report an incident in which Sergeant Bon pointed a gun at his head because Officer Molera did
27 not believe his supervisors would take corrective action. (Doc. 76, pg. 11.) Plaintiffs claim that
28 this “evidence” demonstrates the City of Nogales’ indifference to the lack of supervision.
However, no such testimony from Officer Molera exists on the record. Officer Molera testified
that he initially refrained from reporting the incident because “it had been ingrained so long in
our brains that this stuff is sort of normal.” (Doc. 70-1, pg. 10.)

1 indifference.⁶ Thus, Plaintiffs have failed to demonstrate a material issue of fact with
2 respect to their claim that the City of Nogales was deliberately indifferent to a lack of
3 supervision/training in the police department.⁷ Accordingly, the City of Nogales is
4 entitled to summary judgment on Count 1 of Plaintiffs' Complaint.

5 **B. Defendants Kirkham, Bermudez, Zuniga and Jimenez are entitled to**
6 **summary judgment on Plaintiffs' § 1983 claim because Plaintiffs have**
7 **not established that Officer Molera's supervisors engaged in wrongful**
8 **conduct.**

9 Plaintiffs' Complaint identifies Defendants Kirkham, Bermudez, Zuniga and
10 Jimenez as Nogales Police Department officers serving in a supervisory role.⁸ In order to
11 establish a violation of § 1983 against supervisor defendants, Plaintiffs must prove that
12 Officer Molera's supervisors: (1) set in motion a series of acts by others, or knowingly
13 refused to terminate a series of acts by others, which they knew or reasonably should
14 have known would cause others to inflict constitutional injury; (2) engaged in culpable
15 action or inaction in training, supervision, or control of subordinates; (3) acquiesced in
16 the constitutional deprivation by subordinates; or (4) showed a "reckless or callous
17 indifference to the rights of others." *See Moss v. United States Secret Service*, 675 F.3d
18 1213, 1231 (9th Cir. 2012). Plaintiffs contend that Officer Molera's supervisors "knew or
19 should have known" that "[Sergeant] Bon had previously used his department-issued
20 weaponry in an inappropriate manner with Officer Molera and other officers who are
21 subordinate to him" and that Officer Molera's supervisors acquiesced in inadequate

22 ⁶ In addition, Assistant Chief Bermudez's presentation was not related to the culture of
23 horseplay with which Plaintiffs take issue. Bermudez testified that his presentation was designed
24 to address a "lack of direction [and] sense of belonging" among the motor squad officers. (Doc.
81-1, pg. 3.)

25 ⁷ This conclusion is further supported by the undisputed evidence demonstrating that
26 when the City of Nogales Police Department learned of the tasing incident, it took immediate
27 corrective action that resulted in Sergeant Bon's termination. The evidence before the Court
leads only to one reasonable inference, which is that rather than ignore the alleged "horseplay,"
the City of Nogales responded appropriately to improper conduct in the work place.

28 ⁸ The Court notes that both the Complaint and Plaintiffs' Statements of Fact are devoid of
any factual assertions regarding Defendant Zuniga.

1 training and supervision of officers. (Doc. 76, pgs. 12-13.) To the extent Plaintiffs
2 support this claim with citation to their Complaint, they fail to comply Fed. R. Civ. P.
3 56(e)'s directive that they may not rest upon mere allegations but must set forth specific
4 facts showing that there is a genuine issue for trial. The only evidence presented by
5 Plaintiffs in support of their claim that Officer Molera's supervisors knew about but
6 disregarded inadequate officer training is the testimony of Officer Sullivan.⁹ (Doc. 76,
7 pg. 13.) For the reasons stated in Section I.B., this testimony does not establish that
8 Officer Molera's supervisors knew about improper use of the Taser, nor does it support
9 an inference that the supervisors failed to take corrective action when officers engaged in
10 "horseplay." Accordingly, Defendants Kirkham, Bermudez, Zuniga and Jimenez are
11 entitled to summary judgment on Count 1 of Plaintiffs' Complaint.

12 **C. Defendant Bon is entitled to summary judgment on Plaintiffs' § 1983**
13 **claim because he was not acting under color of state law.**

14 In order to establish a violation of § 1983 against an individual state actor,
15 Plaintiffs must prove that the individual was acting "under color of state law." *See*
16 *Huffman v. County of Los Angeles*, 147 F.3d 1054, 1057 (9th Cir. 1998). Only if
17 Sergeant Bon's actions were in some way related to the performance of his official duties
18 could his acts be fairly said to be under color of state law. *See Van Ort v. Estate of*
19 *Stanewich*, 92 F.3d 831, 838 (9th Cir. 1996). In order to determine whether Sergeant Bon
20 was acting under color of state law, the Court examines "three critical requirements." *See*
21 *Anderson v. Warner*, 451 F.3d 1063, 1068-69 (9th Cir. 2006). First, the defendant's action
22 must have been "performed while the officer is acting, purporting, or pretending to act in
23 the performance of his or her official duties." *Id.* Second, the officer's pretense of acting
24 in the performance of his duties must have had the purpose and effect of influencing the

25
26 ⁹ Officer Sullivan also testified that he had witnessed Sergeant Bon and Officer Molera
27 firing their Tasers near each other's legs when testing the Tasers, but he did not testify that any
28 supervisors witnessed this. (Doc. 72, Ex. 4, pg. 45.) To the contrary, Officer Sullivan testified
that Officer Molera's supervisors did not "necessarily" know about the tasing games. (Doc. 72,
Ex. D, pg. 42.)

1 behavior of others. *Id.* Third, the challenged conduct must be “related in some
2 meaningful way either to the officer's governmental status or to the performance of his
3 duties.” *Id.* In the present case, Plaintiffs have failed to demonstrate the first or third
4 prongs of this test. No reasonable juror could infer that Sergeant Bon was pretending to
5 act in his official capacity when he tased Officer Molera. The undisputed facts
6 demonstrate that Officer Molera and Sergeant Bon historically threatened to tase each
7 other and at the time of the tasing Officer Molera was posturing and/or standing over
8 Sergeant Bon daring him to turn the Taser on. “Just because [defendant] is a police
9 officer does not mean that everything he does is state action.” *Gritchen v. Collier*, 254
10 F.3d 807, 813 (9th Cir. 2001). Tasing a subordinate officer is undisputedly outside the
11 scope of Sergeant Bon’s official duties.¹⁰ *See id.* (finding that officer who threatened to
12 sue a private citizen during a traffic stop was not acting under color of state law given
13 that such conduct was not subject to the control of the police department and was
14 quintessentially personal). This case is factually similar to *Martinez v. Colon*, 54 F.3d
15 980, 987 & n.5 (1st Cir. 1995), *cited in Anderson v. Warner*, 451 F.3d 1063, 1068 (9th Cir.
16 2006), in which one officer accidentally shot another officer in the groin while “horsing
17 around.” The *Martinez* court concluded: “though on duty and in uniform, [the
18 assailant’s] status as a police officer simply did not enter into his benighted harassment of
19 his fellow officer. Hazing of this sort, though reprehensible, is not action under color or
20 pretense of law.” That reasoning applies with equally persuasive force in this case.
21 Accordingly, Defendant Bon is entitled to summary judgment on Count 1 of Plaintiffs’
22 Complaint.

23 **II. Defendants are entitled to summary judgment on Plaintiffs’ claims for**
24 **battery, false imprisonment, intentional infliction of emotional distress, gross**
25 **negligence and loss of consortium.**

26 Plaintiffs’ Complaint alleges state law claims of battery (Count 2, against Bon),

27
28 ¹⁰ Plaintiffs allege, and Defendants do not dispute, that the police department policy forbids a sergeant from tasing a subordinate outside of a training setting. (PNSOF pg. 5.)

1 false imprisonment (Count 3, against Bon), intentional infliction of emotional distress
2 (Count 4, all Defendants), gross negligence (Count 5, all Defendants) and loss of
3 consortium (Count 6, all Defendants). (Doc. 1, pgs. 5-8.) Each of these claims is
4 precluded because it is undisputed that Officer Molera accepted workers' compensation
5 for his injury. A.R.S. § 23-1022(A) provides, in relevant part:

6 The right to recover compensation pursuant to this chapter for
7 injuries sustained by an employee ... is the exclusive remedy
8 against the employer or any co-employee acting in the scope
9 of his employment ... except that if the injury is caused by
10 the employer's willful misconduct, or in the case of a co-
11 employee by the co-employee's willful misconduct, and the
12 act causing the injury is the personal act of the employer, or
in the case of a co-employee the personal act of the co-
employee ... and the act indicates a willful disregard of the
life, limb or bodily safety of employees, the injured employee
may either claim compensation or maintain an action at law
for damages against the person or entity alleged to have
engaged in the willful misconduct.

13 An employee who accepts compensation waives the right to exercise any option to
14 institute proceedings in court against his employer or any co-employee acting within the
15 scope of his employment. *See* A.R.S. § 23-1024. The waiver provision is triggered
16 when the employee accepts compensation for the injury. *See AAA Cab Service, Inc. v.*
17 *Industrial Com'n of Arizona*, 141 P.3d 822, 823-24 (Ariz. App. 2006). Because it is
18 undisputed that Officer Molera received a workers' compensation payment for the injury
19 caused by the tasing, his state law claims are precluded under Arizona law. *See Callan v.*
20 *Bernini*, 141 P.3d 737, 743-44 (Ariz. App. 2006) (granting summary judgment in favor of
21 police department on the ground that police officer injured on the job had accepted
22 workers' compensation benefits and was therefore precluded from maintaining legal
23 action).

24 Officer Molera contends that three material issues of fact exist regarding
25 application of A.R.S. §§ 23-1022-24. First, he claims that a material issue of fact exists
26 as to whether Officer Molera's injury occurred "in the course and scope of employment."
27 "The term 'arising out of' is said to refer to the origin or cause of the injury, while 'in the
28 course of' refers to the time, place and circumstances of the accident in relation to the

1 employment.” *Epperson v. Industrial Commission*, 549 P.2d 247, 249 (Ariz. App. 1976).
2 “By definition, if the employee is assaulted by a third person ‘because of his
3 employment,’ the injury both arises out of and in the course of employment.” *Estate of*
4 *Sims v. Industrial Com'n of Arizona*, 673 P.2d 310, 313 (Ariz. App. 1983) (citing A.R.S.
5 § 23-901(12)(b)). It is undisputed that Officer Molera would not have been injured but
6 for his working relationship with Officer Bon. The injury occurred while Officer Molera
7 was on-shift, turning in paperwork, and arose from a work environment of pranks and
8 horseplay. *See Peter Kiewit Sons' Co. v. Industrial Commission*, 354 P.2d 28, 32 (Ariz.
9 1960) (holding that employee assaulted at work by an inspector following an argument
10 about the manner in which the employee was performing his job was injured in the
11 course and scope of employment). Accordingly, no material issue of fact exists as to the
12 circumstances of Officer Molera’s injury.

13 Second, Officer Molera claims that a material issue of fact exists regarding
14 whether his injury was caused by the Nogales Defendants’ “willful misconduct.”
15 However, under the plain language of the statute, even if Sergeant Bon’s actions were
16 willful, Officer Molera had the option of claiming compensation or maintaining an action
17 at law for damages.¹¹ It is undisputed that he claimed compensation. Accordingly, the
18 waiver provision applies.¹²

19 Third, Officer Molera claims that he did not intend to waive his right to pursue
20 judicial remedies against the Defendants when he filed his workers’ compensation claim.
21 This argument was expressly rejected by the Arizona Supreme Court in *Anderson v.*

22 ¹¹ The Court notes that even if this argument were credited, it would not apply to Officer
23 Molera’s claims of gross negligence or loss of consortium because those claims do not allege
24 willful misconduct. *See Lowery v. Universal Match Corp.*, 430 P.2d 444, 446 (Ariz. App. 1967).
25 In addition, Officer Molera has not alleged any intentional wrongdoing by the Nogales
Defendants -- even his claim for intentional infliction of emotional distress fails to identify any
intentional act by the Nogales Defendants. *Id.*

26 ¹² The Nogales Defendants further argue that in addition to claiming compensation,
27 Officer Molera failed to comply with A.R.S. § 23-906 because he failed to give notice to
28 Defendants of his intent to reject compensation and maintain an action at law. A.R.S. § 23-906
does not apply to an employee who elects to maintain an action at law following an injury caused
by willful misconduct. A.R.S. § 23-906 is the mechanism by which employees may opt out of
workers’ compensation prior to sustaining an injury. *See* A.R.S. § 23-906(C).

1 *Industrial Com'n of Arizona*, 711 P.2d 595, 601 (Ariz. 1985): “[A.R.S. § 23-1024(A)
2 creates this waiver without attaching the condition that the worker understand that he has
3 common law rights or that he is waiving them.” *See also Callan*, 141 P.3d at 743-44
4 (collecting cases demonstrating that the loss of the right to sue the employer [is not]
5 dependent upon the application of common law principles of waiver that require
6 knowledge of the existence of an alternate remedy and an informed choice of remedy.)
7 Accordingly, Defendants are entitled to summary judgment on Plaintiffs’ claims for
8 battery, false imprisonment, intentional infliction of emotional distress, gross negligence
9 and loss of consortium (Counts 2-6 of Plaintiffs’ Complaint).

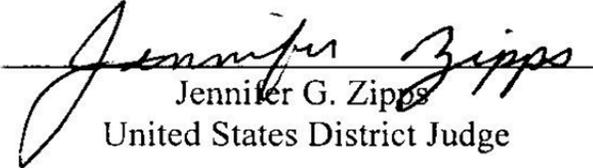
10 **CONCLUSION**

11 For the foregoing reasons, IT IS ORDERED that the Motion for Summary
12 Judgment filed by the Nogales Defendants on October 16, 2012 (Doc. 69) is GRANTED;

13 IT IS FURTHER ORDERED that the Motion for Summary Judgment filed by
14 Defendant Bon on October 16, 2012 (Doc. 71) is GRANTED;

15 IT IS FURTHER ORDERED that the Clerk of the Court shall enter judgment in
16 favor of Defendants and close the file in this matter.

17 Dated this 9th day of September, 2013.

18
19
20 
21 Jennifer G. Zipps
22 United States District Judge
23
24
25
26
27
28