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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Diego Lerma,	)	No. CV 12-518-TUC-FRZ
Plaintiff,	)	<b>ORDER</b>
vs.	)	
City of Nogales; et. al,	)	
Defendants.	)	

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Before the Court for consideration is the Defendants’ Motion for Summary Judgment and the Report and Recommendation of the Magistrate Judgment thereof.

This matter was referred to the United States Magistrate Judge for all pretrial proceedings and report and recommendation in accordance with the provisions of 28 U.S.C. § 636(b)(1) and LRCiv 72.1 and LRCiv 72.2, Rules of Practice of the United States District Court for the District of Arizona.

Plaintiff Diego Lerma filed this action, which arises out of incidents during his arrest by Nogales Police and interaction with Nogales EMTs prior to the arrest.

In his First Amended Complaint, Plaintiff alleges violation of 42 U.S.C. § 1983 and 42 U.S.C. §12131-12134 (“ADA”), and state law claims of: assault, battery, negligence, inadequate training, negligent supervision, intentional infliction of emotional distress, vicarious liability, and exemplary damages.

1 Defendants filed a Motion for Summary Judgment on all claims.

2 . On May 20, 2014, Magistrate Judge Charles R. Pyle issued his Report and  
3 Recommendation, following extensive briefing and a hearing on the matter, recommending  
4 that the District Court, after its independent review of the record herein, grant in part, and  
5 deny in part, Defendants' Motion for Summary Judgment as follows:

6 Defendants' Motion should be granted to the extent they seek summary judgment on  
7 Plaintiff's claims:

- 8 (1) that the City of Nogales had a custom or practice of tasering people  
9 indiscriminately in violation of 42 U.S.C. § 1983 (portion of Claim 1);
- 10 (2) under the ADA (Claim 2);
- 11 (3) of negligence (Claim 5) alleged against the EMTs only;
- 12 (4) of inadequate training (Claim 6);
- 13 (5) of vicarious liability (Claim 9) as to the federal claims only (the parties do not  
14 dispute that Claim 9 remains as to the state law claims); and
- 15 (6) for exemplary damages (Claim 10) except as to Defendant Pimienta.

16 Defendants' Motion should be denied to the extent that they seek summary judgment  
17 on Plaintiff's claims of:

- 18 (1) excessive force in violation of 42 U.S.C. § 1983 (portion of Claim 1);
- 19 (2) assault (Claim 3);
- 20 (3) battery (Claim 4);
- 21 (4) negligence (Claim 5) as to the police officers;
- 22 (5) negligent supervision (Claim 7);
- 23 (6) intentional infliction of emotional distress (Claim 8); and
- 24 (7) entitlement to exemplary damages as to Defendant Pimienta (Claim 10).

25 Magistrate Judge Pyle further recommends that Plaintiff should be granted leave to  
26 amend the complaint to allege gross negligence as to the EMTs.

27 The Report and Recommendation sets forth a thorough factual background of the  
28 relevant facts leading up, to and at the time of, the incident at issue and an in-depth legal  
analysis of the claims under the applicable legal standards.

1           The Report and Recommendation advised the parties that they may file written  
2 objections within fourteen (14) days from the date of service of a copy of the Report and  
3 Recommendation. *See* 28 U.S.C. § 636(b)(1) and Rules 72(b) of Federal Rules of Civil  
4 Procedure. Both parties filed objections and responses to the Report and Recommendation  
5 pursuant to 28 U.S.C. §636(b) and Rule 72(b)(2) of the Federal Rules of Civil Procedure and  
6 LRCiv 7.2(e).

7           Upon review and consideration of all matters presented, including the parties'  
8 objections and responses thereto,

9           The Court finds, after consideration of all matters presented and an independent  
10 review of the record herein, that the findings of the Magistrate Judge as set forth in the  
11 Report and Recommendation, shall be accepted and adopted as the findings of fact and  
12 conclusions of law of this Court, with the exception that the parties will not be granted leave  
13 to amend the pleadings in this case, as suggested by the Magistrate Judge.

14           Based on the forgoing,

15           **IT IS HEREBY ORDERED** that the Report and Recommendation of the Magistrate  
16 Judge (Doc. 115) is **ACCEPTED** and **ADOPTED** as the findings of fact and conclusions of  
17 law by this Court, with the exception leave shall not be granted to amend the complaint;

18           **IT IS FURTHER ORDERED** that Defendant Motion for Summary Judgment (Doc.  
19 96) is **GRANTED** in part and **DENIED** in part accordingly;

20           **IT IS FURTHER ORDERED** that summary judgment is granted as to Plaintiff's  
21 claims:

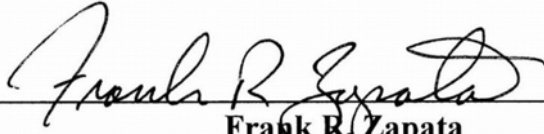
- 22           (1) that the City of Nogales had a custom or practice of tasing people  
23 indiscriminately in violation of 42 U.S.C. § 1983 (portion of Claim 1);
- 24           (2) under the ADA (Claim 2);
- 25           (3) of negligence (Claim 5) alleged against the EMTs only;
- 26           (4) of inadequate training (Claim 6);
- 27           (5) of vicarious liability (Claim 9) as to the federal claims only (the parties do not  
28           dispute that Claim 9 remains as to the state law claims); and
- (6) for exemplary damages (Claim 10) except as to Defendant Pimienta.

1 IT IS FURTHER ORDERED that summary judgment is denied as to Plaintiff's claims  
2 alleging:

- 3 (1) excessive force in violation of 42 U.S.C. § 1983 (portion of Claim 1);
- 4 (2) assault (Claim 3);
- 5 (3) battery (Claim 4);
- 6 (4) negligence (Claim 5) as to the police officers;
- 7 (5) negligent supervision (Claim 7);
- 8 (6) intentional infliction of emotional distress (Claim 8); and
- 9 (7) entitlement to exemplary damages as to Defendant Pimienta (Claim 10).

10  
11 IT IS FURTHER ORDERED that a separate order shall issue setting this case for  
12 Pretrial Conference on the remaining issues and a date for the filing of the Joint Proposed  
13 Pretrial Order and motions in limine.

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15 DATED this 30<sup>th</sup> day of September, 2014.

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18 **Frank R. Zapata**  
19 **Senior United States District Judge**

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