

# **OTTO ZEHM v. CITY OF SPOKANE UNITED STATES v. KARL THOMPSON**

*by Jeffry Finer and Breean Beggs*

In mid-March, 2006, Officer Karl Thompson of the Spokane Police Department overheard a radio dispatch for a “suspicious circumstances” call and possible theft of cash at an ATM. Officer Thompson was then 56 years of age, a highly regarded senior member of the Department who recently had been nominated by more than 20 colleagues as a candidate for Chief of Police. Trained in Los Angeles in the 80s, Officer Thompson was a father figure and example to many younger officers. Although he was on his dinner break, he decided to respond to the suspicious circumstances call ahead of the assigned officer.



The aftermath of that decision unraveled Spokane’s closely knit ties to its police, and ended political careers.

Video tape caught Thompson’s encounter with the suspect: over a dozen baton blows, Taser applications, and the suspect’s asphyxiation at the hands of backup officers. Despite a six-year cover-up, the fallout continues to build: tearing a popular mayor from office, dislodging the current police chief, disgracing her predecessor, prompting the termination of the city’s top lawyer and his controversial assistant, setting the stage for Spokane’s first Ombudsman, and triggering a successful federal prosecution for excessive force and obstruction.

A portion of the story concluded in May, 2012, when the Estate for Otto Zehm and his mother, Ann Zehm, settled with the City and seven defendants for a payout of approximately \$2MM, as follows: \$1.67MM to the family, approximately \$350,000 dedicated funds for all police officers more than a year from retirement to certify in Crisis Intervention Training, a paid consultant to assist the Department make the transition to a new use of force policy, an official apology to the family, and the naming of a permanent structure in one of Spokane’s parks as a memorial to Otto Zehm.

## **The assault**

Officer Thompson had a short drive from where he was taking his break to the location of an ATM on Spokane’s north-south commercial strip, Division Street. Dispatch updates advised him that two women reported a white male had interfered with their drive-up ATM transaction. Updates suggested that he

appeared to be on drugs, that he may have taken their money out of the machine. The women followed in their car as the man headed south. Thompson kept up with the broadcast and spotted the man just as he turned into a small Zip Trip convenience store on Division.



*Karl Thompson, shown at the Spokane Zip Trip following Otto Zehm's lapse into a fatal coma. Officer Thompson is serving 51 months (federal time) for the combined offenses.*

The Zip Trip surveillance video and a dozen witnesses picked up the rest:

The suspect walks into the Zip Trip. He is dressed for the cold evening, wearing a leather coat. He walks at normal speed and, passing various customers, no one takes notice of him. He appears to be smiling. He heads to the store's back aisle.

Officer Thompson follows seconds behind. His entry into the Zip Trip causes at least one customer to put his hands into view, palms out, and step aside. Thompson is moving fast. Thompson draws his LA-issued extra length ironwood baton from his utility belt, "cocking" it to his shoulder as he turns to the back aisle where Otto Zehm is standing along the wall with his back to the officer.

Thompson sharply turns the corner and continues down the rear aisle, Zehm turns and for the first time faces Officer Thompson. Zehm is holding a 2-litre soda bottle. There is no pause while Thompson moves quickly forward and Zehm takes a few steps backwards. He raises the soda bottle, covering his face. Thompson closes in and delivers the first baton strike. Zehm goes down.

Otto Zehm is unaware of the dispatch call and Officer Thompson's suspicions. He may have seen Thompson's police car round the corner at the moment he entered

the Zip Trip but his back is turned as Thompson follows him in to the store. From Otto's standpoint, nothing is amiss until he is in the rear aisle and turns to see Thompson bearing down with a "cocked" baton.

Struck in the leg, Otto goes down backwards, clutching his soda bottle. The two tangle for a long minute with Thompson raining down baton strikes and Otto Zehm on his back. The video cameras can only catch the movements that can be seen above the merchandise racks and at the end of aisles. Witnesses in the store catch glimpses of the struggle. The fight moves up and down two aisles as Otto Zehm tries to regain his feet and Thompson applies the first Taser drive stun.

Two minutes from the time of Officer Thompson's entry, the first dispatched officer arrives and goes to Thompson's aid. Using his Taser, "power strikes" from his baton and grappling techniques, he and Thompson cuff and subdue Otto Zehm.



*Officers Raleigh (l) and Uberagua (r) hours after Raleigh placed an non-rebreather mask onto Otto Zehm's face and held him prone on the floor.*

Five more officers arrive, paramedics are called to remove the Taser barbs. Otto Zehm's legs are bound in a strap that is connected to his wrists. He remains on his stomach. Officer Raleigh, stating that he believes Otto Zehm may try to spit, gets a non-rebreather mask from the EMTs on scene and places the mask over Otto Zehm's face. The mask is not connected to oxygen. The small breathing holes are face down. Two officers, Raleigh and Uberagua, put their weight on Otto Zehm's

upper torso. For a long period, after Otto Zehm ceases to struggle, he simply lays on the floor at the feet of a half-dozen officers.

Two minutes later an officer notices that Otto Zehm has clearly stopped breathing. Officers recall EMTs to his side. He is unconscious at the scene and does not regain consciousness for two days before dying.

According to Thompson's after action report, Otto Zehm presented a risk of assault when he turned to face Officer Thompson while holding the 2-liter pop bottle. Thompson stated at his internal affairs debriefing that he gave two orders to Zehm and Zehm verbally resisted. Thompson declared that Zehm could throw the soda bottle and distract Thompson and gain the advantage. Although the two

men were of nearly the same height and weight, Thompson declares that the suspect's size puts him at a disadvantage. Thompson declared he struck Zehm in order to "preempt" Zehm's possible assault.

Meanwhile, the City of Spokane's acting chief and its risk management attorney moved to set the right tone: the press releases state that Otto Zehm lunged at Officer Thompson, provoking Thompson's necessary use of force.

The City officers sought a search warrant against Otto Zehm for his medical and employment records — despite the fact that he was dead — for 3<sup>rd</sup> degree assault. Law enforcement gathered up the video tapes and the County Prosecutor announced that they would not be released to the public.

Otto Zehm's mother sought help from Spokane's Center for Justice.

## Center for Justice

The Center's Director Breean Beegs and staff-attorney Terri Sloyer initially saw this case as another death in custody. There had been several in the region in the past year. The Center opened a probate file and, under the authority of that process, subpoenaed the video tapes from Zip Trip. Then the Center got a copy of the video and everything changed.

The video did not depict an aggressive assaultive Zehm. There was no indication that Thompson stopped to give even one, much less, two verbal orders. Despite the

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*Though poor quality, the video gave mute evidence that Thompson steadily closed in (circled outline) while Otto Zehm slowly backed away (square outline) covering his face with the Pepsi bottle. Thompson denied claiming that*



*Zehm lunged, but federal prosecutors were able to show that the lunge story surfaced within minutes of the events.*

poor quality of the footage, it was clear that Thompson never slowed his hurried pace from the moment he entered the store to the first baton strike. Otto Zehm, it was equally clear, neither tried to flee or made aggressive movements toward the officer. There was no lunge.

## **The rules of the road**

A police officers may only use such force as is reasonable in detaining a suspect. This force may increase when a suspect resists, and an unarmed fleeing or aggressing suspect may be handled with intermediate force. *Smith v. City of Hemet*, 394 F.3d 689 (9<sup>th</sup> Cir. 2005). There is another rule, based on Washington case law, that states that a person may not resist arrest — even an unlawful arrest — but may resist the application of unlawful force used in an arrest. *State v. Valentine*, 132 Wn.2d 1, 21 (Wash. 1997) (detainee has right to use “reasonable and proportionate force to resist an attempt to inflict injury” during arrest).

The Center saw the case as an unprovoked and unjustified assault by Thompson and Zehm’s privileged resistance to that unlawful force. From that point of view, the video and witnesses supported a strong case for excessive force.

It soon became clear that this was a wrongful in-custody death. The medical examiner’s report was unequivocal: Otto Zehm had no illegal drugs in his system and he died from lack of oxygen due in part to positional asphyxia.

The autopsy deemed the death as “homicide.”

The decedent was placed in a prone restraint position. His hands were secured behind his body with handcuffs and his lower extremities were secured to the upper extremities by 'flex cuffs.' For more than two decades cases have been described in the medical literature in which sudden death and cardiopulmonary arrest has occurred in individuals while in states of excited delirium who are restrained. Research into these deaths, including the effects of restraint position on oxygenation, blood pressure, and pulse, has been conflicting and somewhat controversial. Evidence for an association of mechanical asphyxia from hobble restraint in the circumstance of excited delirium is largely based on observational autopsy reports. However, it is likely in this case, and in similar cases, that restraint itself placed the decedent at risk for cardio-pulmonary arrest. \* \* \* In light of these circumstances, the death is attributed to hypoxic encephalopathy due to cardiopulmonary arrest while restrained (total appendage restraint) in a prone position for excited delirium.

The Center attempted to negotiate with the City but met with immovable resistance. The City made public again and again its firm belief that Officer Thompson's conduct was proper, consistent with the use of force policy and reasonable. The City's ratification was delivered again and again.

On the eve of the statute of limitations, the Center filed suit in federal district court, alleging a 1983 wrongful death claim, state survivor's claim, invasion of privacy under the 4<sup>th</sup> Amendment and breach of contract (for disclosing documents under a protective order).

Six months later, the Department of Justice filed an indictment against Officer Thompson for 18 U.S.C. § 242 (criminal violation of civil rights) and obstruction (under Sarbanes-Oxley) for lying to an official regarding a matter under FBI investigation. Before civil discovery began in earnest, the United States intervened to stay the case and thereby temporarily removed the civil players from the field.

## **LIABILITY**

### **Standard of Care & "Excited Delirium"**

Excited Delirium, a controversial "syndrome" that seems to occur mostly in connection with deaths while in police custody, is often used as a *defense* in wrongful death claims. We decided we could use it *offensively*. After all, whether the syndrome is a real phenomenon or an excuse, in this instance there was no evidence that Otto Zehm met any tests for excited delirium until after he was assaulted by a half-dozen officers. Furthermore, these officers were trained how to handle so-called excited delirium and, in this instance, they failed their own training.

For at least ten years, the Spokane Police Department has been aware of the hazards of restraint-associated asphyxia, or positional asphyxia. The Department's internal training also included specific warnings about the occurrence of asphyxia or heart failure in subjects who are overheated and in prolonged struggles or otherwise show evidence of "excited delirium."

These warnings included the following red flags:

- Being subjected to a prolonged physical struggle;
- Being subjected to multiple blows with police batons.
- Being Tased during a prolonged physical struggle;
- Being handcuffed behind the back and left on stomach;

- Having weight on back while face down;

Defendants knew and were trained above all not to leave anyone suffering from “excited delirium” on their stomach. Mindful of this training, the acting Chief of Police assured television viewers in an early interview that the officers responding to Thompson’s request for aid “immediately” placed Mr. Zehm on his side, in accordance with their training.

But the video showed Otto Zehm on his stomach for for nearly all the 16 minutes between his cuffing and the point when officers noticed he had stopped breathing. He was never placed on his side. Worse, officers are seen putting weight on his back and shoulders during portions of the final minutes.

## **Excessive Force & Unreasonable Seizure**

Under the Fourth Amendment, police may only use such force as is objectively reasonable under the circumstances. *Graham v. Connor*, 490 U.S. 386, 397 (1989). “The essence of the *Graham* objective reasonableness analysis is that the *force* which was applied must be balanced against the *need* for that force: it is *the need for force* which is at the *heart* of the *Graham* factors.” *Headwaters Forest Defense v. County of Humboldt (Headwaters II)*, 276 F.3d 1125, 1130 (9th Cir. 2002).

“[Deadly] force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses *a significant threat of death or serious physical injury* to the officer or others.” *Tennessee v. Garner*, 471 U.S. 1, 3 (1985) (emphasis added). The threat facing the officer must be “*immediate*.” 471 U.S. at 11.

Factors to consider include “the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.” *Graham*, 490 U.S. at 398. “The most important single element of the three specified factors” is “whether the suspect poses an immediate threat to the safety of the officers or others.” *Smith v. City of Hemet*, 394 F.3d 689, 702 (9th Cir. 2005) (en banc). However, “a simple statement by an officer that he fears for his safety or the safety of others is not enough; there must be objective factors to justify such a concern.” *Deorle*, 272 F.3d at 1281.

Less intrusive alternatives to the force that was used must be considered as a part of the “totality of the circumstances.” *Smith v. City of Hemet*, 394 F.3d at 701 (en banc). See also, *Deorle*, 272 F.3d at 1282; *Chew v. Gates*, 27 F.3d 1432, 1443 (1994); *Cunningham v. Gates*, 229 F.3d 1271, 1291 n. 23 (9th Cir. 2000).

## Mental Illness & Excited Delirium

The City's original defense, Otto Zehm's alleged lunge, quickly collapsed with the public release of the video. Its next defense, "excited delirium", proved no better. Instead of meeting that claim with a simple denial, Plaintiffs counsel adopted a two-pronged approach.

First, Otto's conduct on the video does not match law enforcement's criteria for so-called excited delirium. His temperature was normal. His behavior prior to being assaulted drew no attention from store customers. The excited person was Officer Thompson. The delirium, if any, was Otto Zehm fighting for his life.

Second, the term "excited delirium" has no current diagnostic acceptance, but it does have training criteria and those criteria mandate that suspects with excited delirium behaviors be put onto their sides or positioned sitting up. If the officers believed their detainee suffered from excited delirium, then under *Graham v. O'Connor* the decision to leave him prone in a four-point restraint (hog-tied for that portion of the tape where his feet were pinned) was unreasonable.

When dealing with emotionally unbalanced persons, officers have to take into account the mental factor. Excited delirium, at least whatever passes for that term in an officer's mind, does not permit officers to abandon his or her training and use unreasonable force under the circumstances. The Ninth Circuit has been saying this since 2001:

[when dealing with mentally unstable detainees] increasing the use of force may, in some circumstances at least, exacerbate the situation; in the [armed and dangerous criminal detainee case], a heightened use of less-than-lethal force will usually be helpful in bringing a dangerous situation to a swift end. In the case of mentally unbalanced persons, the use of officers and others trained in the art of counseling is ordinarily advisable, where feasible, and may provide the best means of ending a crisis. See *Alexander [v. City and County of San Francisco]*, 29 F.3d 1355 (9<sup>th</sup> Cir. 1994)

*Deorle v. Rutherford*, 272 F.3d 1272, 1282 (9<sup>th</sup> Cir. 2001).

Force that led to the positional asphyxia death of a mentally incapacitated man caused the 9<sup>th</sup> Circuit to note that even unconfirmed mental illness should prompt a careful approach:

While in this case, as distinguished from *Drummond*, the officers did not know for certain that Escobedo suffered from a mental illness, the fact that they believed he might should have prompted the officers to implement a lower level of force to control Mr. Escobedo.

*Escovedo v. Redwood City*, 2005 U.S. Dist. LEXIS 23821, at p. 21 (N.D. Cal. 2005). (9th Cir. 1994).

The rule is not *per se*. The rule simply requires that officers take into account the mental instability element as one of the Graham circumstances:

Even when an emotionally disturbed individual is "acting out" and inviting officers to use deadly force to subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted, not with a person who has committed a serious crime against others, but with a mentally ill individual. We do not adopt a *per se* rule establishing two different classifications of suspects: mentally disabled persons and serious criminals. Instead, we emphasize that where it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in determining, under Graham, the reasonableness of the force employed.

*Deorle*, 272 F.3d at 1282-1283; *Drummond v. City of Anaheim*, 343 F.3d 1052, 1057-58 (9th Cir. 2004), *cert. denied*, 542 U.S. 918 (2004) (*Graham* reasonableness inquiry must include decedent's mental disability).

The *Drummond* Court also left as an open question whether force causing positional asphyxia should be treated as "deadly force." *Id.* at n. 4. In Otto Zehm's case, we considered the force plus restraint resulting in suffocation as a strong candidate for "deadly force," especially on a mentally ill person. Particularly after a protracted fight, handcuffed detainees left on their stomachs have suffocated under the weight of officers. *Jones v. Ralls*, 187 F.3d 848, 850, 852 n.4 (8th Cir. 1999); *Bozeman v. Orum*, 199 F. Supp. 2d 1216, 1226 (M.D. Ala. 2002); *Tofano v. Reidel*, 61 F. Supp. 2d 289, 292-95 (D.N.J. 1999); *Alexander v. Beale St. Blues Co.*, 108 F. Supp. 2d 934, 939 (W.D. Tenn. 1999); *Johnson v. City of Cincinnati*, 39 F. Supp. 2d 1013, 1018 (S.D. Ohio 1999).

We were also mindful that even where a victim cannot testify, once a mentally ill person is incapacitated, a severe injury inflicted by police is powerful evidence of excessive force. *Santos v. Gates*, 287 F.3d 846, 853 (9th Cir. 2002) (where Santos, a mentally ill man, could not recall details of incident, "a jury could reasonably conclude that there was little or no need for the application of force against Santos, and that in light of his serious injury, the force used was both substantial and excessive"); *Lolli v. County of Orange*, 351 F.3d 410, 417 (9th Cir. 2003) (diabetic plaintiff's severe injuries supported inference that officers used excessive force); *Frazell v. Flanigan*, 102 F.3d 877, 883-884 (7th Cir. 1996) (reasonable jury could infer that police officers lied about their use of force and find such force was unreasonable based on extent of mentally ill plaintiff's

injuries); *Abdullahi v. City of Madison*, 423 F.3d 763, 772 (7th Cir. 2005) (where mentally ill man died in police custody, “medical evidence and other circumstantial evidence can be sufficient to create triable issues of fact in excessive force cases”); *Sallenger v. Oakes*, 473 F.3d 731, 740 (7th Cir. 2007) (medical evidence used to impeach officers’ claim that force used was reasonable).

In this case, the very first application of force was Thompson’s assault. No force was justified against Otto Zehm at that time, and Defendants only escalated the force from there, killing an innocent man at what should have been a brief Terry-stop.

## Winning the Public’s Heart & Mind

The City’s Legal and Police departments declared war on Otto Zehm and his advocates and waged it aggressively in the courts and the media for over six years. By most accounts the easy internet access to the actual video and the continued revelations of police cover-up and misconduct undermined the City’s efforts. Over three hundred news stories were written in the print media and thousands of on-line citizen comments in response to those stories demonstrated that the City’s position was untenable. The Center for Justice used this story as its centerpiece to drive police reform in Spokane. The City, however, resisted all attempts to reckon



with the case. That strategy fell apart when, in the fall of 2011, just weeks ahead of the City’s mayoral election date, the Department of Justice’s criminal case against Karl Thompson went to trial. The 13 days of testimony riveted local news media and the verdict — guilty on excessive force and obstruction — signaled the complete collapse of the City’s strategy. Four weeks later, the election results showed the impact: the popular incumbent Mayor (who swept the primaries) was defeated by a long-shot candidate who had publically criticized the City’s blanket support for Karl Thompson. By that winter, Spokane had a new mayor, new city attorney, and new police chief. This new team wanted to settle the civil rights case.

The City agreed to mediate the case with Federal District Court Judge Michael Hogan. Judge Hogan is on senior status and specializes in mediating challenging cases. He utilized a co-mediator lawyer, Ford Elsaesser, from Sandpoint, Idaho,

and together they employed an mediation style that was particularly effective given the parties' six years of conflict.

Their first challenge was to bring the excess insurance carrier, AIG, up to speed. For years AIG had been told by the city's former counsel that there was no liability and, besides, no damages because Otto Zehm had no dependents. Civil rights lawyers of course know that Washington's limitation on general damages for decedents without dependents and parental consortium damages for an adult child do not apply under Section 1983. Judge Hogan flexed his extensive experience in civil rights cases — and his contempt powers — to convince AIG to undertake a painful re-evaluation of the case. Judge Hogan also required the parties to agree to his continuing jurisdiction — his "Tsar Clause" — allowing him complete discretion on collateral disputes over the execution of the settlement. Finally, he obtained the participation of nationally known coverage team to force AIG to reckon with its contractual obligations. In all, 13 lawyers filled the jury box on the first day of a two-day mediation.

Plaintiffs' counsel found that Judge Hogan was sympathetic but frank: the estate was small, even though Otto Zehm's spending patterns for a part-time janitor were very modest. And the Judge highlighted a particular irony: with Officer Thompson guilty of federal criminal violations, AIG had a strong defense on coverage. Nevertheless, the Judge believed that the City's ratification of the "hog-tie" and suffocation aftermath by secondary officers reopened AIG's exposure. The result is one of the largest settlements in the Northwest for an in-custody death.



Most important to Otto's mother than the financial recovery was the City's public contrition. At the first press conference announcing the settlement, the Mayor read to her his handwritten apology. A unanimous City Council, the top members of the police department, and key lawyers from the City's legal department stood by the new Mayor while he apologized for what had happened, including the way the City had handled the dispute. Comprehensive new training was announced based on Memphis's Crisis Intervention Training Model and the City funded an independent consultant to further reform the outdated use of force policies that led to this and many other deaths. The Department of Justice continues to investigate further obstruction of justice by the police in the underlying federal investigation. In mid-

2012, Officer Thompson was sentenced to 51 months of federal detention and, with good time, will likely serve 47 or more months. He is housed in a federal facility in Arizona and is appealing his conviction, in part on *Brady* violations by the United States. A ruling is not expected before Fall, 2013.