STATE OF IDAHO)
County of BONNER)ss

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CLERK, DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF BONNER

JASON MILLER,

Plaintiff,

vs.

IDAHO STATE PATROL [POLICE], TROOPER CHRISTOPHER YOUNT, and JANE DOE YOUNT, et al.,

Defendants.

Case No. **S CV 2008 628**

MEMORANDUM DECISION AND ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

I. BACKGROUND AND PROCEDURAL HISTORY.

On May 5, 2007, Plaintiff Jason Miller (Miller) was observed by Deputy Slinger of the Bonner County Sheriff's Department stumbling near the driver's door of a vehicle parked at the Shell gas station in Priest River, Idaho. Memorandum of Authorities in Support of Motion to Dismiss as to All State Claims, Attachment No. 1, report of Deputy Slinger. Deputy Slinger contacted Idaho State Police[1] Trooper Yount (Yount) and Yount made contact with Miller. It is unknown why Slinger did not make the initial contact with Miller, and instead, apparently intended to let Miller, a person Slinger suspected of being under the influence of drugs or alcohol, get behind the wheel and drive. Memorandum of Authorities in Support of Motion to Dismiss as to All State Claims, Attachment No. 1, report of Deputy Slinger and Attachment No. 2, Report of Trooper Yount, p. 1, ¶ 1: "SLINGER said that he was going to wait for the vehicle to enter the highway."

At the time of Yount's contact, Miller was sitting in the driver's seat of the vehicle with the motor running. Memorandum of Authorities in Support of Motion to Dismiss as to All State Claims, Attachment No. 1, report of Deputy Slinger and Attachment No. 2, Report of Trooper Yount, p. 2, ¶ 2. Yount noted dilated pupils, indicative of methamphetamine use, and noted rebound dilation, indicative of marijuana use. Memorandum of Authorities in Support of Motion to Dismiss as to All State Claims, Attachment No. 2, Report of Trooper Yount, p. 2, ¶ ¶ 4, 6. Yount had Miller perform additional field sobriety tests, which Miller failed. Memorandum of Authorities in Support of Motion to Dismiss as to All State Claims, Attachment No. 2, Report of Trooper Yount, p. 2, ¶ ¶ 6-13. Unable to complete the sobriety tests, Miller was arrested by Yount for driving under the influence. *Id.,* p. 3, ¶ 16.

Yount requested a urine sample from Miller, which Miller refused. *Id.,* ¶ 21. Miller said he would take a BAC test at the jail. *Id.* After Miller told Yount that he smoked marijuana every day and smoked marijuana the day he got out of prison, Yount told Miller "he [Yount] was going to take him [Miller] to the hospital and a urine sample would be taken from him." *Id.,* ¶ 23. Then, Yount's report reads:

> I [Yount] asked MILLER again if he would provide a urine sample. He said, "No". I asked if he was going to continue to refuse. He said, "Yep".

Id., ¶ 25. About forty minutes later, at Bonner General Hospital, Yount asked a registered nurse, Shirin Lamp, to withdraw a urine sample from Miller. Lamp said "she administers catheters all the time and would be happy to." *Id.,* p. 3, ¶ 30. Yount's report then reads:

> Both LAMP and I talked to MILLER and tried to convince him to provide a urine sample voluntarily. He said, "I will not fight you, but I will not give you a sample voluntarily."

Id. According to Yount's report, a urine sample was taken by catheter from Miller about a half-hour later. *Id.,* ¶ 31. Yount wrote in his Idaho State Police Incident Report that he

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[1]Miller errantly named the Idaho State Patrol instead of the Idaho State Police.

recognized Miller and knew him to be a methamphetamine user. *Id.,* p. 1, ¶¶ 3, 4.

After the urine sample was taken by catheter, Yount walked Miller back out to Yount's patrol car. Miller asked for a cigarette, indicated he might have some cigarettes in his shirt pocket, and Yount reached into Miller's shirt pocket. *Id.,* p. 3, ¶ 32. Yount found a pack of cigarettes and a glass methamphetamine pipe which had been used and which field tested positive for methamphetamine. *Id.,* p. 3, ¶ 32.

On September 24, 2007, Miller entered guilty pleas to felony possession methamphetamine, possession of paraphernalia and driving under the influence. Miller conceded that no material facts remain in dispute as to liability: "Trooper Yount was justified in arresting Jason Miller and …Trooper Yount had a reasonable suspicion that Jason Miller was committing the misdemeanor offense of driving while under the influence of a controlled substance." Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment, p. 1.

On April 18, 2008, Miller filed this lawsuit against Idaho State Patrol [Police], Trooper Christopher Yount, Jane Doe Yount, Bonner County, Bonner County Sheriffs Department, Deputy Jason Slinger and Jane Doe Slinger. In his unverified complaint, Miller claims these parties were: negligent; disregarded Miller's constitutional rights; committed a violation of 42 U.S.C. § 1983; committed assault and battery; and were guilty of negligent supervision, hiring and training. Complaint, pp. 1-7.

On July 31, 2008, defendants Idaho State Patrol, Trooper Christopher Yount and "Jane Doe" Yount, field their Answer. On August 8, 2008, the remaining defendants were dismissed by court Order, based upon Miller's stipulation.

On January 16, 2009, defendants Idaho State Patrol (ISP), Trooper Christopher Yount and "Jane Doe" Yount filed their "Motion for Summary Judgment as to All State Law

Claims", a "Memorandum of Authorities in Support of Motion for Summary Judgment as to All State Law Claims", a "Motion to Dismiss All 42 U.S.C. § 1983 Claims Against Defendants Idaho State Police and Trooper Yount" and a "Memorandum of Authorities in Support of Motion to Dismiss All 42 U.S.C. § 1983 Claims Against Defendants Idaho State Police and Trooper Yount." On February 2, 2009, Miller filed a "Motion for Partial Summary Judgment", and a "Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment." Even though it is captioned as a Motion for Partial Summary Judgment, Miller asks for "…summary judgment in his favor as to the liability for any damages on all counts listed in the complaint." On February 22, 2009, Miller filed a "Memorandum in Partial Opposition to Defendant's Motion to Dismiss Claims Under 42 U.S.C. § 1983". On March 9, 2009, defendants Idaho State Patrol, Trooper Christopher Yount and "Jane Doe" Yount, filed their "Memorandum of Authorities: 1) In Reply to Plaintiff's Motion for Summary Judgment; 2) In Response to Plaintiff's Reply to Motion to Dismiss All 42 U.S.C. § 1983 Claims; and 3) In Response to Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment."

On March 24, 2009, oral argument was held on: Miller's Motion for Partial Summary Judgment; defendants' Motion to Dismiss Miller's 42 U.S.C. § 1983 claims pursuant to I.R.C.P.12(b)(6); and defendants' Motion for Summary Judgment on all Miller's State claims. This matter is set for a 4-day jury trial in Bonner County on October 19, 2009.

II. STANDARD OF REVIEW.

In considering a motion for summary judgment, the Court is mindful that summary judgment may properly be granted only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). In determining

whether any issue of material fact exists, this court must construe all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in the light most favorable to the non-moving party. I.R.C.P. 56(c); *Sewell v. Neilson, Monroe Inc.,* 109 Idaho 192, 194, 706 P.2d 81, 83 (Ct. App. 1985). A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue for purposes of summary judgment. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.,* 134, Idaho 84, 87, 996 P.2d 303, 306 (2002). Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence. *Smith v. Meridian Joint School District No. 2,* 128 Idaho 714, 718, 918 P.2d 583, 587 (1996). Where, as here, both parties file motions for summary judgment relying on the same facts, issues and theories, the parties effectively stipulate that there is no genuine issue of material fact. *Riverside Dev. Co. v. Ritchie,* 103 Idaho 515, 518-20, 650 P.2d 657, 661-62 (1982) However, "the fact that both sides moved for summary judgment does not in itself establish that there is no genuine issue of material fact." *Montgomery v. Montgomery,* 09.6 ISCR 239, 240, 2009 Opinion No. 29 (Filed March 4, 2009), *citing Casey v. Highlands Ins. Co.,* 100 Idaho 505, 507, 600 P. 2d 1387, 1389 (1979); *Farmer's Ins. Co. of Idaho, v. Brown,* 97 Idaho 380, 381-82, 544 P.2d 1150, 1151-52 (1976). Our rules do not contemplate the transformation of the court, sitting to hear a summary judgment motion, into the trier of fact when the parties file cross-motions for summary judgment. *Id., citing Moss v. Mid-America Firs and Marine Ins. Co.,* 103 Idaho 298, 302, 647 P.2d 754, 758 (1982).

The standard for reviewing a dismissal for failure to state a cause of action pursuant to I.R.C.P. 12(b)(6) is the same as the standard for reviewing a grant of summary judgment. See *Idaho Schs. For Equal Educ. v. Evans*, 123 Idaho 573, 578, 850 P.2d 724, 728 (1993); *Rim View Trout Co. v. Dep't. of Water Resources*., 119 Idaho 676, 677, 809

P.2d 1155, 1156 (1991). The grant of a 12(b)(6) motion will be affirmed where there are no genuine issues of material fact and the case can be decided as a matter of law. *See Moss v. Mid-American Fire and Marine Ins. Co.,* 103 Idaho 298, 302, 647 P.2d 754, 758 (1982); *Eliopulos v. Idaho State Bank,* 129 Idaho 104, 107-08, 922 P.2d 401, 404-05 (Ct.App.1996). When reviewing an order of the district court dismissing a case pursuant to I.R.C.P. 12(b)(6), the non-moving party is entitled to have all inferences from the record and pleadings viewed in its favor, and only then may the question be asked whether a claim for relief has been stated. *See Idaho Schs. for Equal Educ*., 123 Idaho at 578, 850 P.2d at 729; *Miles v. Idaho Power Co.,* 116 Idaho 635, 637, 778 P.2d 757, 759 (1989). "The issue is not whether the plaintiff will ultimately prevail, but whether the party 'is entitled to offer evidence to support the claims.' " *Orthman v. Idaho Power Co*., 126 Idaho 960, 962, 895 P.2d 561, 563 (1995) (quoting *Greenfield v.. Suzuki Motor Co. Ltd.,* 776 F.Supp. 698, 701 (E.D.N.Y.1991)). If matters outside the pleading being challenged for failure to state a claim are presented, and not excluded by the court, a motion to dismiss filed under Rule 12(b)(6) shall be treated as one for summary judgment and disposed of as provided by Rule 56. *Hellickson v. Jenkins,* 118 Idaho 273, 276, 796 P.2d 150, 153 (Ct.App. 1990); *Drennon v. Idaho State Correctional Institution,* 145 Idaho 598, 601, 181 P.3d 524, 527 (Ct.App. 2007).

III. ANALYSIS.

A. State Law Claims.

1. Assault and Battery.

ISP and Yount move this Court for an order granting them summary judgment as to all of Miller's state law claims for negligence, assault, battery, *respondeat superior,* and negligent supervision. Memorandum in Support of Motion to Dismiss as to All State

Claims, pp. 5, *et seq.* ISP and Yount go on to argue that even if Miller could establish a *prima facie* case for assault or battery, such claims would be barred by the Idaho Tort Claims Act (ITCA). *Id.,* pp. 14-17. ISP and Yount argue Idaho law provides an officer with the choice as to which test will be used to determine the presence or absence of intoxicating substances and implies consent to evidentiary testing whenever a person controls a vehicle within the state. *Id.*, p. 5. Miller moves for summary judgment as to liability for damages on all counts listed in his complaint, arguing Yount's decision to seek catheterization of Miller was not reasonable as a matter of law because the procedure itself is not routine. Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment, p. 5.

Regarding Miller's assault claim, ISP and Yount argue Yount did not commit assault because Miller was provided the opportunity to voluntarily give a urine sample, Yount did not have the requisite intent to cause harm or offense, and Miller has not identified how he was injured or damaged. Memorandum in Support of Motion to Dismiss all State Claims, pp. 7-8. Regarding Miller's battery claim, ISP and Yount argue: 1) the implied consent to evidentiary testing at the request of officers with reasonable grounds for suspicion of DUI by all drivers in Idaho; 2) Yount's belief his contact with Miller was permitted and lawful; and 3) the contact not being harmful or offensive are all fatal to Miller's claim. *Id.,* pp. 8-10. Miller responds:

> [T]o have a hose inserted into one's penis is, in fact, very offensive. The officer had a perfectly valid constitutional option available to him in the form of a blood draw (a test which would give a more accurate representation as to *what was in Mr. Miller's blood*), and he chose instead to order a hose shoved into Mr. Miller's penis.

Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment, p. 6.

In evaluating the Fourth Amendment implications of the Federal Railroad

Administration's (FRA) drug and alcohol testing requirements, the United States Supreme Court discussed urine tests at some length. *Skinner v. Railway Labor Executives' Association,* 489 U.S. 602, 109 S.Ct. 1402 (1989). The Court noted that following events triggering the railroad's duty to test, both blood and urine samples are obtained from each involved employee. 489 U.S. 602, 610, 109 S.Ct. 1402, 1409. "Urine samples are also necessary, however, because drug traces remain in the urine longer than in blood, and in some cases it will not be possible to transport employees to a medical facility before the time it takes for certain drugs to be eliminated from the bloodstream." *Id.* The Court goes on to discuss *Schmerber v. California,* 382 U.S. 757, 767-68, 86 S.Ct. 1826, 1833-34 (1966), and recognized as pertains to blood tests: "this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable." 489 U.S. 602, 616, 109 S.Ct. 1402, 1413. The Court then states:

> Unlike the blood-testing procedure at issue in *Schmerber,* the procedures prescribed by the FRA regulations for collecting and testing urine samples do not entail a surgical intrusion in to the body….Nor can it be disputed that the process of collecting the sample to be tested, which may in some cases involve visual or aural monitoring of the act of urination, itself implicates privacy interest. As the Court of Appeals for the Fifth Circuit has stated:
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> > "There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom." *National Treasury Employees Union v. Von Raab,* 816 F.2d 170, 175 (5th Cir. 1987)

489 U.S. 602, 617, 109 S.Ct. 1402, 1413. Thus, the United States Supreme Court in *Skinner* has viewed collection of urine samples warily, even when such collection does not entail catheterization. Here, the procedure elected by Yount to secure a sample form Miller went far beyond the method the United States Supreme Court in *Schmerber* reluctantly recognized as reasonable.

Miller argues catheterization against a person's will is violative of a person's Constitutional rights regardless of how the procedure is performed. Memorandum in Support of Motion for Partial Summary Judgment, p. 2. Miller argues the United States Supreme Court in *Schmerber* recognized the issue to be: "whether the police were justified in requiring petitioner to submit to the blood test, and whether the means and procedures employed in taking his blood respected the relevant Fourth Amendment standards of reasonableness." *Id.; Schmerber,* 384 U.S. 757, 768, 86 S.Ct. 1826, 1834. The United States Supreme Court determined that intrusions into the body for blood to be analyzed for alcohol content must be justified in the circumstances and must be made in a proper manner. *Id.*

ISP and Yount argue only that the language of Idaho Code § 18-8002, *et seq.* implies consent to evidentiary testing and specifically refers to testing of blood or urine for the purpose of determining the presence of drugs or other intoxicating substances, and that the contact was permissible, not harmful, and not offensive. Memorandum in Support of Motion to Dismiss as to All State Claims, pp. 9-10, *quoting* I.C. § 18-8002(1), (7), (9), and (10). However, this Court finds the Idaho legislature clearly considered voluntary urinalyses, not catheterization when drafting I.C. § 18-8002. This is evidenced by I.C. § 18-8003 – "Persons Authorized to Withdraw Blood for the Purposes of Determining Content of Alcohol or other Intoxicating Substances." Idaho Code § 18-8003 requires a licensed physician, qualified medical technologist, registered nurse, phlebotomist, or other medical personnel to withdraw blood, but the limitation to these professionals "shall not apply to the taking of a urine, saliva, or breath specimen." I.C. § 18-8003(1). The taking of urine against an individual's will through catheterization is at least as invasive if not more invasive than the taking of blood, which requires withdrawal of the blood by medical professionals.

Thus, the legislature intended that the taking of urine specimens contemplated by I.C. § 18-8002 does not include the taking of urine via a catheter. A corollary of this interpretation that the legislature intended that urine need not be taken by a professional via a catheter is that urine may be taken by non-medical professionals when the sample is issued voluntarily. That is, the legislature understood that you need not be a medical professional in order to administer a voluntary urine test.

Miller argues:

> Jason Miller objected to the catheter repeatedly and verbally. He did not physically fight with the officer, but he was very vocal in his objection to having a hose inserted into his penis. As he objected in fact, and there is no law that allows the defendant to override this objection for an otherwise illegal test, the facts show that the plaintiff did not consent to be catheterized.
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> In fact, the facts show that Jason Miller repeatedly objected to that course of action.
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> No anesthesia was administered during the procedure, and so it caused Jason Miller significant pain (as one might imagine) in addition to the mental anguish of being exposed and having one's genitalia handled by an unknown female nurse in front of Trooper Yount.

Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment, p. 8. The problem with Miller's argument is none of these claims are supported by any citation to any portion of the record. The bigger problem for Miller is that Miller *has made no record*. There is no affidavit of Jason Miller that has been filed in this case, save for the Affidavit filed on April 22, 2008, where Miller claimed he was indigent in order to request waiver of the surety bond required under Idaho Code § 6-610 for this civil lawsuit against Yount and ISP. Miller makes these claims in his briefing that he objected to the catheter repeatedly and verbally, yet there is no evidence in the record to support that claim. In fact, the notes of Yount indicate just the opposite. In response to Yount's repeated requests to voluntarily issue a urine sample, Miller simply, but defiantly, said: "I will not fight you, but I will not give

you a sample voluntarily." Memorandum of Authorities in Support of Motion to Dismiss as to All State Claims, Attachment No. 2, Report of Trooper Yount, p. 3, ¶ 30.

ISP and Yount have failed to make clear why a urine test would have been superior to a blood test. ISP and Yount do not allege the drug traces remaining in Miller's blood would have been eliminated by the time transport to the hospital was completed. ISP and Yount only state Miller had no right to avoid seizure of his bodily fluids where probable cause for a DUI arrest was present and where the specimen was taken in a medically reasonable manner. Memorandum in Response to Plaintiff's Motion for Summary Judgment, p. 6. However, this Court finds implied consent to evidentiary testing in the Idaho Code § 8002(1) applies only to urine specimen collection which can be completed by an individual without any specialized medical training. Clearly, catheterization does not fall within this category. Although the procedure employed by Lamp to obtain Miller's urine may have been entirely medically proper, this Court cannot find as a matter of law that the means employed (catheter) was reasonable. This Court cannot find that ISP and Yount are entitled to summary judgment on Miller's assault and battery claims. Reasonableness will be an issue for the jury to decide. On the other hand, neither is Miller entitled to summary judgment as to liability on his assault and battery claims. The Idaho Tort Claim Act immunity is discussed *infra.*

2. Negligence, Negligent Supervision, and *Respondeat Superior.*

ISP and Yount argue Miller's claim of negligence fails due to Miller's failure to define specifically what duty was owed, what act breached that duty, and what harm was caused. Memorandum in Support of Motion to Dismiss as to All State Law Claims, p. 11. ISP and Yount also argue no cause of action for negligent police protection exists. *Id.,* p. 12. Regarding Miller's claim for *respondeat superior*, ISP and Yount argue Yount acted in the

course and scope of his employment but did not act negligently, and Miller's claim for negligent supervision against ISP must fail because ISP is shielded from liability by the Idaho Tort Claims Act. *Id.*, pp. 12-13.

Miller states his claim for negligence rests upon the special relationship between an officer and prisoner. Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment, pp. 8-9. Both Miller on one hand and ISP and Yount on the other, cite *Lundgren v. City of McCall,* 120 Idaho 556, 817 P.2d 1080 (1991) in support of their positions that Yount did or did not owe Miller a particular duty. The Idaho Supreme Court in *Lundgren* held the city owed the plaintiff no duty to protect him from harm where he was struck in the eye by what he believed to be an illegal firework while watching the city's fireworks. 120 Idaho 556, 557, 817 P.2d 1080, 1081. "The respondent's police officers did not have an absolute, all embracing duty to protect the appellant from all types of foreseeable harm. Police officers cannot guarantee the public protection from every possible tortfeasor or criminal." *Id.* The Idaho Supreme Court differentiated the facts in *Lundgren* from those in negligent entrustment, negligent inspection, and negligent supervision cases. *Id.* The Idaho Supreme Court stated: "Municipalities are not liable for the failure to provide police protection in the absence of a special relationship or duty to particular individuals. *Id.* Miller argues the Restatement (Second) of Torts § 314A and 320 (1965) establish a "special relationship" between Yount and Miller, which results in Yount having a duty to exercise reasonable care to protect Miller from harm. Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment, p. 9.

It is well settled that "one owes the duty to every person in our society to use reasonable care to avoid injury to the other person in any situation in which it could be reasonably anticipated or foreseen that a failure to use such care might result in such

injury." *Alegria v. Payonk,* 101 Idaho 617, 619, 619 P.2d 135, 137 (1980) (quoting *Kirby v. Sonville,* 286 Or. 339, 594 P.2d 818, 821 (1979)); *Harper v. Hoffman,* 95 Idaho 933, 935, 523 P.2d 536, 538 (1974) ("Every person has a general duty to use due or ordinary care not to injure others, to avoid injury to others by any agency set in operation by him, and to do his work, render services or use his property so as to avoid such injury."). As cited by Miller:

> One who is required by law to assume the custody of another so as to deprive him of his normal power of self-protection or to subject him to association with persons likely to harm him, has a duty to exercise reasonable care to protect him from harm. Restatements (Second) of Torts §§ 314A and 320 (1965). This duty is specifically applicable to a police officer or to a jailer at a penal institution. *Id.,* § 320.

Merrit for Merrritt v. State, 108 Idaho 20, 24, 696 P.2d 871, 875 (1985). In the present case, it is a jury question as to whether Yount failed to observe the general duty to use reasonable care to avoid injury to Miller in a situation in which it could be reasonably anticipated or foreseen that a failure to use such care might result in such injury. If Yount breached his duty to Miller in the course and scope of his employment, it follows that ISP would be liable under *repsondeat superior* and may even be liable for negligent supervision. *See Doe v. Durtschi,* 110 Idaho 466, 472, 716 P.2d 1238, 1244 (1986) (holding a school district liable where it knew of Durstchi's proclivities for molestation, and his actions while teaching were the foreseeable result of the district's failure to exercise due care to protect its students). ISP and Yount are not entitled to judgment as a matter of law on Miller's negligence claims. Miller's claims are not properly resolved at summary judgment because, while the question of whether a duty exists is a question of law (and that duty is set forth above in *Alegria, Harper,* and *Merritt*), the question of whether a party breached its duty to another is a question of fact for the jury. *Baker v. Barlow,* 94 Idaho 712, 714, 496 P.2d 949, 951 (1972) (Issues of negligence ordinarily present questions of

fact for the jury to resolve.).

B. Idaho Tort Claims Act.

ISP and Yount argue they are immune from liability under I.C. § 6-904 because there has been no showing that Yount acted with malice or criminal intent. Memorandum in Support of Motion to Dismiss as to All State Claims, p. 14. Miller argues Yount acted with reckless, willful and wanton conduct so as to cause injury to Miller who was under his supervision, custody or care in violation of I.C. § 6-904A(2) and that Yount acted with criminal intent so as to make immunity under the § 6-904(3) of the ITCA inapplicable. Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment, pp. 10-11. However, argument by his attorney is all Miller has presented. Miller has not presented any admissible evidence as to whether Yount acted with malice or criminal intent. Both parties concede that Yount was acting in the course and scope of his employment during the relevant time period. ISP and Yount state so outright, Miller argues the State is liable for Yount's negligence under the doctrine of respondeat superior (and thereby implicitly states Yount was acting in the course and scope of his employment). Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment, p. 10; Memorandum in Support of Motion to Dismiss as to All State Claims, p. 16.

Idaho Code § 6-904 states that a governmental entity and its employees, acting within the course and scope of their duties without malice or criminal intent, are not liable for claims arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. I.C. § 6-904(3). Malice under this section means actual malice, the commission of a wrongful or unlawful act without legal justification or excuse and with ill will. *Anderson v. City of Pocatello,* 112 Idaho 176, 187, 731 P.2d 171, 182 (1986). Thus,

actual malice requires a wrongful act without justification combined with ill will. *Evans v. Twin Falls County,* 118 Idaho 210, 216, 796 P.2d 87, 93 (1990). "Criminal intent" is shown where a person knowingly performs proscribed acts. *Durtschi,* 110 Idaho 466, 470, 716 P.2d 1238, 1242 (citing *State v. Sisneros,* 631 P.2d 856, 858 (Utah 1981) ("A person acts with intent when it is his conscious objective or desire to engage in the conduct or to cause the result.")); *State v. Gowin,* 97 Idaho 766, 767-68, 554 P.2d 944, 945-46 (1976). Ordinarily, criminal intent is a question for the trier of fact. *Durtschi,* 110 Idaho 466, 470, 716 P.2d 1238, 1242.

Idaho Code § 6-904A provides, in relevant part, a governmental entity and its employees, acting in the course and scope of their employment, without malice or criminal intent, and without reckless, willful or wanton conduct, are not liable for claims arising out of injuries to persons or property by a person under the supervision, custody or care of a governmental entity. I.C. § 6-904A(2). Miller argues Yount's causing the catheterization was reckless, willful and wanton because Yount intentionally and knowingly acted to create an unreasonable risk of harm to Miller. Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment, pp. 10-11. "This [intentionally causing catheterization] involved a high degree of probability that Jason Miller would experience both pain and humiliation." *Id.,* p. 11. As mentioned by this Court above, this is simply argument by Miller's counsel, based upon not a single shred of evidence. Where is a deposition of Yount where Miller's attorney asks Yount why catheterization was used? Without that evidence, it is completely unknown at this time whether Yount intentionally and knowingly acted to create an unreasonable risk of harm to Miller. Where is Miller's own testimony that he in fact experienced pain and humiliation? There is no evidence on this issue.

In this case, neither ISP and Yount on one hand, nor Miller on the other hand, are

entitled to judgment as a matter of law on the issue of whether Yount acted with actual malice or criminal intent for the purposes of I.C. § 6-904(3) and whether Yount acted with reckless, willful and wanton conduct for the purposes of I.C. § 6-904C. Neither party has provided this Court with support for their position that the Court may determine whether Yount's actions rose (or did not rise) to a level of actual malice, criminal intent, or willful reckless or wanton conduct *as a matter of law*. The question of whether ordering catheterization is so unreasonable as to amount to ill will or knowingly performing a proscribed act is a question for the jury. Therefore, a grant of summary judgment to either side improper.

C. 42 U.S.C. § 1983 Claim.

1. Idaho State Police.

ISP and Yount also move this Court to dismiss Miller's 42 U.S.C. § 1983 claims pursuant to Idaho Rule of Civil Procedure 12(b)(6). Miller concedes that both the State of Idaho and the Idaho State Police are not "persons" as defined by 42 U.S.C. § 1983. Memorandum in Partial Opposition to Defendants' Motion to Dismiss Claims under 42 U.S.C. § 1983, p. 1. Thus, the 42 U.S.C. § 1982 claims against ISP and the State of Idaho must be dismissed. Miller claims he only proceeds on his 42 U.S.C. § 1983 claim against Yount as an individual, not in his official capacity. Memorandum in Partial Opposition to Defendants' Motion to Dismiss Claims under 42 U.S.C. § 1983, pp. 1-2.

2. Yount in His Individual Capacity.

In evaluating whether an officer is entitled to qualified immunity, the Supreme Court requires that it be determined as a threshold matter whether, in the light most favorable to the plaintiff, the facts alleged show that the officer's conduct violated a constitutional right. *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272 (2001). Here,

that issue is whether the evidentiary testing method was reasonable. "The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." *Schmerber v. California,* 384 U.S. 757, 767, 86 S.Ct. 1826, 1834 (1966). The question before the United States Supreme Court in *Schmerber* was "whether the police were justified in requiring petitioner to submit to the blood test, and whether the means and procedures employed in taking his blood respected relevant Fourth Amendment standards of reasonableness." *Id.,* 384 U.S. 757, 768, 86 S.Ct. 1826, 1834. If the violation of a constitutional right can be made out on a favorable view of the plaintiff's submissions, the next question is whether the right at issue is clearly established. *Saucier,* 533 U.S. at 201. The contours of the right must be sufficiently clear that a reasonable officer would understand that what he was doing would violate the right. *Anderson v. Creighton,* 483 U.S. 635, 639, 197 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987).

Here, Yount's stop and arrest are not being challenged. The only issue is whether a reasonable officer in Yount's position would have understood it to be unreasonable to order a catheter be placed in Miller in order to secure a urine sample. It is without question that the right to be free from intrusions into the body which are not justified or which are made in an improper manner is a clearly established right. *Schmerber,* 384 U.S. 757, 767, 86 S.Ct. 1826, 1834. The issue before this Court on a motion to dismiss is whether, in the light most favorable to Miller, Yount would reasonably have believed his conduct was lawful. Because Miller has stated a claim for relief, that is, at least an issue of fact exists as to whether ordering catheterization is so unreasonable as to be violative of the Fourth Amendment reasonableness standard, ISP and Yount's motion to dismiss pursuant to I.R.C.P. 12(b)(6) must be denied. "The issue is not whether the plaintiff will ultimately prevail, but whether the party 'is entitled to offer evidence to support the claims.' " *Orthman v. Idaho Power Co*.,

126 Idaho 960, 962, 895 P.2d 561, 563 (1995) (quoting *Greenfield v.. Suzuki Motor Co. Ltd.,* 776 F.Supp. 698, 701 (E.D.N.Y.1991)). Here, the right to be free from unreasonable intrusions into one's body is an established right, and Miller is entitled to present evidence to a jury supporting his claim that catheterization is unreasonable given the circumstances in this case.

Miller argues his rights under 42 U.S.C. § 1983 were violated by Yount's ordering catheterization. Memorandum in Partial Opposition to Defendants' Motion to Dismiss Claims under 42 U.S.C. § 1983, p. 2. ISP and Yount argue they are entitled to immunity under § 1983 because Miller has not provided authority supporting his contention that "withdrawal of bodily fluids requested pursuant to statute in a hospital by a healthcare professional in a safe and reasonable manner, after a traffic stop for probable cause, violated federal law." Memorandum in Response to Plaintiff's Summary Judgment Motion, p. 4. 42 U.S.C. § 1983 states that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress…

Section 1983 provides a cause of action for anyone who is deprived of the right secured by the United States Constitution or federal law by a person acting under the color of state law. *Bryant v. City of Blackfoot,* 137 Idaho 307, 314, 48 P.3d 636, 643 (2002). Arguably, the reasonableness of Yount's ordering catheterization of Miller remains a material question of fact. It is without question that Yount acted under the color of state law in the instant case, but it is for a trier of fact to determine whether he deprived Miller of the rights secured by the United States Constitution or federal law.

Local governments can be sued directly under section 1983 where a "policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers" deprives an individual of his or her constitutional rights. *Monell v. Dep't of Soc. Servs. of the City of New York,* 436 U.S. 658, 690, 98 S.Ct. 2018, 2036 (1978). Governmental entities may also be sued if their unofficial custom works a constitutional deprivation. *Id.* However, a governmental entity cannot be held liable under section 1983 for *respondeat superior.* 436 U.S. 658, 691, 98 S.Ct. 2018, 2037. Therefore, the governmental entity can only be held liable if the actions conducted pursuant to its official policies or customs caused a constitutional deprivation. *See e.g. Limbert v. Twin Falls County,* 131 Idaho 344, 347, 955 P.2d 1123, 1126 (Ct.App.1998)).

Because only Yount is being sued under 42 U.S.C. § 1983, whether he is entitled to immunity for the 42 U.S.C. § 1983 claim turns on the reasonableness of his having ordered catheterization and whether a reasonable officer would understand that ordering catheterization would violate Constitutional rights. *See, Anderson v. Creighton,* 483 U.S. 635 (1987). These questions of fact are not properly resolved upon a motion to dismiss pursuant to I.R.C.P. 12(b)(6).

IV. CONCLUSION.

Because Miller has presented no evidence, the only fact before the Court is that Yount ordered a medical professional to use a catheter to obtain a urine sample from Miller, because Miller refused to issue a urine sample voluntarily. If it were not for all reasonable inferences being given to Miller on that singular fact, all of his claims would be dismissed. Because Miller has put in no evidence, there is no indication that Miller suffered from a "shy bladder" on the night in question. Yount's report indicates this is nothing less than an outright refusal by Miller to voluntarily provide a urine sample. There is every indication

that: 1) Miller was perfectly capable of giving a urine sample; 2) Yount specifically wanted a urine sample due to reasonable suspicion of marijuana and/or methamphetamine; yet 3) Miller specifically and defiantly tells the officer he will not provide a urine sample. There is no evidence in the record that Miller in any way resisted the catheter, or that the catheter caused him any pain, injury or damage. However, a reasonable inference is that a catheterization *could* produce pain, injury or damage.

IT IS HERBY ORDERED THAT Miller's 42 U.S.C. § 1982 claims against ISP and the State of Idaho are dismissed. To that extent only, ISP and Yount's "Motion to Dismiss all 42 U.S.C. § 1983 Claims Against Defendants Idaho State Police and Trooper Yount" is GRANTED; as to all other grounds set forth in ISP and Yount's "Motion to Dismiss all 42 U.S.C. § 1983 Claims Against Defendants Idaho State Police and Trooper Yount" are DENIED.

IT IS FURTHER ORDERED that ISP and Yount's Motion for Summary Judgment as to all State Law Claims is DENIED.

IT IS FURTHER ORDERED that Miller's Motion for Partial Summary Judgment is DENIED.

DATED this 27th day of April, 2009

_____
JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of April, 2009 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Plaintiff's Attorney – Peter Jones, FAX (509) 921-0802

Defendants' Attorney – Peter J. Johnson FAX (509) 747-3175

CLERK OF THE DISTRICT COURT BONNER COUNTY

BY:_____
Deputy