The Honorable Karen Donohue
Friday, July 20, 2018 at 11:00 a.m.
Department 22

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
KING COUNTY

SARA L. LACY, in her Personal Capacity and as Personal Representative of the Estate of CECIL D. LACY, JR., deceased, Plaintiff, v. SNOHOMISH COUNTY, a political subdivision of the State of Washington, Defendant.	Case No. 16-2-21526-2 SEA DEFENDANT SNOHOMISH COUNTY'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

On September 18, 2015, Snohomish County Sheriff's Deputy Charles Tyler Pendergrass provided back-up assistance to Tulalip Tribal Police officers in response to a call about an individual who was reportedly intoxicated and walking in the middle of a dark roadway. The extent of Deputy Pendergrass's participation was a brief discussion with this individual, Cecil D. Lacy, Jr., before Tulalip Tribal police officers assumed control of the incident. Deputy Pendergrass then came to the assistance of the tribal officers when Mr. Lacy jumped out of the Tulalip patrol vehicle and struggled with the officers. During the struggle, Deputy Pendergrass delivered a single Taser deployment in drive stun mode. The officers continued struggling with

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Mr. Lacy for approximately 30 seconds. Following the struggle, Mr. Lacy was speaking with the officers for a period of time. Officers then noticed that he was not breathing. Efforts to revive Mr. Lacy were unsuccessful and he died at the scene.

Snohomish County now moves for summary judgment regarding (1) Plaintiff's claim for negligent training and supervision and (2) Plaintiff's claim for the tort of outrage, as Plaintiff cannot establish essential legal elements of these claims. Snohomish County also moves for summary judgment regarding any portion of (3) Plaintiff's negligence claim premised on the supposition that Deputy Pendergrass should have summoned medical aid or involuntarily detained Mr. Lacy prior to the struggle which ended their interaction, as Plaintiff cannot establish that such a duty was owed. Snohomish County also moves for summary judgment on (4) Plaintiff's claim of "Negligent Use of Excessive Force," because it is not a recognized cause of action in the State of Washington. Snohomish County also moves to dismiss (5) Plaintiff's claims of battery and false imprisonment as legally insufficient. Finally, there are insufficient facts to establish that Snohomish County caused the death of Mr. Lacy. As all of Plaintiff's claims fail as a matter of law, this action should be dismissed in its entirety.

II. EVIDENCE RELIED UPON

Snohomish County relies upon the Declaration of Bridget E. Casey and the exhibits and attachments thereto, the Declaration of Charles Tyler Pendergrass, the exhibit thereto, the Declaration of Theodore Chan, the pleadings and papers filed in this matter, and the argument below.

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III. STATEMENT OF FACTS

At about 10:00 p.m. on September 18, 2015, Deputy Charles Tyler Pendergrass was dispatched to a traffic hazard on Marine Drive in Snohomish County. Exhibit D to Casey Declaration at p. 27, ll. 9-23. The reported hazard was an individual who appeared to callers to be intoxicated and walking in the roadway. *Id.* Deputy Pendergrass contacted an individual matching the description of the intoxicated male, later identified as Cecil D. Lacy Jr. *Id.* at p. 30 ll. 22-30, p. 31 ll. 1-4, p. 32 ll. 18-25 and p. 33 ll. 1-18. Less than a minute after Deputy Pendergrass arrived, Sergeant Michael Johnsen and Officer Tyler Gross of the Tulalip Tribal Police Department arrived and joined the contact. Exhibit D to Casey Decl. at p. 34, ll. 23-25 and p. 35 ll. 1-4; Exhibit E to Casey Decl., at p 6 l 25, p. 7-8. During a brief conversation, Mr. Lacy informed the group that he was a tribal member and Tulalip Police Sergeant Johnsen thus asserted control of the situation. Exhibit E to Casey Decl., at p 7, ll. 15-18.

Sergeant Johnsen made the decision to provide Mr. Lacy with a courtesy ride home. *Id.* at p. 9, ll. 17-25, and p. 10 ll. 1-11. For safety purposes, Sergeant Johnsen requested to search Mr. Lacy prior to Mr. Lacy entering the Tulalip Tribal police vehicle. *Id.* at p 11 ll. 8-25, and Exhibit A to Pendergrass Declaration. Mr. Lacy agreed. *Id.* at p. 10 ll. 18-21, and Exhibit A to Pendergrass Decl. Mr. Lacy was reluctant to be handcuffed for the ride home, but reached an agreement with Sergeant Johnsen to be handcuffed in front. *Id.* at p. ll ll. 23-25, p. 12 ll 1-9. Mr. Lacy sat down in Officer Gross' Tulalip Tribal Police Department vehicle, but within a few moments, his affect changed drastically and he jumped out of the vehicle, striking the officers. *Id* at p. 12 ll 11-15 and Exhibit F to Casey Decl. at p 10. All three officers struggled to restrain Mr. Lacy against his efforts to fight them, with Deputy Pendergrass attempting a single Taser drive-

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stun to Mr. Lacy's shoulder before Deputy Pendergrass was disarmed. Exhibit E to Casey Decl. at p. 13 ll. 11-15, p. 14 ll. 1-25. Mr. Lacy knocked Sergeant Johnsen's body camera off of Sergeant Johnsen during the initial struggle. Exhibit D to Casey Decl. at p. 48 ll. 20-21 and p. 49 l. 1, and Exhibit A to Pendergrass Decl. Sergeant Johnsen was finally able to take Mr. Lacy to the ground with a leg sweep. *Id.* at p. 14 ll. 5-12. The group struggled on the ground, with Sergeant Johnsen controlling Mr. Lacy's arms, Officer Gross controlling his legs, and Deputy Pendergrass on his knees next to Mr. Lacy, controlling his torso. *Id.* at p. 15, ll. 20-25, and Exhibit D to Casey Decl. at p. 62, ll. 22-25 and p. 63 ll. 1-7. Mr. Lacy was conversing with the officers before Deputy Pendergrass noticed he was not breathing. Exhibit D to Casey Decl. at p. 65 ll. 4-15. The entire struggle on the ground had lasted about 30 seconds to one minute. Exhibit D to Casey Decl. at p. 63 ll. 1-7 and Exhibit E to Casey Decl. at p. 16 ll. 20-12.

After the short struggle, Mr. Lacy was talking to the officers, responding to their suggestions that he relax. Exhibit D to Casey Decl. at p. 66 ll. 1-13. When the officers observed that Mr. Lacy was not responding, Deputy Pendergrass initiated CPR compressions and continued until aid arrived. *Id.* at p. 68-71.

Despite efforts to revive him, Mr. Lacy passed away. The cause of death was attributed to cardiac arrhythmia due to acute drug intoxication due to methamphetamine. Exhibit I to Casey Decl. at ¶12, Exhibit A to Omalu Deposition, pages 5-6.

Plaintiff initially brought suit against Deputy *Doug* Pendergrass (Deputy Charles T. Pendergrass' retired father), Sheriff Ty Trenary, and Snohomish County. Dkt. Sub # 1. Plaintiff subsequently dismissed the individual defendants, Deputy Doug Pendergrass and Sheriff Trenary. Dkt. Sub # 16. The County admitted that Deputy Charles Tyler Pendergrass was acting in the

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course and scope of his employment with Snohomish County on September 18, 2015, when he initially contacted Cecil D. Lacy, Jr., and then assisted the tribal officers once they took over. Exhibit B to Casey Decl. at ¶¶ 36 and 40. The County further admitted the County would be liable under the doctrine of *respondeat superior* for any alleged tortious conduct by Deputy Pendergrass within the course and scope of his employment. *Id.* The County denies the alleged tortious conduct. There are no allegations by either party that Deputy Pendergrass (or any other County employees) acted outside the course and scope of their employment. *See* Exhibits A and B to Casey Decl.

IV. ISSUES

A. Where Plaintiff has not alleged a tortious act by any County employee that was outside the scope of the employee's employment, should the claim for negligent training, supervision and retention be dismissed for failure to establish an essential element of the claim and as superfluous?

B. Where Plaintiff has filed a claim of outrage, but cannot establish facts to support an essential element of the claim, and allowing the claim to go forward would permit double recovery, should the claim of outrage be dismissed?

C. Where some portion of Plaintiff's claim appears to be based upon the supposition that Deputy Pendergrass should have summoned medical aid or involuntarily detained Mr. Lacy prior to the struggle which ended their interaction, but Plaintiff cannot establish that such a duty was owed, should these claims be dismissed?

D. Where Plaintiff has filed a claim for "Negligent Excessive Force," knowing it is not a recognized cause of action in the State of Washington, should the claim be dismissed?

E. Where Tulalip Tribal Police took over supervision of the call, should liability for negligence occurring after Tulalip Police took control lie with the Tulalip Tribes?

F. Where Plaintiff cannot establish necessary elements of battery or false imprisonment, must those claims be dismissed?

G. Where there are insufficient facts in the record to establish that Deputy Pendergrass caused Mr. Lacy's death, must any claim related to that death be dismissed?

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1 V. **ARGUMENT**

2 Plaintiff's claims for negligent training, supervision and retention, and outrage, all fail to
3 establish at least one element of the claims. Plaintiff's claims based on the idea that Deputy
4 Pendergrass should have summoned medical aid or involuntarily detained Mr. Lacy prior to the
5 struggle which ended their interaction also fail as Plaintiff cannot establish that Snohomish
6 County owed Mr. Lacy such a duty, and as the deputy's actions were directed by Tulalip Tribal
7 Police. Plaintiff's claim for "Negligent Excessive Force," is not a recognized cause of action
8 and should be dismissed. Plaintiff's battery and false imprisonment claims are legally insufficient
9 and Plaintiff's evidence of proximate cause is insufficient. Snohomish County is entitled to
10 summary judgment on these claims as a matter of law.

A. The summary judgment standard.

Summary judgment is appropriate if "there is no genuine issue as to any material fact and … the moving party is entitled to a judgment as a matter of law." CR 56(c). The moving party bears the burden of demonstrating that there is no genuine issue of material fact. *Atherton Condominium Apartment-Owners Association Board of Directors v. Blume Development Company*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). A material fact is one on which the outcome of the litigation depends. *Id.* (citing *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974)). A court must view the facts and reasonable inferences in the light most favorable to the nonmoving party. *Atherton,* 115 Wn.2d at 516.

A defendant moving for summary judgment may meet the initial burden by pointing out the absence of evidence to support the nonmoving party's case. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225 n. 1, 770 P.2d 182 (1989). If the defendant meets this initial showing,

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then the inquiry shifts to the plaintiff to set forth evidence to support his case. *Young*, 112 Wn.2d at 225. The nonmoving party must make a showing sufficient to establish each element on which that party will bear the burden of proof at trial. *Id.* The "nonmoving party...may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value; for after the moving party submits adequate affidavits, the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exits." *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986) (citing *Dwinell's Cent. Neon v. Cosmopolitan Chinook Hotel*, 21 Wn. App. 929, 587 P.2d 191 (1978)).

If "the plaintiff 'fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,' then the trial court should grant the motion." *Young*, 112 Wn.2d at 225 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986)).

B. Plaintiffs' claim of negligent training and supervision fails because an essential element is lacking, rendering the claim improper and superfluous.

To the extent Plaintiff brings a claim for negligent training, supervision and retention against Snohomish County, such claim must be dismissed for failing to allege an essential element, namely that Deputy Pendergrass acted outside the scope of his employment in his interactions with Mr. Lacy on September 18, 2015.[1]

Plaintiff purports to bring a negligence or gross negligence claim against Snohomish County because the County and Sheriff Trenary allegedly failed "to properly train Deputy

[1] The complaint also references Snohomish County Sheriff Robert Trenary, who has never been made party to this action. Accordingly, allegations made against the Sheriff in the complaint are being construed as allegations against the County for the purposes of this motion.

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Pendergrass and other officers in the proper use of Tasers and proper training on interactions with mentally ill persons," failed to "properly supervise Deputy Pendergrass and other officers with respect to the proper use of Tasers, means of restraint, and interacting with mentally ill persons," and through "their retention of officers who have engaged in excessive force." Second Amended Complaint, at ¶¶ 52-53. Plaintiff's complaint acknowledges that "[a]t all times material to this lawsuit, Sheriff Ty Trenary and Deputy Charles Pendergrass were acting within the course and scope of their employment," a fact which Snohomish County has admitted. Exhibit A to Casey Decl. at ¶ 1; and Exhibit B at ¶ 1.

Pursuant to well-established Washington law, a claim for negligent training and/or supervision is redundant when a plaintiff has already alleged the liability of the County based upon the doctrine of *respondeat superior* and the County admits its employees were acting within the scope of employment with the County. *See, e.g., LaPlant v. Snohomish Cty.*, 162 Wn. App. 476, 479-80, 271 P.3d 254 (2011); *Evans v. Tacoma Sch. Dist. No. 10*, 195 Wn. App. 25, 47, 380 P.3d 553 (2016). "Under Washington law, therefore, a claim for negligent hiring, training, and supervision is generally improper when the employer concedes the employee's actions occurred within the course and scope of employment." *LaPlant*, 162 Wn. App. at 480.

Put differently, employers are liable for the negligent acts of their employees that occur within the scope of employment under the theory of *respondeat superior*, and a negligent supervision claim only applies when an employee acts outside the scope of employment. *See id.* Therefore, when an employer admits agency (and will thus automatically be held responsible if the employee is found to have acted negligently), issues of whether the employer was negligent in its training and supervision of its employees are "immaterial." *Id.*; *see also Gilliam v. DSHS*,

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89 Wn. App. 569, 584-85, 950 P.2d 20, *review denied*, 135 Wn.2d 1015 (1998) (further explaining rationale).

The County concedes that Deputy Pendergrass' actions on September 18, 2015 were within the course and scope of his duties, and therefore any claim for negligent training or supervision is superfluous. *Cf. Brownfield v. City of Yakima*, 178 Wn. App. 850, 877-78, 316 P.3d 520 (2014) ("The city of Yakima adopted, as its own, all of the actions taken by Chief Granato and City Manager Zais, about which Jeff Brownfield complains. When the employer does not disclaim liability for the employee, the claim collapses into a direct tort claim against the employer, which requires dismissal of the negligent supervision claim.").

Whatever arguments Plaintiff could make regarding the County's alleged negligence in training and supervising Deputy Pendergrass are of no logical consequence. If Deputy Pendergrass is found not negligent or grossly negligent, the County cannot be held liable even if, hypothetically, its supervision and training were negligent. Conversely, if Deputy Pendergrass's acts are found negligent or grossly negligent (which they were not), then those acts will automatically create liability for the County – notwithstanding the existence of any negligent supervision or training.

The facts necessary for this Court to make a decision on this motion are not at issue. Both parties agree that Deputy Pendergrass was acting in the course and scope of his employment with Snohomish County during the incident giving rise to Plaintiff's Second Amended Complaint. Defendant is entitled to summary judgment as a matter of law with regard to Plaintiff's claim of negligent training, supervision, and retention.

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C. **Plaintiff's claim for Outrage lacks an essential element and would lead to impermissible double-recovery contrary to Washington Tort law.**

Plaintiff alleges Deputy Pendergrass's actions rise to the level of infliction of extreme emotional distress, or outrage. Plaintiff fails to plead any facts which support an essential element of the claim of outrage, namely, that Plaintiff was present for the acts alleged to constitute the tort of outrage.

Under Washington law, the elements of outrage are: "(1) extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) actual result to the plaintiff of severe emotional distress." *Rice v. Janovich*, 109 Wn.2d 48, 61-62, 742 P.2d 1230, 1238 (1987). To establish the tort of outrage, Plaintiff must show that the conduct giving rise to his claim was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Grimsby v. Samson*, 85 Wn.2d 52, 59-60, 530 P.2d 291, 295 (1975).

As to the third element of the claim, actual results to the Plaintiff of "severe emotional distress," Washington precedent holds that the Plaintiff must be an immediate family member of the person who is the object of the defendant's actions, and that the family member of Plaintiff must be present at the time of such conduct. *Id.*, 85 Wn.2d at 59-60 (citing Restatement (Second) of Torts § 46 (1965) and comments thereto); *also*, *Reid v. Pierce Cty.*, 136 Wn2d 195, 202, 961 P.2d 333, 337 (1998). Plaintiff has not pled and cannot establish any facts indicating that she was present for the acts alleged to constitute outrage.[2]

[2] Moreover, nothing about Deputy Pendergrass' conduct was either extreme or outrageous, much less both.

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Additionally, even if Plaintiff could show the elements of outrage, Washington law does not permit a Plaintiff to recover for both outrage and battery when the claims are based in the same facts. "[O]utrage should allow recovery only in the absence of other tort remedies." *Rice v. Janovich*, 109 Wash. 2d 48, 62, 742 P.2d 1230, 1238 (1987) citing Restatement (Second) of Torts § 46. As Plaintiff is attempting to recover for the same conduct under other theories, an outrage claim would be improper.

For the foregoing reasons, Snohomish County is entitled to summary judgment Plaintiff's outrage claim.

D. Defendant owed no duty to summon aid, or to involuntarily detain Mr. Lacy, and is entitled to summary judgment regarding any claims based upon these premises.

In expert discovery, Plaintiff's experts appear to allege County negligence through a contention that Deputy Pendergrass should have recognized that Mr. Lacy was suffering from a medical or mental health condition earlier in the contact and either involuntarily detained him, summoned medical aid, or both. Exhibits G, H, and I to Casey Decl. Any claim stemming from this line of reasoning fails, as Plaintiff cannot establish that the County owed a duty to medically diagnose or involuntarily detain Mr. Lacy at the time the alleged failures occurred. As no specific individual duty was owed, the County cannot be liable and such claims cannot survive.

1. <u>The public duty doctrine bars negligence liability.</u>

While the legislature's waiver of sovereign immunity exposed governmental entities to suit, a Plaintiff seeking to bring a claim against a governmental entity must still prove "the existence of a duty, a breach thereof, a resulting injury, and proximate causation between the breach and the resulting injury." *Washburn v. City of Fed. Way*, 178 Wn.2d 732, 753, 310 P.3d

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1275, 1287 (2013) (quoting *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 605, 257 P.3d 532 (2011)).

Because the government is tasked with responsibilities greater than those of an ordinary citizen, the public duty doctrine adds an additional step to the analysis, and courts are directed to "carefully analyze the threshold element of duty," and "determine whether a duty is actually owed to an individual claimant rather than the public at large." *Id.* (internal citations and quotations omitted). In other words, "governments, unlike private persons, are tasked with duties that are not legal duties within the meaning of tort law." *Washburn,* 178 Wn.2d at 753. Under the public duty doctrine, to proceed with her negligence claims, a plaintiff must "show that the duty breached was owed to her individually, rather than to the public in general." *Bratton v. Welp*, 145 Wn.2d 572, 576, 39 P.3d 959, 961 (2002). The burden to show that a duty was owed individually to the decedent, rather than to the public, rests on the Plaintiff's shoulders. *Sunshine Heifers, LLC v. Washington State Dep't of Agr.*, 188 Wn. App. 960, 966, 355 P.3d 1204, 1208 (2015) (citing *Babcock v. Mason County Fire Dist. No. 6*, 144 Wn.2d 774, 785, 30 P.3d 1261 (2001). Plaintiff cannot meet this burden.

2. <u>No public duty doctrine exemptions apply.</u>

"The public duty doctrine presumes that the [governmental entity's] actions serve its duty to the public as a whole rather than to a particular individual plaintiff." *Boone v. State Dep't of Soc. & Health Servs.*, 200 Wn. App. 723, 740, 403 P.3d 873, 881 (2017), published with modifications at 199 Wn. App. 1049 (2017) (citing *Donohoe v. State*, 135 Wn. App. 824, 832, 142 P.3d 654 (2006)). The courts have recognized four exceptions to the public duty doctrine's presumptive lack of negligence liability: "(1) legislative intent, (2) failure to enforce, (3) the rescue

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doctrine, and (4) a special relationship." *Cummins v. Lewis County*, 156 Wn.2d 844, 854 at n. 7, 133 P.3d 458, 462 (2006). If, as is the case here, Plaintiff cannot establish one of these four exceptions, then no liability may be imposed for a public officer's allegedly negligent conduct. *Id.*, at 852.

First, the legislative intent exception allows for a statutorily created duty to apply to an individual when the statute "evidences an intent to identify and protect a particular and circumscribed class of persons," and that intent is "clearly expressed." *Boone,* 200 Wn. App. at 741-42 (internal quotations and citations omitted). Here, no statute imposes a duty on the County to recognize whether someone being contacted by law enforcement suffers from a medical or mental health condition, or to involuntarily detain him, summon medical aid, or both. To the extent Plaintiff points to RCW 71.05.153(2) as the source of such a duty, such argument would fail as the permissive statute grants authority, but does not create a duty. RCW 71.05.153(2) ("A peace officer <u>may</u> take or cause such person to be taken into custody") (emphasis added). The legislative intent exception does not apply.

Second, the failure to enforce exception applies in circumstances "where governmental agents responsible for enforcing statutory requirements possess actual knowledge of a statutory violation, fail to take corrective action despite a statutory duty to do so, and the plaintiff is within the class the statute intended to protect." *Raynor v. City of Longview*, 94 Wn. App. 1014 (1999) (citing *Bailey v. Town of Forks*, 108 Wn.2d 262, 268, 737 P.2d 1257). Plaintiff cannot establish any failure to enforce any law which Deputy Pendergrass had a duty to enforce in the minute or two of his contact with Mr. Lacy before Tulalip Tribal Police took control of the situation. Thus, this exception also does not apply.

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Next, the rescue doctrine applies "if a governmental entity (1) undertakes a duty to aid a person in danger, (2) fails to exercise reasonable care, and (3) the offer to render aid is relied on by either the person to whom the aid is to be rendered or by another who, as a result of the promise, refrains from acting on the victim's behalf." *Rider v. King County*, 176 Wn. App. 1029 (2013). "Integral to this exception is that the rescuer, including a state agent, *gratuitously* assumes the duty to warn the endangered parties of the danger and breaches this duty by failing to warn them." *Babcock v. Mason County Fire Dist. No. 6,* 101 Wn.App. 677, 685, 5 P.3d 750 (2000), *aff'd on other grounds,* 144 Wn.2d 774 (2001) (emphasis in original). Here, none of the three elements are present. Deputy Pendergrass did not undertake a duty to aid Mr. Lacy, as he barely had a chance to start speaking with him before Tulalip took over the contact. Even if he had undertaken the aid of Mr. Lacy, no evidence could suggest it was done gratuitously, as he had responded to a 911 call. Moreover, there is no evidence that Mr. Lacy relied on any rescue attempt by Deputy Pendergrass or that he refrained from any conduct as a result. This exception also does not apply.

Finally, the special relationship exception requires Plaintiff to prove "that there is some form of privity between the plaintiff and the public entity that differentiates the plaintiff from the general public, that the public entity made an express assurance to the plaintiff, and that the plaintiff justifiably relied on the assurance." *Bratton v. Welp*, 145 Wn.2d 572, 576–77, 39 P.3d 959, 961 (2002) (citing *Taylor v. Stevens County,* 111 Wn.2d 159, 166, 759 P.2d 447 (1988); *Beal v. City of Seattle,* 134 Wn.2d 769, 785, 954 P.2d 237 (1998)). Here again none of the elements are met, as Deputy Pendergrass had no special privity with Mr. Lacy, did not make express assurances to him, and there is no evidence Mr. Lacy relied on these nonexistent assurances.

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To the extent that Plaintiff brings a negligence claim based on the contention that Deputy Pendergrass should have recognized that Mr. Lacy was suffering from a medical or mental health condition earlier in the contact and either involuntarily detained him, summoned medical aid, or both, it is based on Plaintiff's assertion that Deputy Pendergrass "possessed a duty to act as a reasonable police officer." Casey Decl. Exhibit B at ¶ 41. In fact, all of Plaintiff's negligence claims appear to arise out of this purported duty. Yet, nothing individuates that alleged duty as one owed specifically and individually to Mr. Lacy or Plaintiff, rendering the negligence claims based in this duty non-actionable, as "a duty to all is a duty to no one." *Taylor v. Stevens County*, 111 Wn.2d 159, 163, 759 P.2d 447 (1988); (quoting *J & B Dev. Co. v. King County*, 100 Wn.2d 299, 303, 669 P.2d 468 (1983)); *see also Torres v. City of Anacortes*, 97 Wn. App. 64, 74, 981 P.2d 891 (1999), *rev. denied*, 140 Wn.2d 1007 (2000) ("The relationship of police officer to citizen is too general to create an actionable duty."). As the determination of the existence of such a duty is a question to be decided by the Court at summary judgment, the County seeks dismissal of these claims now. *See Munich v. Skagit Emergency Communication Center,* 175 Wn.2d, 871, 877, 288 P.3d 328, 332 (2012)*; Folsom v. Burger King,* 135 Wn.2d 658, 671, 958 P.2d 301 (1998)*; Honcoop v. Wash.*, 111 Wn.2d 182, 188, 759 P.2d 1188 (1988). All negligence claims allegedly stemming from this general duty to act as a reasonable officer fail and the County is entitled to summary judgment.

E. Plaintiff cannot maintain a negligence action regarding Deputy Pendergrass' use of force in this matter.

Among Plaintiff's claims against Snohomish County contained in Plaintiff's Second Amended Complaint, Plaintiff purports to bring a claim for "negligent use of excessive force," which is not a recognized cause of action in Washington. Casey Decl. Exhibit A at ¶¶ 79-81.

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Specifically, the complaint alleges that "Deputy Pendergrass possessed a duty to refrain from using force excessively and unreasonably," and that "Deputy Pendergrass breached his duty when he negligently used excessive force to detain Mr. Lacy." This claim fails for multiple reasons.

1. Plaintiff's claim for "negligent excessive force" is not cognizable under Washington law and should be dismissed.

A claim of "negligent use of excessive force" is not recognized in the State of Washington. Procedurally, the County initially viewed Plaintiff's claim for "negligent excessive force," as a claim for excessive force under the Fourth Amendment of the United States Constitution, brought under 42 U.S.C. §1983. Plaintiff's complaint cited to federal case law to support the claim of "negligent excessive force." *Id.* at ¶ 38. Plaintiff has denied that her claim for "negligent excessive force," is a federal claim under 42 U.S.C. §1983. Exhibit C to Casey Decl. In proceedings in this case regarding the claim of "negligent excessive force," Plaintiff has conceded that such a claim is not recognized in Washington.[3] *Id.* at pages 5 and 7. Plaintiff may elect to bring a claim for negligence (subject to the constraints of the public duty doctrine, as discussed above), and Plaintiff may elect to bring a claim of excessive force under 42 U.S.C. §1983. Plaintiff may not invent and bring a combined claim for "negligent use of excessive force." Plaintiff has also chosen to bring a battery and false imprisonment claim, which are correct claims covering the intentional behavior involved in the use of force under Washington law. *Boyles v. Kennewick*, 62 Wn. App. 174, 813 P.2d 178 (1991); *McKinney v. Tukwila*, 103 Wn. App. 391, 13 P.3d 631 (2000). The Court should dismiss Plaintiff's claim of "negligent use of excessive force,"

[3] Plaintiff is likely to cite to California law regarding this issue, but it is plainly inapplicable, as the case law Plaintiffs are anticipated to refer to relies on a specific California legal duty placed on police officers. *Hayes v. County of San Diego*, 57 Cal.4th 622, 120 Cal. Rptr.3d 684, 305 P.3d 252 (2013). No such duty-generating statute or case law exists in Washington.

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as alleged in ¶¶ 78-81 of Plaintiff's Second Amended Complaint as this cause of action does not exist.

2. <u>Any remaining claims originating in the intentional use of force cannot proceed under a negligence theory and should be dismissed.</u>

It is well established in Washington that a plaintiff may not base a claim of negligence on an intentional act. *See Willard v. City of Everett*, 2013 WL 4759064 at *2-*3 (W.D. Wash. Sept. 4, 2013); *also Tegman v. Accident & Med. Investigations, Inc.*, 150 Wn.2d 102, 75 P.3d 497 (2003) ("fault" within the meaning of RCW Chapter 4.22, which encompasses liability for negligence, does not include intentional acts or omissions); *Brutsche v. City of Kent*, 164 Wn.2d 664, 679, 193 P.3d 100 (2008) (declining to address negligence claim where officer's act of breaching the door on plaintiff's property was intentional, not accidental); *Roufa v. Constantine*, C15-1379JLR, 2017 WL 120601, at *11 (W.D. Wash. Jan. 11, 2017) (A plaintiff, "may not base claims of negligence on alleged intentional actions, such as excessive force or unlawful arrest.") Characterizing an intentional act as negligence does not transform its fundamental character and does not expose a defendant to potential liability in negligence for intentional acts. *Ste. Michelle v. Robinson*, 52 Wn. App 309, 314-16, 759 P.2d 467 (1988).

Plaintiff has alleged that Deputy Pendergrass deployed his Taser in drive-stun mode, that he grabbed Mr. Lacy while he struggled with Tulalip Police Officers, and that he assisted with controlling Mr. Lacy's torso while they struggled on the ground. All of these alleged acts are intentional uses of force. Plaintiff cannot reasonably contend these acts were intentional under her battery or false imprisonment claims and then unintentional under the imagined negligent use of force claim.

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Moreover, as has been noted above, any negligence claims stemming from the use of force would also fail to survive the rigors of the public duty doctrine analysis.[4] Plaintiff cannot meet her burden under the public duty doctrine, and thus even if negligent use of force was a viable claim supported by facts,[5] it would still fail under these circumstances.

F. Any liability for negligence occurring after Tulalip Police took control of the call lies with the Tulalip Tribes.

To the extent Plaintiff argues that negligent actions took place after Tulalip Police Sergeant Michael Johnsen arrived, realized Mr. Lacy was a tribal member, and thus assumed authority and control over the incident, and took custody of Mr. Lacy, any resulting negligence liability would fall on the Tribe. *See Sheimo v. Bengston*, 64 Wn. App. 545, 550, 825 P.2d 343, 345–46 (1992). In *Sheimo*, the City of Colville was determined to be the liable party, even though the alleged negligent act was committed by a Stevens County Sheriff's Deputy. *Id.* The court reasoned that the City was liable because the county deputy had responded to a call within the City of Colville and a city police sergeant had taken charge of the call and directed what took place next. *Id.* Here, the facts are similar. Shortly after Tulalip Police Sergeant Michael Johnsen arrived, he realized that Mr. Lacy was a tribal member. As the situation involved a tribal member within the bounds of the reservation, Tulalip Tribal Police had primary jurisdiction. As a result,

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[4] "[W]hile it is true that the officers owe a general duty to all citizens of the City to avoid the use of excessive force when effectuating an arrest, it cannot be said that they owe [the plaintiff] a specific duty." *James v. City of Seattle*, 2011 WL 6150567, 15 (W.D.Wash. 2011) (citing *Pearson v. Davis*, No. C06-5444RBL, 2007 WL 3051250, at *4 (W.D.Wash. 2007)); *see also Jimenez v. City of Olympia*, No. C09-5363RJB, 2010 WL 3061799, at *15 (W.D.Wash. 2010) ("It appears that the public duty doctrine bars a claim [for negligence arising out of the use of excessive force] against [the] [o]fficers ... and the City ..."); *Nix v. Bauer*, No. C05-1329Z, 2007 WL 686506, at *4 (W.D. Wash. 2007) (citing *Donaldson v. City of Seattle*, 65 Wn. App. 661, 831 P.2d 1098 (1992) ("[P]olice responsibility in regard to any further investigation becomes part of their overall law enforcement function and does not generate a right to sue for negligence.").

[5]

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Sgt. Johnsen took over, stating "we can take him" and taking lead in all interactions. Exhibit A to Pendergrass Decl. Deputy Pendergrass deferred to Sgt. Johnsen's rank, jurisdiction, and decision-making, for example noting that Mr. Lacy was not under arrest until Sgt. Johnsen had decided so. Exhibit D to Casey Decl. at pp. 45-46. Because Tulalip Police had primary jurisdiction, had taken control of the call, and Deputy Pendergrass was acting under Sgt. Johnsen's lead and direction, any negligence liability falls on Tulalip. *Sheimo*, 64 Wn. App. at 550.

G. Defendant is not liable for battery or false imprisonment.

Plaintiff's complaint includes the intentional tort claims of battery and false imprisonment, naming the non-party individual officers involved in this matter. Exhibit A to Casey Decl. at §§ VII, VIII. With regard to both claims, the complaint then states: "Because Snohomish County had notice and could have prevented this battery by the exercise of due care by government employees, Snohomish County is liable for its own negligence." *Id.* This language appears to be another attempt at stating a negligent supervision claim. As has been discussed above, a negligent supervision claim is improper here. In what appears to be an intentional filing decision, the battery and false imprisonment claims in the complaint do not include allegations of vicarious liability. *Compare id.*, ¶ 79 (alleging county liability because Deputy Pendergrass acted within the scope of his duty for "negligent excessive force" claim) *with id.*, §§ VII, VIII (making no mention of County liability for Deputy Pendergrass' acts). As Plaintiff has not alleged vicarious liability for either battery or false imprisonment claims, and as

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the alleged negligent supervision claim is inapplicable, the battery[6] and false imprisonment[7] claims should be dismissed.

H. Plaintiff has not provided facts to establish that Deputy Pendergrass caused Mr. Lacy's death.

Washington law recognizes two elements to proximate cause: Cause in fact and legal causation. *Harbeson v. Parke-Davis, Inc.*, 98 Wn.2d 460, 475, 656 P.2d 483 (1983); *Petersen v. State*, 100 Wn.2d 421, 435, 671 P.2d 230 (1983). Cause in fact refers to the "but for" consequences of an act, the physical connection between an act and an injury. *Hartley v. State*, 103 Wn.2d 768, 778, 698 P.2d 77, 83 (1985). "It is a matter of what has in fact occurred." *Id.*

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[6] To the extent Plaintiff intended to raise a vicarious liability claim for battery, there is no evidence that Deputy Pendergrass' use of force was unlawful, and the claim would still fail. Not every prima facie battery is tortious, as use of force may be privileged. *See e.g.* 16 Wash. Prac., Tort Law And Practice §§ 14:20-14:21, 14:28 (4th ed.) (addressing defense of self, others, and state-law qualified immunity for law enforcement). For example, "there is a privilege to use force" by any person "if he reasonably believes that, under the circumstances, it is necessary to use reasonable force to protect the third person from injury." 16 Wash. Prac., Tort Law And Practice § 14:21 (4th ed.) (citing R.C.W. 9A.16.020; Restatement Second, Torts § 76). The cited statute, R.C.W. 9A.16.020, explains that force is lawful when "necessarily used by a public officer in the performance of a legal duty," or "[w]henever used by any person to prevent a mentally ill, mentally incompetent, or mentally disabled person from committing an act dangerous to any person."

Deputy Pendergrass' minimal force, which did not occur until Mr. Lacy was already struggling with the Tulalip Police Officers, was lawful under either of the above prongs. Specifically, Deputy Pendergrass deployed a single Taser drive-stun to Mr. Lacy's shoulder, used his hands to hold on to Mr. Lacy as he fought with the Tulalip Officers, and then used a portion of his weight to control Mr. Lacy's torso on the ground for about 30 seconds. None of these minimal uses of force can be deemed unreasonable in the context of helping other police officers struggling with Mr. Lacy, who was attempting to escape their lawful mental health detention of him.

[7] Even if vicarious liability had been pleaded, the false imprisonment claim would fail because "[t]he existence of probable cause is a complete defense." *McBride v. Walla Walla Cty.*, 95 Wn. App. 33, 38, 975 P.2d 1029, 1032 (1999), as amended, 990 P.2d 967 (1999) (citing *Hanson v. City of Snohomish*, 121 Wn.2d 552, 563–64, 852 P.2d 295 (1993); *Fondren v. Klickitat County*, 79 Wn.App. 850, 856, 905 P.2d 928 (1995)). Deputy Pendergrass did not handcuff Mr. Lacy, and he was never placed in a County vehicle. Deputy Pendergrass did not become involved in any restraint of Mr. Lacy until after he was already fighting with the Tribal Officers, and he had probable cause for numerous crimes including, among others: Disorderly Conduct, RCW 9A.84.030, Assault, RCW 9A.36.031, and Obstructing, RCW 9A.76.020. Additionally or alternatively, Deputy Pendergrass had lawful authority to restrain Mr. Lacy under the ITA, RCW 71.05.150. Because no restraint occurred prior to probable cause, the claim fails.

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(quoting W. Prosser, Torts 237 (4th ed. 1971)). Here, Plaintiff lacks sufficient evidence to create a genuine issue of fact as to whether Deputy Pendergrass caused the death of Cecil Lacy, Jr.

To establish cause in fact a claimant must establish that the harm suffered would not have occurred but for an act or omission of the defendant. *Joyce v. State, Dep't of Corr.*, 155 Wn.2d 306, 322, 119 P.3d 825, 833 (2005). There must be a direct, unbroken sequence of events that link the actions of the defendant and the injury to the Plaintiff. *Id.*, citing *Taggart v. State*, 118 Wn.2d 195, 217, 822 P.2d 400 (1999). Cause in fact is usually a question for the jury; it may be determined as a matter of law only when reasonable minds reach one conclusion. *Daugert v. Pappas*, 104 Wn.2d 254, 257, 704 P.2d 600 (1985). Cause in fact does not exist if the connection between an act and the later injury is indirect and speculative. *Bordon v. State*, 122 Wn. App 227, 95 P.32 764, 770-771. Cause in fact does not exist where evidence purported to prove causal connection requires an inference that is too remote and unreasonable. *See Lynn v. Labor Ready Inc.*, 136 Wn. App. 295, 311, 151 P.3d 201 (2006).

Plaintiff has hired an expert who is attempting to offer an alternative to the legal cause of death[8] established by the medical examiner who actually examined Mr. Lacy's body: "cardiac arrhythmia due to acute drug intoxication due to methamphetamine." Exhibit I to Casey Decl. Excerpts of the Deposition of Bennet Omalu, Exhibit A thereto, at 5. Doctor Omalu opines that "three police officers directly contributed to and caused" Mr. Lacy's death through "Mechanical

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[8] That determination by the medical examiner is deemed "legally accepted," a fact which further belies Plaintiff's spurious claim above. *See* RCW 70.58.180

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and Positional Asphyxiation."[9] *Id.*, at 13-14. As the facts allegedly supporting this conclusion, Dr. Omalu offers his version of facts, which explains:

> [A]sphyxiation was caused by three adult men lying on top of his trunk and placing the weights of their bodies on his trunk while pressing him prone onto the ground, crisscrossing his lower extremities and handcuffing his upper extremities. The mechanical and positional asphyxiation was sustained for more than 3 to 5 minutes for this is the amount of time required for the brain to suffer irreversible damage from hypoxic-ischemic injury.

Id., at 12. Dr. Omalu notes that the timing of the asphyxiation is critical, noting that "[i]f you don't correct the source of injury, after three to five minutes the brain suffers irreversible damage," and if someone is asphyxiated for less than that amount of time, "[i]f they stop the pressure, you're resuscitated successfully." Exhibit I. to Casey Decl. at p. 13, ll. 21-23, p. 79, ll.17-18. Dr. Omalu repeats his reliance on the time frame, describing it as the "generally-accepted scientific principle of three to five minutes," and repeating that "the standard, when is for one minute, when you stop, you recover; you don't die." *Id.*, p. 41, ll. 12-13, p. 79, ll. 4-5.

This is where Plaintiff's causation theory fails. There is **no evidence in the record** to support the false assumption that Deputy Pendergrass applied weight to Mr. Lacy for anywhere near the "generally accepted scientific" time frame of three to five minutes. In fact, the time was estimated to be thirty seconds by both Deputy Pendergrass and Sgt. Johnsen. Exhibit D to Casey Decl. at p 63, l. 7 and Exhibit E to Casey Decl. at p. 16 ll. 20-21. No contrary evidence exists. Considering the only actual evidence of the length of restraint, Dr. Omalu opines "for somebody

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[9] Snohomish County disputes the "science" underlying Dr. Omalu's theory altogether. The County has offered the declaration of Dr. Theodore Chan in the interest of trying to preserve scientific integrity regarding the long-debunked theory of positional or restraint asphyxia in the law enforcement custody context. Nonetheless, given the footing of this motion, the County will argue below under the false assumption that Dr. Omalu's stated theory had scientific validity, because even if the science was valid, in this case there is still a complete absence of factual support for the time Dr. Omalu believes would be needed.

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to suffer asphyxial injury, it has to be sustained. They have to hold the person down. Not for 30 seconds." Omalu Dep., p. 33, ll. 7-9.

While Dr. Omalu may make some assumptions in forming an opinion, he must base those assumptions in fact. *Davidson v. Municipality of Metro. Seattle*, 43 Wn. App. 569, 575, 719 P.2d 569, 573 (1986) ("[T]here is no value in an opinion where material supporting facts are not present."). Expert testimony is inadmissible, and therefore cannot create a genuine issue of fact, if the expert's opinion is made "by drawing inferences from facts not in evidence or by assuming facts actually conflicting with eyewitness testimony." *See id.* As the assumption required to create a causal link between Deputy Pendergrass and the death here actually contradicts all available facts, it is invalid. Without evidence that Deputy Pendergrass caused Mr. Lacy's death,[10] no wrongful death claim may proceed.

VI. CONCLUSION

Plaintiff's claim for negligent training and supervision fail because Plaintiff does not allege that a negligent act was committed by a Snohomish County employee that was outside of the employee's scope of employment. Plaintiff's claim of outrage fails because no facts support an essential element of the claim. Any claims premised on the idea that Deputy Pendergrass should have summoned medical aid or involuntarily detained Mr. Lacy earlier in the contact fail because the County owed no specific duty to Mr. Lacy. Plaintiff's claim for "negligent excessive force," fails as there is no such cause of action in the State of Washington. Plaintiff's claims for battery and false imprisonment are legally insufficient. Plaintiff has not provided any facts to support the

[10] Deputy Pendergrass's only other use of force was a single Taser drive-stun application to the shoulder. Plaintiff has offered no evidence that this single attempted drive stun application was a "but-for" cause of Mr. Lacy's death.

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1 claim Deputy Pendergrass caused Mr. Lacy's death. Accordingly, Plaintiff's claims should be
2 dismissed in their entirety.
3 DATED this 22nd day of June, 2018.
4
5
6 MARK K. ROE
Snohomish County Prosecuting Attorney
7
8 /s/Bridget Casey

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I certify that this memorandum contains 7,697 words, in
15 compliance with Local Civil Rules.
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CERTIFICATE OF SERVICE

I hereby declare I served a true and correct copy of the foregoing

1. **Defendant's Motion for Summary Judgment**
2. **Declaration of Bridget E. Casey in support of Defendant's Motion for Summary Judgment**
3. **Declaration of Theodore C. Chan, M.D. in Support of Defendant's Motion for Summary Judgment**
4. **Declaration of Charles Tyler Pendergrass in Support of Defendant's Motion for Summary Judgment** upon the person/persons listed by the method(s) indicated:

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I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

SIGNED at Everett, Washington, this 22nd day of June, 2018.

Teresa Kranz, Legal Assistant

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