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NO. 71044-3-1

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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KATHLEEN MANCINI,

Appellant,

v.

CITY OF TACOMA, ET. AL.,

Respondents.

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RESPONDENT'S BRIEF

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## **I. INTRODUCTION**

In response to information provided by a reliable, proven confidential informant (CI), Tacoma police obtained a search warrant for 28625 16<sup>th</sup> Avenue SW, Apartment B-1, Federal Way, as well as for the person of Matthew Logstrom. Logstrom, who had a long criminal history of felony drug convictions, was purported to have weapons and a significant amount of methamphetamine in his apartment. Unfortunately, the CI got the wrong building and identified apartment B-1 as Logstrom's. Instead, Logstrom lived in A-1 and plaintiff, Kathleen Mancini, lived in B-1.

The officers executed the warrant on apartment B-1 and found plaintiff. After conducting a short investigation to confirm that plaintiff was not Logstrom's mother and was not connected to the drugs police were seeking, the officers left.

Although plaintiff's expert concedes that the warrant issued for plaintiff's apartment was based on probable cause and that the tactics used by officers to execute the warrant were proper, plaintiff has sued, alleging that the officers were negligent in how they investigated Logstrom. As a result of the allegedly negligent investigation, plaintiff asserted a variety of state tort claims, all of which were dismissed by the superior court on summary judgment.

Plaintiff appeals the dismissal of her claims, as well as a pretrial order excluding testimony from her treating healthcare providers, an order issued because of plaintiff's discovery abuse and her failure to comply with an earlier order compelling disclosure of the providers' opinions. As outlined herein, the trial court's rulings were, in all respects, proper and should be affirmed.

## **II. ISSUES ON APPEAL**

1. Whether the trial court correctly dismissed plaintiff's negligence claims where a claim of negligent investigation against the police is not cognizable and where plaintiff failed to establish the existence of a duty owed to her as an individual.
2. Whether the trial court correctly dismissed plaintiff's false imprisonment claim where the warrant included the explicit authority to detain plaintiff while executing the warrant and where the officers did not exceed the scope of that authority.
3. Whether the trial court correctly dismissed plaintiff's assault and battery claim where there was no evidence that the force used by the police was excessive and where plaintiff's expert opined that the tactics used by the police in executing the warrant were proper.
4. Whether the trial court correctly dismissed plaintiff's invasion of privacy (intrusion) claim where the officers had a valid warrant, supported by probable cause, authorizing them to enter her residence.
5. Whether the trial court correctly dismissed plaintiff's defamation claim where plaintiff failed to adduce evidence to establish all essential elements and where the officers' conduct was privileged.

6. Whether the trial court correctly dismissed plaintiff's outrage claim where plaintiff's claim is based on standard police procedures and where plaintiff cannot establish the severe emotional distress necessary to support this claim.
7. Whether the trial court abused its discretion in excluding opinion testimony from plaintiff's treating healthcare providers where plaintiff failed to comply with disclosure requirements and a court order compelling disclosure and where the trial court made express findings that the discovery abuse was willful, prejudicial and that no lesser sanction would suffice.

### **III. STATEMENT OF THE CASE**

#### **A. Factual History**

On December 4, 2010, Officer Kenneth Smith of the Tacoma Police Department's Special Investigations Division was contacted by a confidential informant (CI) who advised him that he/she had been on contact with a white male about thirty years of age, named "Matt," who was selling and dealing methamphetamine and marijuana. CP 678. Officer Smith had worked with this particular CI on at least two prior occasions, wherein the CI had provided specific information that resulted in the arrests of large scale narcotics dealers. Id. Further, the CI had previously participated in two controlled reliability buys. Id. Officer Smith's prior experience with this particular CI had established him/her as both credible and reliable. Id.

On January 4, 2011, the CI told Officer Smith that he/she had been inside "Matt's" apartment located at 28625 16<sup>th</sup> Avenue S, Apartment B-1,

within the prior 72 hours, and had observed “Matt” selling methamphetamine; the CI also observed a drug scale and packaging for methamphetamine sales. CP 678-679; 687-688. The CI had also observed “Matt” driving a black Dodge Charger, Washington license plate 539-WFD, and further, within the previous 72 hours, had observed “Matt” with dealer-sized quantities of methamphetamine in the car. Id. The CI also reported “Matt” carried a handgun. Id. The CI provided a description of the heavily wooded apartment complex grounds, including the stairwell and layout of “Matt’s” building. Id.

Officer Smith subsequently met with the CI, who directed him to 28625 16<sup>th</sup> Avenue SW. CP 679. Upon arrival, the CI pointed out apartment B-1, and identified it as “Matt’s” apartment, where the CI had observed “Matt” selling methamphetamine. Id. The CI stated that he/she had been in the apartment the day before, January 3, 2011. Id. The CI also stated that he/she had seen “Matt” with drugs two days before, on January 2, 2011. Id. Officer Smith also observed a black Dodge Charger, license plate 539-WMD parked in the lot outside apartment B-1, which the CI identified as the car belonging to “Matt.” Id.

The CI told Officer Smith that “Matt” did not have anything in his name relating to his residence, and that he lived with his mother. CP 679-680. Officer Smith checked numerous records sources to elicit any

information he could about “Matt” and about the apartment. Id. A records check revealed the owner of the black Charger was a Matthew D. Logstrom, DOB \*/\*/1983, who had nine felony convictions, including felony narcotics convictions, as well as theft and firearms violations. Smith Affidavit, para. 11. A records search also indicated that the address of 28625 16<sup>th</sup> Avenue SW, Apartment B-1, was used by an older female, which was consistent with the information provided by the CI that Logstrom had no property in his name and that his mother may have leased the apartment. Id.

On January 4, 2011, Officer Smith applied to the Pierce County Superior Court for a search warrant authorizing the search of 28625 16<sup>th</sup> Avenue SW, Apartment B-1, the person of Matthew Logstrom, and the black Dodge Charger. CP 680-681; 686-689. Judge Bryan Chushcoff issued the search warrant. CP 691-693.

On January 5, 2011, at approximately 9:45 a.m., Tacoma Police served the search warrant at 28625 16<sup>th</sup> Avenue SW, Apartment B-1. CP 681. For officer safety and tactical reasons, the team used a “limited penetration” entry, as the information available to the officers at that time was that they were about to enter the apartment of a large scale methamphetamine dealer who was a convicted felon and known to carry

guns. CP 681-682. After the team conducted the knock-and-announce, the front door to apartment B-1 was breached with the ram. CP 682.

A female later identified as plaintiff, clad in a nightgown, was inside the apartment and was brought outside the apartment. Id.<sup>1</sup> Officer Smith observed that the interior of plaintiff's apartment did not match the description provided by the CI of Logstrom's apartment. Id. Officer Smith contacted plaintiff and learned she was a nurse who worked from home. Id. Officer Smith removed the handcuffs while a brief protective sweep was done of the apartment to ensure it was clear. Id.

Plaintiff was asked about the black Dodge Charger parked directly in front of her building and she stated that it belonged to a male in Apartment A-1, the building immediately to the north, which was nearly obscured from view by trees. CP 682.

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<sup>1</sup> Plaintiff contends that she was awakened by a booming noise, made it as far as her bedroom door, and then observed between three and seven officers in her hallway pointing guns and yelling at her. CP 566-567; 577-578. She stated that she was handcuffed and that officers touched her back to get her down on the floor of her hallway. CP 580-584. She was then taken to the landing outside her apartment door. CP 589; 591; 620-621; 630-632; 659. The court should note that plaintiff's testimony about her movements outside of the apartment is vague and conflicting. Id. Plaintiff also testified that she believes she was outside her apartment anywhere between 30 to 60 minutes. CP 592-595. The officers then removed the handcuffs and proceeded to Logstrom's building. CP 598-600. None of plaintiff's personal belongings were damaged. CP 625-626. Before leaving, two of the officers attempted to fix plaintiff's door and when they were unable to do so, Officer Smith provided her with a card so she could obtain a claim number for replacing her door. CP 603-605. For purposes of this motion only, the defendants adopt these facts as alleged by plaintiff. As outlined herein, the facts alleged by plaintiff do not create a genuine issue of material fact and do not preclude the court's determination of the issues in the instant motion.

After providing plaintiff with contact information regarding the damage to her door and door frame, the team proceeded to the building identified by Ms. Mancini. CP 683. The officers knocked on the door of Apartment A-1; Matthew Logstrom answered the door. Id. Officers detained Logstrom while a new search warrant was obtained<sup>2</sup>. Id.

### **B. Procedural History**

Plaintiff initiated the instant action, asserting numerous causes of action. Plaintiff's claims for negligent training and supervision were dismissed pursuant to CR 12(c), as were plaintiff's claims under Article I, §§ 1, 3, and 7 of the Washington State Constitution. CP 377-379. Following discovery, the City moved for summary judgment on plaintiff's negligence claim, a discrimination claim under RCW 49.60.030, and state tort claims of assault and battery, false imprisonment, defamation, invasion of privacy, and outrage claims. CP 710-733. On summary judgment, plaintiff abandoned her RCW 49.60 claim. CP 203-243. The trial court granted the City's motion and all remaining claims were dismissed. CP 84-86.

During the discovery period, the City moved to exclude, or in the alternative, compel, plaintiff's disclosure of her experts' opinions,

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<sup>2</sup> Pursuant to that warrant, officers seized a large quantity of methamphetamine, a small marijuana grow operation in the bathroom, packaging materials, weapons (including a stolen handgun), a drug scale, and cash. CP 683.

including the opinions of treating healthcare providers to be offered at trial. CP 380-536. The trial court granted the alternative relief sought and ordered that plaintiff disclose her experts' opinions, including treating healthcare providers' opinions, by July 5, 2013. CP 29-31. Plaintiff failed to comply with the court's order to compel and so the City brought a second motion to exclude. CP 126-153. The trial court gave plaintiff additional time to produce the required opinions and in the event plaintiff failed to comply with the court's second order, the court made the necessary findings under Burnet<sup>3</sup> and entered an order excluding any opinion testimony from plaintiff's treating healthcare providers at trial. CP 81-83.

The trial court did not, however, order that plaintiff obtain her medical records at her own expense for the defendants. CP 29-31; 548-553.

#### **IV. STANDARD OF REVIEW**

Appellate review of summary judgment determinations is *de novo*. Ellis v. City of Seattle, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000). Thus, "the appellate court engages in the same inquiry as the trial court." Id.

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<sup>3</sup> Burnet v. Sacred Heart Medical Center, 131 Wn.2d 484, 933 P.2d 1036 (1997).

(quoting Trimble v. Washington State Univ., 140 Wn.2d 88, 92-93, 993 P.2d 259 (2000)).

Pursuant to CR 56 (c), summary judgment should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. One of the principal purposes of the rule is to dispose of factually and legally unsupported claims or defenses. CR 56; Marincovich v. Tarabochia, 114 Wn.2d 271, 274, 787 P.2d 562 (1990); Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

On a motion for summary judgment, the moving party bears the initial burden of showing the absence of a material issue of fact. Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). A *defendant* can meet this burden in one of two ways. First, the defendant can set forth its version of the facts and allege that there is no material issue as to those facts. Hash v. Children's Orthopedic Hosp. & Med. Ctr., 110 Wn.2d 912, 916, 757 P.2d 507 (1988). In the alternative, the defendant can meet its burden by showing that there is absence of evidence to support the nonmoving party's case. Howell v. Spokane & Inland Empire Blood Bank, 117 Wn.2d 619, 624, 818 P.2d 1056 (1991) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 91

L.Ed.2d 265 (1986)). After the defendant makes its required showing, the burden then shifts to the plaintiff:

If, at this point, the plaintiff [as nonmoving party] “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....”In such a situation, there can be ‘no genuine issue as to any material fact,’ since ***a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.***”

(emphasis added) Hiatt v. Walker Chevrolet, 120 Wn.2d 57, 66, 837 P.2d 618 (1992). Consequently, the plaintiff “must do more than express an opinion or make conclusory statements”; *the plaintiff must set forth specific and material facts to support each element of his prima facie case.*

Id.

Finally, while “[t]he nonmoving party is entitled to have the evidence viewed in a light most favorable to him,” the standard on summary judgment does not relieve the nonmoving party of his burden to adduce competent, admissible evidence sufficient to support a jury’s verdict. Seiber v. Poulsbo Marine Center, Inc., 136 Wn. App. 731, 736, 150 P.3d 633 (2007). “[I]f the plaintiff, as the nonmoving party, can offer only a “scintilla” of evidence, evidence that is “merely colorable,” or evidence that “is not significantly probative,” the plaintiff will not defeat

*the motion.*" Id. (citing Herron v. Tribune Publishing Co., 108 Wn.2d 162, 170, 736 P.2d 249 (1987)).

## **V. ARGUMENT**

As a preliminary matter, it is unclear what numbering system plaintiff is using for identification of the record, as plaintiff's citations to the Clerk's Papers do not correspond with the actual record, a situation the City has found it difficult to address. Moreover, plaintiff makes numerous factual assertions for which there is no citation to the record and no support in the record. For example, plaintiff claims that Detective Smith did not perform a controlled buy because he did not consider the King County prosecutors to be trustworthy. Appellant's Opening Brief, p. 7. In support of this assertion, plaintiff cites to CP 257-59, which is actually a portion of plaintiff's expert's curriculum vitae. A careful examination of Detective Smith's testimony, however, shows that he never said that King County Prosecutors were not trustworthy, but that there was a possibility of King County releasing information on a confidential informant (CI) in cases involving delivery charges, which can leave the CI exposed in other cases. CP 313-320. Therefore, the detective chose to seek a warrant for possession of a controlled substance and not delivery. Id.

Further, plaintiff's arguments, as outlined in her opening brief, are based on a woefully incomplete record. When plaintiff designated the

record, she did not include any of the City's materials on summary judgment, nor did she include all of the City's materials on the other motions at issue. The City has supplemented the Clerk's Papers so that the Court has a complete record to decide the instant appeal. See CP 377-762. See also Appendix A.

**A. Plaintiff's negligence claim against Tacoma is really a claim of negligent investigation, which is not cognizable.**

As she did in the trial court, plaintiff argues in the instant appeal that the officers were "negligent and violated well accepted standards of police investigation which led to a raid on the wrong residence." Appellant's Opening Brief, p. 13. Plaintiff contends that the defendants failed to take appropriate steps to ascertain that they were entering the correct apartment and that their conduct fell below the acceptable standard of care. Id. In simple terms, plaintiff is alleging that the defendants were negligent in how they conducted their narcotics investigation and as a result, obtained a warrant for the wrong apartment. Id. at p.13-15. Although she tries to couch it in other terms, plaintiff is really asserting a common law negligent investigation claim against the police. Such a claim is not cognizable.

*Washington courts have repeatedly held that there is no common law cause of action for negligent investigation against the police*<sup>4</sup>. *See, e.g., M.W. v. Dept. of Social and Health Services*, 149 Wn.2d 589, 601, 70 P.3d 954 (2003) (“Our courts have not recognized a general tort claim for negligent investigation.”); *Laymon v. Department of Natural Resources*, 99 Wn. App. 518, 530, 994 P.2d 232 (2000) (“A claim of negligent investigation will not lie against police officers.”); *Rodriguez v. Perez*, 99 Wn. App. 439, 434, 994 P.2d 874 (2000) (“Thus, in general, a claim for negligent investigation does not exist under the common law because there is no duty owed to a particular class of persons.”); *Corbally v. Kennewick School District*, 94 Wn. App. 736, 740, 973 P.2d 1074 (1999) (“In general, a claim for negligent investigation is not cognizable under Washington law.”); *Fondren v. Klickitat County*, 79 Wn. App. 850, 862, 905 P.2d 928 (1995) (“A claim for negligent investigation is not cognizable under Washington law.”); *Donaldson v. City of Seattle*, 65 Wn. App. 661, 671, 831 P.2d 1098 (1992) (“Washington does not recognize the tort of negligent investigation.”); *Dever v. Fowler*, 63 Wn. App. 35, 45, 816 P.2d 1237 (1991) (“The reason courts have refused to create a cause of action

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<sup>4</sup> The courts have carved out a very narrow exception to this rule for police and DSHS under RCW 26.44.050, which only applies to reports of child neglect or abuse where a negligent investigation results in a harmful placement decision. *M.W. v. Dept. of Social and Health Services*, 149 Wn.2d 589, 601-602, 70 P.3d 954 (2003); *Rodriguez v. Perez*, 99 Wn. App. 439, 994 P.2d 874 (2000). This case does not include a claim of negligent investigation under RCW 26.44.050 against the Tacoma Police Department.

for negligent investigation is that holding investigators liable for the negligent acts would impair vigorous prosecution and have a chilling effect upon law enforcement.”).

A review of Washington case law amply demonstrates that plaintiff’s claim, alleging a negligent investigation in the instant case, fails to state a claim upon which relief can be granted. For example, in Fondren v. Klickitat County, *supra*, plaintiffs brought a claim for negligent investigation based on the investigation of a fatal shooting. Fondren, 79 Wn. App. at 852. Initially, plaintiff Clyde Fondren was convicted of manslaughter as a result of the investigation. Id. at 853. After the conviction was reversed on appeal, a second jury acquitted Mr. Fondren, finding that he had acted in defense of himself or another. Id. The Fondrens brought a civil suit against the County for a variety of claims, including negligent investigation. Id. The County then moved for judgment on the pleadings, arguing that the Fondrens had failed to state a claim upon which relief could be granted, and the trial court denied the motion on the negligent investigation claim. Id. at 853-54 and 862.

The County appealed the trial court’s denial of its motion to dismiss the negligent investigation claim. On appeal, the Court of Appeals reversed the trial court, finding that the negligent investigation claim was simply not cognizable under Washington law. Id. See also

Donaldson v. City of Seattle, 65 Wn. App. 661, 671, 831 P.2d 1098 (1992), review dismissed, 120 Wn.2d 1031 (1993) (“Washington does not recognize the tort of negligent investigation. Liability for negligent investigation would be a substantial change in the law ...”).

Therefore, to the extent plaintiff’s claim rests upon her allegations that the defendants conducted their narcotics investigation in a negligent manner, her claim necessarily fails. Moreover, the trial court dismissed plaintiff’s negligent investigation claim in response to a motion for partial judgment on the pleadings, a ruling that plaintiff has not appealed herein. CP 377-79. Plaintiff’s failure to appeal the trial court’s ruling on the motion for partial judgment on the pleadings waives any argument about the propriety of this ruling on appeal. Stevens v. City of Centralia, 86 Wn. App. 145, 155, 936 P.2d 1141 (1997).

**B. Plaintiff failed to establish that the City owed her an individualized duty and thus, her negligence claim fails as a matter of law.**

Even if the Court were to decide that the actions of the police were not part of a criminal investigation, plaintiff’s negligence claim against the City fails as a matter of law as the City owed no individualized duty to the plaintiff.

To maintain a negligence action, all plaintiffs must plead and prove the following elements: (1) the existence of a duty owed to the

complaining party; (2) a breach of that duty; (3) proximate cause; and (4) resulting injury. Ruff v. County of King, 125 Wn.2d 697, 704, 887 P.2d 886 (1995). The existence of a duty is the threshold question in any negligence action and the action will fail if no duty is established. Cummins v. Lewis County, 156 Wn.2d 844, 852, 133 P.3d 458 (2006). The existence of a legal duty is a pure question of law. Folsom v. Burger King, 135 Wn.2d 658, 671, 958 P.2d 301 (1998).

The public duty doctrine serves as a focusing tool for determining the scope of the duty owed by municipal corporations. Moore v. Wayman, 85 Wn. App. 710, 717, 934 P.2d 707 (1997), review denied, 133 Wn.2d 1019 (1997). A plaintiff seeking recovery from a municipal corporation in a negligence action must show that the duty breached was owed to the injured plaintiff as an individual, and was not merely a duty owed to the general public as a whole (i.e., a duty to all is a duty to no one). Moore, 85 Wn. App. at 717. “[N]egligent performance of a governmental police power duty enacted for the benefit of the general public imposes no municipal liability running to individual members of the public.” Georges v. Tudor, 16 Wn. App. 407, 410, 556 P.2d 564 (1976). Thus, the doctrine applies only to governmental functions; it does

not apply when the government performs a proprietary function<sup>5</sup>. Borden v. City of Olympia, 113 Wn. App. 359, 371, 53 P.3d 1020 (2002).

On appeal, plaintiff relies upon Justice Chambers' concurrence in Munich v. Skagit Emergency Communications Center, 175 Wn.2d 871, 288 P.3d 328 (2012), and argues that the City owed plaintiff a common law duty in the instant case<sup>6</sup>. Plaintiff's reliance on the Munich concurrence is misplaced, namely because plaintiff has misconstrued what the concurring opinion was attempting to convey. The concurrence simply points out that in contexts *other* than traditional governmental functions (such as cases involving issues of premises liability), common law negligence duties apply. But nowhere does the Munich concurrence state that a City's law enforcement functions are not traditional governmental functions, nor does the concurrence state the law enforcement functions are not subject to analysis under the public duty doctrine. In fact, such an argument flies in the face of both the City's

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<sup>5</sup> The test for distinguishing governmental functions from proprietary functions is whether the act performed is for the common good of all, or whether it is for the special benefit or profit of the corporate entity. Okeson v. City of Seattle, 150 Wn.2d 540, 550, 78 P.3d 1279 (2003); Lakoduk v. Cruger, 47 Wn.2d 286, 288-89, 287 P.2d 338 (1955).

<sup>6</sup> Plaintiff also attempts to rely on Washburn v. City of Federal Way, 169 Wn. App. 588, 283 P.3d 567 (2012), arguing that in Washburn, the officer was found liable under a common law duty of ordinary care and thus, such a duty must also apply in this case. Washburn, however, is wholly inopposite to the instant case. The duty at issue in Washburn was the product of a jury instruction that the City failed to challenge on appeal, and therefore, became the law of the case. The Washburn court expressly declined to analyze the public duty doctrine, which had been the subject of summary judgment, since the law of the case doctrine mandated that the duty in question was determined by the unchallenged jury instruction.

legislative duty to provide law enforcement services for public health and safety (RCW 35.22.280(35)) and a wealth of prior case law.

Washington courts have consistently held that the duties owed by police “are owed to the public at large and are unenforceable as to individual members of the public.” Chambers-Castanes v. King County, 100 Wn.2d 275, 284, 669 P.2d 451 (1983). “The relationship of police officer to citizen is too general to create an actionable duty. Courts generally agree that responding to a citizen’s call for assistance is basic to police work and not special to a particular individual.” Torres v. City of Anacortes, 97 Wn. App. 64, 74, 981 P.2d 891 (1999), rev. denied, 140 Wn.2d 1007 (2000).

There are four recognized exceptions to the public duty doctrine: the legislative intent exception; the failure to enforce exception; the rescue doctrine; and the special relationship exception. Bailey v. Forks, 108 Wn.2d 262, 268, 737 P.2d 1257, modified, 753 P.2d 523 (1988). In support of its motion for summary judgment before the trial court, the City addressed each of these four exceptions. In response to the City’s motion and on appeal, plaintiff addresses only the special relationship exception. In so doing, plaintiff implicitly concedes that the other exceptions (legislative intent, failure to enforce and rescue doctrine) have no application to her claims against the City in this case.

As the Munich majority emphasized, in order to establish the existence of a special relationship sufficient to create an individualized duty, the plaintiff must show three essential elements. Munich, 175 Wn.2d at 879. Plaintiff must show 1) direct contact or privity between the plaintiff and the public official that sets plaintiff apart from the general public; 2) an express assurance given by the public official, and 3) justifiable reliance on the assurance by the plaintiff. Id. See also Cummins v. Lewis County, 156 Wn.2d 844, 854, 133 P.3d 458 (2006); Babcock v. Mason County Fire Dist., 144 Wn.2d 774, 786, 30 P.3d 1261 (2001); Beal v. City of Seattle, 134 Wn.2d 769, 784-85, 954 P.2d 237 (1998); Chambers-Castanes v. King County, 100 Wn.2d 275, 286, 669 P.2d 451 (1983).

In the instant case, plaintiff did not offer any evidence to establish any of these essential elements, and instead argued – without authority – that the simple act of getting a warrant for plaintiff’s residence created a special relationship between the City and plaintiff. See RP 15, lines 12-13 (“The minute the police got a search warrant of Ms. Mancini’s apartment, there was a special relationship and they had a duty to her.”). See also RP 16. In response to the City’s motion, plaintiff adduced no evidence of direct contact or privity with the officers before the officers executed the warrant, and no evidence of an express assurance by the officers or

detrimental reliance by plaintiff on any such assurance after the officers executed the warrant. Plaintiff bears the burden of proof on this issue at trial, and her failure to adduce evidence in support of each of the requisite elements is fatal to her negligence claim. Hiatt v. Walker Chevrolet, 120 Wn.2d at 66.

C. **Plaintiff's false imprisonment claim fails as a matter of law because her brief confinement was justified under the circumstances.**

Plaintiff asserts that her detention, while handcuffed, outside her apartment constitutes false imprisonment. In order to establish a claim for false imprisonment, plaintiff is required to prove that the defendants intentionally confined her and that the confinement was without justification under the circumstances. See Kellogg v. State, 94 Wn.2d 851, 856, 621 P.2d 133 (1980).

"The gist of an action for false arrest or false imprisonment is the unlawful violation of a person's right of personal liberty or the restraint of that person *without legal authority*." (emphasis added.) Turngren v. King County, 104 Wn.2d 293, 303, 705 P.2d 258 (1985). In cases involving an allegation of false arrest where the officers acted pursuant to a search warrant, the plaintiff must demonstrate that the warrant is invalid. Id. at 304. To do so, the plaintiff must establish that the officer swearing out the affidavit in support of the warrant deliberately conveyed false information

to the issuing court in order to obtain the warrant. Id. A finding of probable cause is a defense to such an action. Id. See also Michigan v. Summers, 452 U.S. 692, 704-05, 101 S.Ct. 2587, 69 L.Ed.2d 127 (1981) (“...we hold that a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted.”)

There is no dispute that the officers had a validly issued search warrant for the apartment located at 28625 16<sup>th</sup> Avenue S. Apt. # B-1, which was in fact plaintiff’s residence. Plaintiff’s own expert concedes that the superior court found sufficient probable cause to issue the warrant and that the tactics used by the officers in executing the warrant were consistent with standard police procedures. CP 669-672; 674-675. Moreover, there is no evidence that Officer Smith, the officer who swore out the complaint in support of the warrant, deliberately conveyed false information to the superior court. The defendants do not dispute that the CI identified the wrong apartment, but the fact of a simple mistake is insufficient, as a matter of law, to establish a valid claim for false arrest.

Moreover, although plaintiff asserts that her declaration establishes that she was retrained long after the officers knew they had the wrong premises, a careful examination of plaintiff’s declaration and her deposition testimony do not support this claim. In both her declaration

and her deposition, plaintiff describes the officers' actions to investigate whether plaintiff and/or her residence were connected with the narcotics they were seeking. Plaintiff testified that she could not see the officers doing a protective sweep inside her apartment, but that the officers came out of the apartment, questioned her about the subject of the investigation, Matt Logstrom, as well as about the Dodge registered to Logstrom. CP 267-268; CP 596-598. Once the officers determined that plaintiff and her residence were not connected to the narcotics they were seeking, they released her. Id. And while there is a dispute as to exactly how long plaintiff was detained, the dispute is not material, since both the plaintiff's testimony as to what the officers did to investigate plaintiff's involvement with the drugs is consistent with the officers' testimony. Id. See also, CP 682-683. Once the officers had conducted an appropriate investigation and determined that plaintiff was not connected to Logstrom<sup>7</sup> or the drugs they were seeking, the officers left. Id.

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<sup>7</sup> The CI had told the officers that Logstrom kept nothing in his name and lived with his mother. CP 679. The records search conducted by the officer on Mancini's apartment showed that an older female used the address, which was consistent with the information provided by the CI. CP 680. Thus, the presence of an older female in the apartment when the officers entered did not immediately put the officers on notice that they might be in the wrong residence. These facts distinguish the instant case from the case relied upon by plaintiff, Simmons v. City of Paris, Texas, 378 F.3d 476 (5th Cir. 2004). In Simmons, officers did not enter the house for which they had a warrant; they entered the home next door, a home occupied by a family with two children. The evidence adduced in that case was that the officers continued to search the home even after they knew that they were in the wrong house, unlike the case at bar. In the instant case, the officers had the "right" house, insofar as they entered the residence for which the warrant had been

Plaintiff has failed to adduce evidence to show that the officers exceeded the scope of authority conferred by the warrant or that the warrant was invalid. And in fact, plaintiff's own expert conceded that the warrant was based on probable cause and valid. CP 674-675. Thus, plaintiff's false imprisonment claim fails, as a matter of law.

**D. Plaintiff's claim for assault and battery fails because the force used by the officers during her detention was objectively reasonable.**

Plaintiff has also asserted a claim for assault and battery<sup>8</sup>. In her deposition, plaintiff testified that the totality of her physical contact with the officers consisted of the following: an officer allegedly touched her back and pushed her to the floor; one or two officers placed her in handcuffs; two officers picked her up off the floor and escorted her out of the apartment; and an officer touched her to remove her handcuffs. CP 599-600.

It is well established in Washington that a police officer, in performing his or her official duties, is justified in using sufficient force to subdue a prisoner, and is liable for assault and battery only if

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issued. Further, the officers in the instant case left as soon as their investigation was sufficient to confirm that plaintiff was not Logstrom's mother and was not connected with the drugs in question.

<sup>8</sup> A battery is a harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff or a third person to suffer such a contact, or apprehension that such a contact is imminent. McKinney v. Tacoma, 103 Wn. App. 391, 408, 13 P.2d 631 (2000). An assault is any such act that causes apprehension of a battery. Id.

unnecessary violence or excessive force is used in discharging their duties. Boyles v. City of Kennewick, 62 Wn. App. 174, 813 P.2d 178 (1991), review denied, 118 Wn.2d 1006 (1991).

In the instant case, the force utilized by the officers was objectively reasonable for the execution of a high risk search warrant, when the information available to the officers was that they were entering the residence of a large-scale convicted felon who was dealing methamphetamine out of his apartment and who was known to carry guns. CP 669-672. See also CP 694-704. According to plaintiff's own testimony, the only physical contact between officers and the plaintiff occurred when they took her into custody (pushing her onto the floor and placing her in handcuffs), pulled her up from the floor and removed her handcuffs. CP 599-600. Plaintiff also alleges that officers pointed weapons at her and ordered her onto the floor. All of these acts, however, are standard procedure for law enforcement officers executing a high risk warrant. CP 694-704; CP 669-673. Even plaintiff's police procedures expert concedes as much. CP 673, lines 5-7 ("Q: Okay. So the tactics that the officers used to execute the warrant were proper. The problem is it wasn't the target's apartment; am I correct? A: That's fundamentally correct, yes."). Moreover, on summary judgment, plaintiff's counsel conceded to the trial court that plaintiff was not alleging that the tactics

used to execute the warrant were improper. RP 24, lines 8-12 (“THE COURT: But you are agreeing that their procedures, had the apartment been listed as the right building, what they did was proper? You’re not disputing that? MS. HASKELL: Correct. ...”). Because plaintiff did not present evidence to show that the officers used more force than necessary in carrying out their duties, plaintiff’s assault and battery claim also fails, as a matter of law.

**E. Plaintiff’s invasion of privacy claims fail due to a complete absence of evidence.**

On appeal, plaintiff asserts that the trial court erred in dismissing her “intrusion” invasion of privacy claims, but fails to even identify the elements necessary to establish such a claim. Instead, plaintiff argues at the most abstract level that she had a “reasonable expectation of privacy” in her home. Appellant’s Opening Brief, p. 22. While this statement is fundamentally true, it is of no help in analyzing whether plaintiff adduced sufficient evidence to establish her “intrusion” claim.

In order to establish a cause of action for intrusion, a plaintiff must prove (1) an intentional intrusion, physical or otherwise, upon the solitude or seclusion of plaintiff or his private affairs; (2) a legitimate and reasonable expectation of privacy with respect to that matter or affair, (3) an intrusion that would be highly offensive to a reasonable person, (4)

damage that was proximately caused by the defendant's conduct. Doe v. Gonzaga University, 143 Wn.2d 687, 704, 24 P.3d 390 (2001), rev'd on other grounds, 536 U.S. 273, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002); the Restatement (Second) of Torts sec. 652B (1977). Further, the intrusion or prying must be into something private, something the general public is not free to view. Mark v. King Broadcasting Co., 27 Wn. App. 344, 356, 618 P.2d 512 (1980); Jeffers v. City of Seattle, 23 Wn. App. 301, 313, 597 P.2d 899 (1979). See also Mark v. Seattle Times, 96 Wn.2d 473, 497, 635 P.2d 1081 (1981), cert. denied, 457 U.S. 1124 (1982) ("The interference with a plaintiff's seclusion must be a substantial one resulting from conduct of a kind that would be offensive and objectionable to the ordinary person. *It is clear also that the thing into which there is intrusion or prying must be, and be entitled to be, private. . . .*" (emphasis added; internal citations omitted)).

In this case, the existence of a valid search warrant is fatal to plaintiff's invasion of privacy claims. While there was an intrusion into plaintiff's private affairs, that intrusion was authorized by the search warrant and based on probable cause. Therefore, under the circumstances of this case, the warrant superseded plaintiff's reasonable expectation of privacy. The officers' entry into plaintiff's home was expressly authorized by the court and is not actionable as an invasion of privacy.

F. **Plaintiff's defamation claim fails because she cannot establish a prima facie case and because a qualified privilege attaches to any statements made by the officers.**

As she did in the trial court, on appeal, plaintiff argues that the officer defamed her by putting her in handcuffs while in a semi-public area, but plaintiff presents no authority for her position. Instead, plaintiff asks this court to create new law and allow a theory that would grossly expand the scope of liability for police agencies in this state. Under plaintiff's theory, any time a police officer detains a person in order to conduct an investigatory stop (when the stop does not result in an arrest), the officer and his agency would be liable for defamation. That is not the state of the law in Washington.

A prima facie defamation case requires a showing (1) that the defendant's statement was false, (2) that it was unprivileged, (3) fault, and (4) that the statement proximately caused damage. Mark v. Seattle Times, 96 Wn.2d 473, 486, 635 P.2d 1081 (1981). In the instant case, plaintiff is unable to identify any statement that the officers made about her, let alone a false statement. CP 627; 647. On that basis alone her claim fails. Moreover, even if plaintiff was able to establish that officers made an express statement about her, her defamation claim would still fail. Washington has recognized a qualified privilege as to statements or

communications made by police officers in the performance of their official duties. Bender v. City of Seattle, 99 Wn.2d 582, 664 P.2d 492 (1983). Once a statement has been recognized as subject to the qualified privilege, it is then the plaintiff's burden to establish an abuse of that privilege in order to maintain their action. Bender, 99 Wn.2d at 601. In order to establish the abuse of this qualified privilege, the plaintiff must prove that the maker of the statement knew it to be false or acted with reckless disregard as the falsity of the statement. Id. In other words, in order to defeat the defendant's qualified privilege, the defamation plaintiff must establish actual malice by clear and convincing evidence. Id. There was no such evidence offered in the instant matter.

**G. Plaintiff cannot establish actionable outrage, given that the officers had a warrant, which they properly executed.**

Plaintiff argues that the officers' actions in procuring and executing the search warrant are sufficient to create a question of fact on her outrage claim. In support of her argument, plaintiff identifies the allegedly actionable conduct as the negligent investigation leading up to the issuance of the warrant, placing plaintiff in handcuffs and making her stand outside of her apartment while officers conducted a short investigation. Appellant's Opening Brief, p. 29-31. In short, plaintiff argues that the standard procedures employed by law enforcement

agencies every day are sufficient to establish actionable outrage. This is not the law in Washington.

To recover for outrage, plaintiff must the following elements: (1) extreme and outrageous conduct; (2) the intentional or reckless infliction of emotional distress; and (3) actual result to the plaintiff of severe emotional distress. Keates v. Vancouver, 73 Wn. App. 257, 263, 869 P.2d 88 (1994). Whether conduct is sufficiently extreme is generally a question of fact; however, the court must initially decide as a matter of law whether reasonable minds could differ on whether the conduct was extreme enough to create liability. Dicomes v. State, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989). Furthermore, the conduct needs to be more than mere insults, indignities, threats, annoyances, petty oppressions or other trivialities. Grimsby v. Samson, 85 Wn.2d 52, 59, 530 P.2d 291 (1975).

In determining whether conduct is outrageous, it is not enough that the defendant's intent was tortious, criminal, intended to inflict emotional distress or characterized by malice or a degree of aggravation that would entitle a plaintiff to damages for another tort. Birkliid v. Boeing Co., 127 Wn.2d 853, 868, 904 P.2d 278 (1995) (citing Grimsby, 85 Wn.2d at 59). Liability will only be imposed where the conduct is "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.” Id. Also, “the degree of emotional distress caused by a party must be severe as opposed to constituting mere annoyance, inconvenience or the embarrassment which normally occur in a confrontation of the parties...” Id. at 867. Finally, the plaintiff must show that the defendant engaged in the extreme and outrageous conduct *intending to cause* emotional distress to the plaintiff. Id. at 868.

In this case, the plaintiff’s claim of intentional infliction of emotional distress fails on all three elements.<sup>9</sup> First, in support of these claims, plaintiff claims that the officers broke down her door, pointed weapons at her and made her get onto the ground. While these factual allegations are true, as a matter of law, they are insufficient to establish the “extreme and outrageous conduct” element of this claim. As outlined previously herein, plaintiff’s own expert testified that the officers’ actions were standard procedure and that the warrant was executed appropriately. Exhibit 6 to Homan Affidavit, pp. 52-56.

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<sup>9</sup> Furthermore, plaintiff’s claim of outrage should be dismissed because plaintiff alleges other tort-based causes of action for which she seek a remedy. Rice v. Janovich, 109 Wn.2d 48, 62, 742 P.2d 1230 (1987). Generally, outrage is recognized only where it is a separate and distinct basis of tort liability, without the presence of elements necessary for any other torts, such as assault, battery and the like. Id.; Restatement (Second) of Torts § 46, comment *b* at 72 (1965). For example, the court has recognized damages for mental or emotional distress under the theory of assault or outrage but not both, as to do so would impermissibly allow double recovery. Rice v. Janovich, 109 Wn.2d at 61; Bankhead v. Tacoma, 23 Wn. App. 631, 638, 597 P.2d 920 (1979). Therefore, “outrage should only allow recovery in the absence of other tort remedies.” Rice v. Janovich, 109 Wn.2d at 62. Since plaintiff’s outrage claim is based on the same conduct for which she has asserted other claims, the outrage claims should be dismissed for this reason as well.

Second, there is no evidence that the officers acted intentionally or recklessly. As stated previously, while there is no question that the CI identified the wrong apartment, the officers had every reason – based on the CI’s track record – to consider the CI both credible and reliable. The very best argument plaintiff can make is that the officers were negligent in their investigation, and again, that claim is not cognizable. There is simply no evidence to establish that the officers acted with the requisite intent to support this claim.

Finally, plaintiff cannot offer medical testimony to establish that she sustained the severe emotional distress necessary to support her claim. Because plaintiff failed to properly respond to defendants’ discovery, the trial court entered an order excluding any opinion testimony from plaintiff’s healthcare providers. See Section V.H, *infra*. And plaintiff’s bare allegations of garden-variety emotional distress are wholly insufficient to satisfy each element of her prima facie case. Her failure to adduce competent, admissible evidence in support of each element of her prima facie case mandated dismissal of this claim.

H. **The trial court properly excluded opinion testimony from plaintiff's treating healthcare providers because plaintiff failed to disclose their opinions and failed to comply with an order compelling the disclosure of this discovery.**

During discovery, the City propounded written discovery requests to plaintiff, asking, *inter alia*, for a full disclosure of all expert opinions to be offered by plaintiff at trial, including expert opinions from treating healthcare providers. CP 402; 426. Following a failed attempt at a CR 26(i) conference, the defendants received plaintiff's responses to the discovery requests on November 16, 2012. CP 402-403; CP 435; CP 437-440. In her original answers to defendants' discovery requests, plaintiff did not identify her treating healthcare providers or provide any information about expert testimony to be provided at trial. CP 404. The defendants requested supplementation and received plaintiff's supplemental responses on December 5, 2012. CP 404; 442; 445-447. In her supplemental responses, plaintiff did identify her healthcare providers, but did not answer the interrogatories directed at witnesses with knowledge of her claims or expert opinions. CP 404-405; CP 445. Instead, plaintiff's response indicated that information about witnesses and expert opinions would be identified in accordance with the case schedule. CP 440.

In her disclosure of possible primary witnesses, plaintiff identified three healthcare providers who would be called to testify about plaintiff's injuries, the cause of said injuries and the treatment of said injuries. CP 410; CP 513-519. Plaintiff did not, however, disclose any of the specific opinions to be offered by her healthcare providers on injuries plaintiff allegedly sustained, or the basis for any such opinions. CP 518.

After exhausting all reasonable efforts to obtain the healthcare providers' opinions, the City brought a motion to exclude, or in the alternative, compel disclosure of these opinions. See, generally, CP 402-413. See also CP 380-393. The court order granted the alternative relief sought and ordered plaintiff to disclose the opinions of any experts expected to be offered at trial, including opinions from her treating healthcare providers. CP 29-31. The ordered disclosure was due July 5, 2013. Id.

After the trial court entered its order compelling disclosure of plaintiff's experts' opinions, plaintiff filed a motion for reconsideration, asserting that the trial court's order to compel required plaintiff to obtain copies of her medical records at her own expense and provide the same to the defendants. CP 109-125. Plaintiff's reading of the court's order to compel was in error. The City had already started the compulsory process to obtain the medical records from the healthcare providers, but the

providers had either refused to comply with the subpoena or were trying to charge the City a significant sum to redact the records. CP 408-409; CP 545. The order to compel contained a provision that required plaintiff's healthcare providers to produce the records to the defendant in an unredacted form. CP 30. The order did not, however, require plaintiff to obtain the records, a fact that the City clarified in response to plaintiff's motion for reconsideration. CP 548-553.

On July 5, 2013, plaintiff served a supplemental witness disclosure on defendants. CP 134; 141-145. In her supplemental disclosure, plaintiff failed to provide any specific opinions to be offered by her treating healthcare providers and in fact, provided no additional information about any opinions to be offered by her treating healthcare providers beyond the conclusory statements previously supplied. Compare CP 141-145 to 147 - 153.

In her supplemental disclosure, although packaged a little differently, plaintiff offered no new information or specific opinions. For example, with regard to Dr. Quick, plaintiff's disclosure indicated that Dr. Quick will testify "what injuries [plaintiff] sustained, causation, and whether or not those injuries were consistent with being handcuffed." CP 143-144. The disclosure does not include a diagnosis of a specific condition or injury, the basis for any such diagnosis, or any facts or

opinions to establish that the unidentified conditions or injuries were attributable to defendants' actions. Similarly, with regard to Ms. Forgey, massage therapist, plaintiff's supplemental disclosure simply stated that "Ms. Forgey will describe her treatment of the injuries for which she treated Kathleen Mancini and what the plaintiff described to her regarding the events that made the treatment necessary." CP 144. Again, no specific opinions were disclosed for Ms. Forgey, and no facts for any such opinions are included. All of plaintiff's disclosures with regard to opinions to be offered by her treating healthcare providers were similarly deficient.

Because plaintiff willfully failed to comply with the trial court's order compelling *complete* disclosure of her providers' opinions, the defendants moved for exclusion of any expert testimony from plaintiff's treating healthcare providers. CP 126-132. The trial court granted the City's motion to exclude and made the necessary findings under Burnet v. Sacred Heart Medical Center, 131 Wn.2d 484, 933 P.2d 1036 (1997). In its order, however, the trial court gave plaintiff one final opportunity to meet her obligations under the discovery rules and avoid the exclusion of her treating healthcare providers' opinions. CP 81-83. When it entered its order to exclude on August 2, 2013, the trial court extended the deadline to comply with the motion to compel to August 16, 2013. CP 83. Thus,

the trial court gave plaintiff yet another two weeks to produce her providers' opinions, and yet, plaintiff again failed to do so.

Plaintiff had an obligation under both the King County local rules and under the Civil Rules to produce the opinions to be offered by her providers, and she had multiple opportunities to meet her obligations. Her repeated and willful failure to comply with her obligations constituted discovery abuse, thereby justifying the severe sanction of exclusion.

1. Pursuant to the King County local rules, plaintiff was required to disclose all experts' opinions as part of her primary witness disclosure.

The King County local court rules impose specific disclosure requirements with regards to expert opinions to be offered at trial. Pursuant to LCR 26(k), parties must disclose primary and rebuttal witnesses according to the case management schedule set by the court. With regard to expert witnesses, the disclosure must include “[a] summary of the expert’s opinions and the basis therefore and a brief description of the expert’s qualifications.” LCR 26(k)(3)(C). See also Peters v. Ballard, 58 Wn. App. 921, 927, 795 P.2d 1158 (1990) (“Prior to trial, parties *are required* to disclose the expert witnesses they plan to call, the subject matter on which the experts are expected to testify, the substance of the facts and opinions to which they are testifying, and a summary of the

grounds for their opinions.” (emphasis added), citing CR 26(b)(5)(A)(i) and (ii); KCLR 26(a)-(d))<sup>10</sup>.

Courts interpret “court rules as though they were drafted by the legislature.” State v. George, 160 Wn.2d 727, 735, 158 P.3d 1169 (2007). “As with statutes, [the] court gives effect to the plain language of a court rule, as discerned by reading the rule in its entirety and harmonizing all of its provisions.” Id. See also City of Seattle v. Holifield, 170 Wn.2d 230, 237, 240 P.3d 1162 (2010)(interpretation of statutes and court rules based on the same principles of statutory construction). When interpreting a court rule, the court looks first to the plain language of the rule. City of Seattle v. Holifield, 170 Wn.2d at 237. “If the plain language is subject to one interpretation only, [the court’s] inquiry ends because plain language does not require construction.” Id.

There is no question that under the applicable court rules, opinion testimony from treating healthcare providers constitutes expert testimony. ER 702 provides that “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to...determine a fact in issue, a

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<sup>10</sup> LCR 26(k)(4) also provides as follows: “Any person not disclosed in compliance with this rule may not be called to testify at trial, unless the Court orders otherwise for good cause and subject to such conditions as justice requires.” The Supreme Court has recently emphasized, however, that the local court rules may not be applied in a manner inconsistent with the civil rules and since exclusion under CR 37 requires an analysis of the Burnet factors, the presumption of exclusion contained in LCR 26(k)(4) does not apply. Jones v. City of Seattle, 179 Wn.2d 322, 343-44, 314 P.3d 380 (2013).

witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion[.]” In the instant case, plaintiff claims that the incident with the officers caused her to suffer a bilateral shoulder injury and PTSD. At trial, plaintiff will bear the burden of proving causation and in order to carry her burden, she will have to present opinion testimony from medical experts.

“In general, expert testimony is required when an essential element in the case is best established by an opinion which is beyond the expertise of a layperson.” Harris v. Groth, 99 Wn.2d 438, 449, 663 P.2d 113 (1983). “Medical facts in particular must be proven by expert testimony unless they are ‘observable by [a layperson's] senses and describable without medical training’.” Id. “To remove medical issues from the realm of speculation, the medical testimony must demonstrate that the alleged negligence ‘probably’ or ‘more likely than not’ caused the harmful condition leading to the injury.” Conrad v. Alderwood Manor, 119 Wn. App. 275, 282, 78 P.3d 177 (2003). See also Thiel v. Dept. of Labor & Indus., 56 Wn.2d 259, 263, 352 P.2d 185 (1960) (“When Dr. Borchardt retracted his indispensable testimony: that the exposure to aluminum paint was the most probable cause of the workman's death, and admitted that it was not the most probable cause, he left the claimant's case without any factual foundation.”). Thus, since treating healthcare providers’ opinions

on issues such as causation and “reasonable and necessary” fall within the scope of ER 702, LCR 26(k) requires full disclosure of all such opinions to be offered by such providers, as well as disclosure of all opinions to be offered by retained experts. Accord Fabrique v. Choice Hotels Int’l Inc., 144 Wn. App. 675, 183 P.3d 1118 (2008)(summary judgment in favor of defendant affirmed where plaintiff failed “to come forward with expert medical testimony establishing a causal link between the salmonella-contaminated food and her injuries.”).

The official comments to LCR 26 state that “[t]he rule sets a minimum level of disclosure that will be required in all cases, even if one or more parties have not formally requested such disclosure in written discovery.” In the instant case, plaintiff failed to meet even this minimum level of disclosure required by the rule, despite multiple attempts by the City to obtain this information. CP 400-13; CP 29-31; CP 133-153. Simply saying that providers will offer opinions at trial does not constitute a “summary of the expert’s opinions and the basis therefore” and is not sufficient to satisfy the rule. Thus, plaintiff failed to satisfy her disclosure obligations under LCR 26(k).

2. Plaintiff's failure to answer discovery requests relating to expert opinions, including opinions to be offered by treating healthcare providers, was an abuse of the discovery process.

CR 37(b)(2) authorizes a variety of sanctions for discovery violations, including “refusing to allow the disobedient party to support...designated claims...or prohibiting him from introducing designated matters in evidence[.]” CR 37(b)(2)(B). “When the trial court ‘chooses one of the harsher remedies allowable under CR 37(b),...it must be apparent from the record that the trial court explicitly considered whether a lesser sanction would probably have sufficed,’ and whether it found that the disobedient party’s refusal to obey a discovery order was willful or deliberate and substantially prejudiced the opponent’s ability to prepare for trial.” Burnet v. Sacred Heart Medical Center, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). See also Jones v. City of Seattle, 179 Wn.2d 322, 314 P.3d 380 (2013); Teter v. Deck, 174 Wn.2d 207, 274 P.3d 336 (2012); Blair v. TA-Seattle East No. 176, 171 Wn.2d 342, 254 P.3d 797 (2011) (hereinafter Blair II). In order to exclude testimony as a sanction, the court must find an intentional nondisclosure, a willful violation of a court order, or other unconscionable conduct. Burnet, 131 Wn.2d at 494.

When the court issued its order compelling disclosure of the providers' opinions, the trial court correctly found that plaintiff had an obligation to produce such information in response to the City's discovery requests. "In general, [CR 26] allows for discovery of anything material to the litigation, except for things protected by privilege." In re Firestorm 1991, 129 Wn.2d 130, 136, 916 P.2d 411 (1996). Pursuant to the express terms of CR 26, a party can obtain, through written discovery requests, complete disclosure of all relevant information regarding experts intended to be called as witnesses at trial, their opinions and the basis for said opinions. CR 26(b)(5). Additionally, CR 33(a) requires that all interrogatories be answered "separately and fully in writing." Plaintiff failed to comply with her discovery obligations when she provided the supplemental witness disclosure that failed to disclose the providers' opinions and the basis for said opinions. CP 143-145. Plaintiff's answers to the City's discovery requests were similarly deficient. CP 440; CP 445-447.

Plaintiff had an obligation to speak to her healthcare providers and learn what opinions they would offer under oath and the facts which form the basis for such opinions. See CR 26(g). See also Clipse v. State, 61 Wn. App. 94, 98, 808 P.2d 777 (1991) ("[T]he rule imposes on the attorney a duty to make a "reasonable inquiry" into the factual basis of a

response, request, or objection.”) Thus, plaintiff and her attorney had a duty to investigate and provide a response to the discovery request. Clipse v. State, 61 Wn. App. at 98-99 (attorneys sanctioned pursuant to CR 26(g) for not undertaking a reasonable investigation into experts’ opinions and disclosing said opinions prior to opposing party taking experts’ depositions).

Moreover, plaintiff’s failure to fully comply with the trial court’s order was willful. A “willful” violation means a violation without a reasonable excuse. Gammon v. Clark Equipment Co., 38 Wn. App. 274, 280, 686 P.2d 1102 (1984) (citing Tietjen v. Dep’t. of Labor & Industries, 13 Wn. App. 86, 93, 534 P.2d 151 (1975)). Even an inadvertent error in failing to disclose an expert witness has been deemed willful, justifying exclusion of testimony. Falk v. Keene Corp., 53 Wn. App. 238, 767 P.2d 576, aff’d, 113 Wn.2d 645, 782 P.2d 974 (1989). Thus, the courts have repeatedly held that lack of reasonable excuse for the untimely disclosure justifies an order excluding the witness. See, e.g., Scott v. Grader, 105 Wn. App. 136, 141, 18 P.3d 1150 (2001) (Exclusion of expert witness was appropriate because party offered “no reasonable excuse for waiting until the last minute to obtain an expert witness”). See also Dempere v. Nelson, 76 Wn. App. 403, 406, 886 P.2d 219 (1994) (expert witness excluded when party failed to disclose the witness within discovery period); Allied

Financial Services, Inc. v. Mangum, 72 Wn. App. 164, 168-69, 864 P.2d 1 (1993) (witnesses excluded due to party's failure to submit a witness list as required by pretrial order); Hampson v. Ramer, 47 Wn. App. 806, 737 P.2d 298 (1987) (no reasonable excuse put forth so the noncompliance with discovery may be deemed to be willful). See also Blair II, 171 Wn.2d at 350 n.3. (where party offers an excuse to explain nondisclosure, trial court must consider the excuse in order to find the failure to comply "willful"); Teter, 174 Wn.2d at 219 (ibid)<sup>11</sup>.

Finally, plaintiff's failure to provide complete and timely responses to the City's discovery requests unreasonably prejudiced the City's ability to prepare its defense in this case. Plaintiff asserts that the defense's trial preparation was not prejudiced because the defense had the option of taking the depositions of the plaintiff's medical experts. However, the rules governing discovery of expert opinions were specifically designed to allow a party to elicit the necessary information from an opposing expert "without the expense and inconvenience of depositions." Washington Handbook on Civil Procedure § 39.3 at p. 384-85 (2013 Ed.). In fact, according to the comments to the rules, "it is improper to respond to interrogatories by saying simply 'take the witness's

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<sup>11</sup> In the instant case, plaintiff has not offered any reasonable excuse to explain her failure to comply with the court's order compelling disclosure of her providers' opinions. Instead, at both the trial court and before this court, she simply argues she should not be required to get or disclose such information.

deposition.”” Id. In this case, that is exactly what plaintiff did. Rather than providing substantive answer to the City’s interrogatories concerning expert witnesses, plaintiff attempted to force the City to bear the considerable expense of taking the providers’ depositions. That is precisely situation the rules are designed to preclude.

The trial court made the necessary Burnet findings, in writing, in the order excluding the providers’ testimony. CP 82. The trial court expressly found that the plaintiff failed to comply with the court’s prior order compelling disclosure of the providers’ opinions, that plaintiff’s failure to comply was willful, that plaintiff’s failure prejudiced the defendants in this case and that a sanction less than exclusion would not suffice under the circumstances. Id. In light of the totality of circumstances, the trial court’s findings were supported by substantial evidence and the order to exclude was not an abuse of the trial court’s discretion.

## **VI. CONCLUSION**

The trial court’s orders in this case should be affirmed. To the extent plaintiff is basing any of her causes of action on the allegation that the City was negligent in how the police conducted the narcotics investigation, the claim is one of negligent investigation and it is not cognizable. Further, even if these claims were not within the ambit of

negligent investigation, any claim grounded in negligence still fails, as a matter of law, since plaintiff did not establish the existence of an actionable duty, owed to her as an individual.

With regard to plaintiff's false imprisonment claim, the officers had the implicit authority to detain plaintiff while executing the search warrant and plaintiff failed to show that the warrant was invalid. In fact, plaintiff's own expert conceded that the warrant was based on probable cause and was properly executed. Further, the officers did not exceed the authority conferred by the warrant because they detained plaintiff only for the time necessary to conduct an investigation and determine that plaintiff was not connected to Logstrom or the narcotics they were seeking.

With respect to plaintiff's assault and battery claim, the testimony from plaintiff's expert is dispositive. Plaintiff's own expert testified that the tactics used by the officers to breach the door, enter the apartment and take plaintiff into custody were proper. And during oral argument before the trial court, plaintiff's counsel indicated that plaintiff was not challenging the way in which the warrant was executed. In light of these admissions, plaintiff's appeal of the dismissal of her assault and battery claim makes no sense.

With respect to plaintiff's claims for invasion of privacy (intrusion), defamation and outrage, the trial court correctly dismissed

these claims due to plaintiff's failure to adduce competent, admissible evidence in support of her claims and because the officers' conduct was privileged.

Finally, with respect to the trial court's order excluding opinion testimony from plaintiff's treating healthcare providers, the order was supported by the appropriate findings and was not an abuse of discretion. Despite having multiple opportunities to comply with both the local court rule and discovery obligations, plaintiff repeatedly – and without excuse – failed to disclose the required information. And plaintiff's position on appeal makes it clear that she still does not understand or accept her obligations. Thus, any sanction less than exclusion would not be sufficient to satisfy the purpose of the rules.

For these reasons, the defendants respectfully ask this Court to affirm the trial court's rulings, on all grounds supported by the record.

Dated this 22nd day of August, 2014.

ELIZABETH A. PAULI, City Attorney

By:



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**CERTIFICATE OF SERVICE**

I hereby certify that on this 22nd day of August, 2014, I filed, through my staff, the foregoing with the Clerk of the court for the Court of Appeals, Division I, for the State of Washington via electronic filing.

A copy of the same is being emailed and mailed, via U.S. mail, and/or via ABC Legal Messenger to:

Lori S. Haskell  
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DATED this 22<sup>ND</sup> day of August, 2014.



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JEAN P. HOMAN, WSBA #27084

## APPENDIX A

## MANCINI CLERK'S PAPERS

<u>Event/Documents</u>	<u>CP Nos.</u>
1. <b>Complaint</b>	1-9
2. <b>12(c)</b> - Order Granting	377-379
3. <b>Exclude/Compel</b>	
- City's Motion	380-393
- Homan Affidavit	400-536
- Plaintiff's Opposition	19-28/96-105
- Haskell Declaration	10-18/87-95
- City's Reply	537-542
- Supplemental Homan Affidavit	543-547
- Order Granting Motion to Compel	29-31/106-108
4. <b>Reconsideration</b>	
- Plaintiff's Motion	32-35/109-112
- Haskell Declaration	113-125
- Homan Affidavit in Response	548-553
- Order Denying	79-80/195-196
5. <b>Exclude</b>	
- City's Motion to Exclude THCP Testimony	126-132
- Homan Affidavit	133-153
- Plaintiff's Response	38-46/154-162
- Haskell Declaration	47-78/163-194
- Reply in Support	554-559
- Order Granting	81-83/197-199

Event/Document

CP Nos.

6. **Summary Judgment**

- City's Motion 710-733
- Homan Affidavit 560-675
- Smith Affidavit 676-693
- Martin Declaration 694-709
  
- Plaintiff's Opposition 203-243
- Stamper Declaration 244-262
- Mancini Declaration 263-275
- Haskell Declaration 276-374
  
- Reply in Support 737-742
- Supplemental Homan Affidavit 743-762
  
- Order Granting 84-86/200-202

7. Stipulation Re: Appellant's Summary Judgment Materials 375-376

MISSING/UNRELATED NUMBERS:

- Declaration of Lori S. Haskell Re: Hearing Date 36-37