HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SHIRLEY SCHEIER,

Plaintiff,

vs.

CITY OF SNOHOMISH, a municipal corporation, and DARLENE GIBSON, CHUCK MACKLIN, and ALEXANDER ROSS, all individuals,

Defendants.

Case No.: CV 07-01925 JCC

PLAINTIFF'S OPPOSITION TO THE CITY OF SNOHOMISH'S MOTION FOR SUMMARY JUDGMENT ON MUNICIPAL LIABILITY

NOTING DATE: **September 26, 2008**

I. INTRODUCTION

The bulk of the City's Motion (Dkt. # 32) argues that the conduct of the officers was proper, and rehashes the facts and argument underlying Defendants' initial Motion for Summary Judgment based on qualified immunity (Dkt. # 22). The City's Motion is rife with the same types of factual misstatements as Defendants' original Motion for Summary Judgment. For example, the City claims that Ms. Scheier (1) trespassed, (2) ignored signage, and (3) was only detained for twenty six minutes. These statements are unsupported by any competent testimony, contrary to the documentary evidence, and are inaccurate even under the most liberal standards of accuracy.

Ms. Scheier asserts two bases for municipal liability: (1) ratification and (2) the existence of a municipal policy which caused the constitutional harm. Following the incident in question, Ms.

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON
705 Second Avenue, Suite 300
Seattle, Washington 98104-1799 / (206) 624-2184

Scheier (through her United States Senator) brought the incident to the attention of the City. In response, the City expressly ratified the conduct of the officers in a detailed letter. This constitutes ratification sufficient to create municipal liability. In addition, there is no dispute that the City had numerous policies in place regarding handcuffing and treatment of suspects, and these policies caused (or at least contributed) to the escalation of Ms. Scheier's detention and arrest. The City fails to satisfy its burden of showing that there are no material disputes of fact with respect to its liability based on ratification or the existence of a policy. The City also moves for summary judgment on Ms. Scheier's state law claims. The existence of factual disputes as to whether the officers were justified in detaining and arresting Ms. Scheier similarly preclude the grant of summary judgment on these claims. Ms. Scheier respectfully requests that the Court deny the City's Motion.

II. DISCUSSION

A. The City's Motion Contains the Same Misstatements as Defendants' Initial Motion

Ms. Scheier has set forth in her Opposition to Defendants' initial Motion for Summary Judgment (Dkt. # 24) the reasons why core factual disputes preclude summary judgment against the defendant-officers, as well as the factual failings underlying Defendants' contentions. Ms. Scheier will not reiterate those factual disputes in detail here. However, three factual contentions made by the City are worth highlighting. (Ms. Scheier incorporates by reference the declarations submitted and the factual disputes and legal argument argued in her Opposition (Dkt. # 24 (Plaintiff's Opposition to Defendants' Motion for Summary Judgment); Dkt. # 25 (Declaration of Shirley Scheier); and Dkt. # 26 (First[1] Declaration of Venkat Balasubramani) to Defendants' original Motion).)

1. The City incorrectly claims Ms. Scheier trespassed.

The City repeatedly argues that Ms. Scheier "trespassed." (Motion, p. 5: 15-21 ("Plaintiff

[1] For purposes of clarity, this Motion refers to the "First," "Second," (and where applicable the "Third") Declarations of Richard Jolley (Dkt. # 20 (First); Dkt. # 30 (Second); and Dkt. # 33 (Third)), Commander Havener (Dkt. # 21 (First); and Dkt. # 28 (Second)), and Venkat Balasubramani (Dkt. # 26 (First); and Dkt. # 37 (Second)).

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON
705 Second Avenue, Suite 300
Seattle, Washington 98104-1799 / (206) 624-2184

Was a Trespasser").) This is contrary to direct testimony from Deputy Chief Macklin that the officers lacked probable cause to arrest Ms. Scheier for trespass. (Macklin Dep. I, p. 77:10-14 (First Balasubramani Decl., **Ex. B**).) This is also contrary to the CAD report (First Jolley Decl., **Ex. C**) and BPA emails (First Balasubramani Decl., **Ex. G**) which indicate that Ms. Scheier was taking photographs from *outside the gate*. Indeed, in Commander Havener's deposition, not only did he testify that he was not sure as to whether Ms. Scheier trespassed, he indicated that he was not sure where the line was between portions of the publicly accessible BPA facility which the public may drive or walk onto without trespassing and those portions which were freely publicly accessible. (*See* Second Declaration of Venkat Balasubramani, **Ex. A** ("Havener Dep."), p. 23: 4-7 ("That would be a . . . question better answered by [BPA]."); p. 23: 20-25 – 24: 1-7.)

2. The City claims Ms. Scheier ignored signage without any competent evidence.

The City's Motion also argues that Ms. Scheier "had to walk past and disregard multiple signs." (Motion, p. 2: 13-18; p. 5: 16-21 ("[Ms. Scheier] walked and/or drove past multiple signs which indicated no trespassing and no unauthorized personnel or vehicles.").) As support for this proposition the City cites to its earlier summary judgment filing which contained photographs purporting to depict the facility at the time of the incident. The sole authenticating and foundation testimony for the photographs was the Second Declaration of Commander Havener (See Dkt. 28, ¶ 2), and this declaration was filed in response to an evidentiary objection raised by Ms. Scheier. (*See* Plaintiff's Opposition to Defendants' Motion for Summary Judgment (Dkt. # 24), pp. 22-23 (Section G).) However, Commander Havener in his deposition admitted that not only did he not take the photographs (photos 1-6 contained in the First Jolley Declaration as Exhibit E (and labeled as pages 22-27)) in question, or review them prior to signing his Declaration, he had no first-hand knowledge of whether they accurately depicted the facility at the time of the incident. (*See* Havener Dep., p. 26: 4-24; p. 27: 23-24; p. 63: 14-24; p. 65: 20-25 – p. 66:1-2; p. 69: 6-15; p. 70: 17-22.) Commander Havener also testified that he did not know specifically where the "no trespass" signs were (which were depicted in photographs 1-6) and could not say with certainty that Ms. Scheier necessarily passed the no trespassing signs in order to reach the intercom. (Havener Dep, p. 32: 12-

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON
705 Second Avenue, Suite 300
Seattle, Washington 98104-1799 / (206) 624-2184

13; p. 35: 16-17; p. 39: 3-5; p. 42: 11-14; p. 44.) The City's claim that Ms. Scheier "had to walk past and disregard multiple signs," is thus not supported by any competent evidence.[2]

3. The City's claims regarding the duration of Ms. Scheier's detention are misleading.

The City's Motion repeatedly argues that Ms. Scheier was detained only for twenty-six minutes. (City's Motion, p. 1: 17-20.) This is similarly inaccurate. Ms. Scheier was *in handcuffs* in the back of the police car for at least twenty-six minutes. The CAD report and Deputy Chief Macklin's follow up memorandum confirm that the incident lasted at least forty five minutes, if not much longer. (CAD Report (First Jolley Decl., **Ex. C**); Macklin Memo (First Jolley Decl., **Ex. G**).) The City is engaging in rhetorical sleight of hand that undermines its credibility when it states that Ms. Scheier was only "detained for twenty-six minutes." Obviously, Ms. Scheier was not free to leave from the beginning of the encounter, and there is no dispute regarding this.

B. Ratification – The City is Liable Because It Ratified the Conduct of the Officers

Following the incident, Ms. Scheier lodged a complaint with her senator (among other people). In response, the City reviewed the incident and the conduct of the officers, and responded to Senator Cantwell in a three page letter (the "***Snohomish Letter***") which recounted the City's perspective of the facts underlying the incident. The Snohomish Letter recited the version of the facts offered by the officers and concluded that the acts of the officers were appropriate:

> Our review showed that no physical forced was used upon Ms. Scheier. Our officers, several of whom were on scene including our Deputy Chief of Police, were professional and courteous to Ms. Scheier during the contact. It is our belief that the suspicious facts as we have articulated them clearly justified the brief detention and actions taken by our officers when considered in context.

(*See* First Balasubramani Decl., **Ex. D**.) Both the City Council and former Chief Wiborg were copied on the letter. The City argues that "there is no evidence to suggest that the City made a 'conscious affirmative choice' to ratify unconstitutional conduct by the officers." (Motion, p. 13: 7-

[2] The photographs on which Defendants rely are simply not supported by the sort of foundation evidence (among other things) regarding the spatial and temporal context in which they were taken sufficient to support their admissibility. In Section G, *infra*, Ms. Scheier renews her objections to Defendants' use of the photographs and provides citations to Commander Havener's deposition transcript which support Ms. Scheier's objections to those photographs.

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON
705 Second Avenue, Suite 300
Seattle, Washington 98104-1799 / (206) 624-2184

9.) Assuming that – as Ms. Scheier argues – the conduct of the officers violated Plaintiff's constitutional rights, the Snohomish Letter constituted exactly that: a "conscious, affirmative" choice to ratify the conduct of the officers.

It is difficult to see what more a plaintiff is required to prove to show ratification by a municipality. The City argues that the Ninth Circuit "appears to require more than a failure to reprimand to establish ratification leading to liability." (Motion, p. 13: 19-21 (also discussing caselaw regarding "failure to discipline officers").) This is a red herring. Ms. Scheier is not arguing municipal liability based on a failure to reprimand or a failure to discipline. She is arguing that the City officially ratified the conduct of the officers. The focus of Ms. Scheier's ratification claim is on whether the City officials with policymaking authority expressly approved of what the officers did. There is ample precedent in the Ninth Circuit to support Ms. Scheier's theory of ratification liability against the City.

1. Ratification occurs when the final policymaker expressly approves officer conduct.

A municipality may be held liable for a constitutional violation under 42 U.S.C. § 1983 when the final policymaker ratifies the conduct of the officers. St. Louis v. Praprotnik, 485 U.S. 112, 121-22 (1988). The United States Supreme Court first recognized in Praprotnik that "if . . . authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final." Praprotnik, 485 U.S. at 127. Following Praprotnik, Ninth Circuit cases have found municipal liability where the plaintiff brings the constitutional violation to the attention of the municipality and the municipality expressly affirms the conduct of the officers. *See*, *e.g.*, Larez v. City of Los Angeles, 946 F.2d 630, 633 (9th Cir. 1991); Fuller v. City of Oakland, 47 F.3d 1522 (9th Cir. 1995). Ratification "is a question for the jury." Christie v. Iopa, 176 F.3d 1231, 1238-39 (9th Cir. 1999).

In Larez, plaintiffs filed a complaint with the Los Angeles Police Department ("***LAPD***") alleging excessive force. Larez, 946 F.2d 630, 633 (9th Cir. 1991). Several LAPD officers had entered plaintiffs' home in the middle of the night, and physically assaulted several of the family members. Id. at 633-35. The LAPD Internal Affairs department assigned a detective in the same

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON
705 Second Avenue, Suite 300
Seattle, Washington 98104-1799 / (206) 624-2184

division as the accused officers to investigate the complaint, and the chief of police ultimately notified the plaintiffs that their complaints could not be sustained. Id. at 635. The Ninth Circuit found that the chief was liable in both his individual and official capacities because he had ratified the unconstitutional actions of the officers and the inadequate investigation into the complaint. Id. at 646-47. The Ninth Circuit relied on the fact that the chief of police signed on to the letter of the investigator. In Fuller v. City of Oakland, the Ninth Circuit found municipal liability on similar grounds. Fuller v. City of Oakland, 47 F.3d 1522, 1530 (9th Cir. 1995). A police officer filed a section 1983 action against the City of Oakland alleging the denial of equal protection in the course of the internal investigation of her sexual harassment complaint. Id. at 1534. The City was found liable because the police chief approved the "grossly inadequate" investigation and the underlying conduct. Id. at 1535. Again, the police chief's formal stamp of approval was central to the Ninth Circuit's decision. In contrast, where the official policymaker did not take affirmative steps to ratify the unconstitutional conduct, the Ninth Circuit has refused to find liability, notwithstanding the policymaker's knowledge of the conduct. Christie v. Iopa, 176 F.3d 1231, 1239 (9th Cir. 1999) ("policymaker's knowledge of an unconstitutional act does not, by itself, constitute ratification"). The cases generally distinguish between liability based on the policymaker's failure to overrule, and liability based on the policymaker's express approval. Id. Where, as here, the municipality takes some affirmative action or makes an express statement ratifying the conduct, municipal liability may attach.

2. The Snohomish Letter ratified the unconstitutional acts of the officers.

a. The City Manager is vested with policymaking authority on police matters

Whether an official has final policymaking authority is a matter of state law. *See* Gillette v. Delmore, 979 F.2d 1342, 1346-47 (9th Cir. 1992). The position of City Manager is one with official policymaking authority for the City. According to the Snohomish Municipal Code, the City Manager is vested with authority to establish policy for all City departments, and is in fact made expressly accountable for them. (*See* Snohomish Municipal Code, § 2.38.030 (City Manager, Scope of Authority) (available at: <http://www.ci.snohomish.wa.us/MunicipalCode.htm>) (Second

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON
705 Second Avenue, Suite 300
Seattle, Washington 98104-1799 / (206) 624-2184

Balasubramani Decl., **Ex. B**).) The City Manager is "responsible for the general administration and supervision of City government." The City Manager oversees all City departments, and is expressly responsible for "accountability of their performance." Id. Thus, City Manager Bauman is the City official responsible for overseeing the City Police Department, and therefore is an official with policymaking authority with respect to the underlying conduct of the officers. The City does not make any arguments to the contrary. Indeed, the City admitted in response to Requests for Admissions that the references to "we" in the Snohomish Letter were references to the City of Snohomish. (*See* First Balasubramani Decl., **Ex. E** (Requests for Admissions and Responses).)

b. The Snohomish Letter amounts to ratification under Larez and Fuller

Like the city officials in Larez and Fuller, Manager Bauman was specifically aware through Senator Cantwell's office of Ms. Scheier's concern that Ms. Scheier was unreasonably searched and detained by the City police. In a letter dated October 25, 2005, Senator Cantwell asked for City Mayor Liz Loomis to give "prompt attention," to the matter; Scheier's e-mail to the Senator was attached, and begins with an explicit statement that she was "unreasonably detained," by the City police. (Second Balasubramani Decl., **Ex. C** (Senator Cantwell's Letter to the City).) City Manager Bauman's December 8, 2005, letter to Senator Cantwell was in direct response to the Senator's letter. Mr. Bauman was therefore aware of potential constitutional violations and was the official responsible for investigating the incident. Mr. Bauman wrote that he had "conducted an informal review of the incident." The court could infer a policy of condoning unreasonable searches and seizures from City Manager Bauman's "failure to take any remedial actions after the violations," as it inferred from the police chief's similar failure to discipline in Larez. However, as in Larez and Fuller, Bauman went even further. He specifically approved of the search and seizure and of the underlying decision that Scheier was "suspicious." Accordingly, the Snohomish Letter constitutes "affirmative conduct," that officially "approve[d] a subordinate's decision and the basis for it." Gillette, 979 F.2d at 1348; Praprotnik, 485 U.S. at 127. Because Mr. Bauman is a City official with policymaking authority, such ratification is attributable to the City and forms the basis for municipal liability. Id.; *see also* Trujillo v. City of Ontario, 428 F. Supp. 2d 1094, 1111-1112

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON
705 Second Avenue, Suite 300
Seattle, Washington 98104-1799 / (206) 624-2184

(C.D. Cal. 2006) (denying summary judgment on the basis of municipal defendant's failure to show absence of material fact "[that decisionmaker] authorized or otherwise ratified the unconstitutional search").)

C. Policy Liability: City Policies Were a Moving Force Behind the Officers' Conduct

In addition to ratification, Ms. Scheier argues that the City should be held liable due to its policies which caused the harm. In arguing that it is entitled to summary judgment, the City claims that Ms. Scheier "was removed from her vehicle and handcuffed, not because of any specific City policy, but due to the totality of the circumstances . . . ." (Motion, p. 9: 14-17.)

Courts recognize that a policy which authorizes the use of force (or another enforcement method) may support municipal liability where the policy authorizes "force that might be constitutional in some cases, but . . . excessive in many others." Szabla v. City of Brooklyn Park, 486 F.3d 385, 400 (8th Cir. 2007). The Sixth Circuit held in one case that a policy requiring police to handcuff all persons arrested could support municipal liability where police put cuffs that were too small on a non-violent detainee and thereby injured him. Kostrzewa v. City of Troy, 247 F.3d 633, 645 (6th Cir. 2001).

The City had in place at least three different policies that resulted in the unlawful escalation of Ms. Scheier's initial investigatory detention by the police officers.

Policy	Source/Citation
The City's policy that everyone in the back of a police car should remain handcuffed.	"[T]he current chief [had] a policy in effect that anybody in the back of a patrol car should be handcuffed." (*See* Gibson Dep. p. 23: 16-18 (First Balasubramani Decl., **Ex. C**).) "We handcuff and search everyone that we place in our patrol cars by policy and procedure." (Macklin Dep. II, p. 16: 19-21 (First Balasubramani Decl., **Ex. B**).)
The City's policy to not search vehicles with individuals inside them.	"I know it was standard operating procedure that we did not search the insides of vehicles with individuals inside of them." (Macklin Dep. I, p. 118: 22-24 (First Balasubramani Decl., **Ex. B**).)
The City's policy to handcuff individuals	"Chief Wiborg was at the time teaching a technique

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON
705 Second Avenue, Suite 300
Seattle, Washington 98104-1799 / (206) 624-2184

prior to searching them.	wherein prior to searching an individual you handcuff them." (Macklin Dep. II, p. 37: 13-14.)

The City argues that "the decision to remove Plaintiff from the car and handcuff her was based on the circumstances confronting the officers rather than a reflective execution of City policy." (Motion, p. 10: 18-20.) The City's argument that the decision to remove Ms. Scheier from the car and handcuff her was not based on the City's policies is contrary to the testimony of the officers that they were following City policy in removing Ms. Scheier and handcuffing her. (Gibson Dep., p. 23: 16-18; Macklin Dep. I, p. 118: 18-22; Macklin Dep. II, p. 16: 19-21; p. 30: 8-17.) At a minimum, there exists a factual dispute as to whether the City's policies caused the constitutional injury in question.

A second problem with the City's argument is that it cannot cite to any other legally cognizable reasons for why the officers escalated Ms. Scheier's detention (*i.e.*, removed Ms. Scheier from her vehicle, handcuffed her, and kept her in the back of the police car). The officers testified that (1) Ms. Scheier did not pose an immediate threat or a direct threat (Macklin Dep. II, p. 24: 12), (2) Ms. Scheier did not possess any weapons and did not have any weapons in her car (Macklin Dep. I, p. 122: 20-23), (3) Ms. Scheier made no efforts to escape (Macklin Dep. II, p. 26: 15-24.), and (4) Ms. Scheier complied with all commands of the officers (Gibson Incident Report (First Jolley Decl., **Ex. D**)). Thus, none of the circumstances which may warrant an escalation of a detention and the use of handcuffs to restrain a suspect exist here according to the officers' own testimony. Defendants' expert witness (Thomas Ovens) similarly agreed that Ms. Scheier fell on the compliant side of the continuum, and "did not constitute an immediate threat". (Ovens Dep., p. 54: 23-25; p. 58: 24-25 – p. 59: 1-8 (Second Balasubramani Decl., **Ex. D**).) Sergeant Ovens could not identify any extenuating circumstances which would justify removing Ms. Scheier from her car, handcuffing her and placing her in the police car, particularly since she and her vehicle had been searched and no weapons were found. (Ovens Dep., p. 64-65.)

D. Summary Judgment is Inappropriate on Plaintiff's False Arrest Claim

In addition to claims under section 1983, Ms. Scheier brought state law claims centered

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON
705 Second Avenue, Suite 300
Seattle, Washington 98104-1799 / (206) 624-2184

around her false arrest. Ms. Scheier's state law claims all hinge on the legality of her arrest and detention under state law.

Under Washington law, a person commits false arrest when he or she unlawfully restrains or imprisons (with actual or ostensible legal authority) another person. Bender v. City of Seattle, 99 Wash. 2d 582, 591 (1983). False imprisonment is the unjustified intentional confinement of another person. Id. ("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."). Whether Ms. Scheier's arrest was lawful under state law turns on whether Ms. Scheier was arrested and whether the officers had probable cause. Turngren v. King County, 705 P.2d 258 (Wash. 1985) (outlining elements of false arrest cause of action under Washington law); Bender v. Seattle, 664 P.2d 492 (Wash. 1985) (same).

1. The officers lacked probable cause under Washington law.

The question of whether a police officer had probable cause is generally one of fact. McDaniel v. City of Seattle, 65 Wash. App. 360, 368 (1992), *review denied*, 120 Wash. 2d 1020, 1024 (1993). Washington courts have held that "unless the evidence conclusively and without contradiction establishes the lawfulness of the arrest, it is a question of fact for the jury to determine whether an arresting officer acted with probable cause." Daniel v. State ex rel. Washington State Patrol, 36 Wash.App. 59, 62 (1983). The Washington Supreme Court has long recognized that "[t]he Washington constitution affords greater privacy protection than the Fourth Amendment." State v. Duncan, 146 Wn.2d 166, 177 (Wash. 2002); State v. Grande, 187 P.3d 248 (Wash. 2008) ("article I, section 7 often provides greater protection in some instances for individual privacy than the Fourth Amendment"). Under Washington law, outside of certain narrow exceptions, an arrest can only be made pursuant to a warrant. *See generally* State v. Walker, 157 Wn.2d 307, 317 (2006); RCW § 10.31.100 (requiring that a police officer have probable cause to believe that a person has committed or is committing a felony before arresting without a warrant).

The City has yet to identify what crime Ms. Scheier was thought to have committed. Accordingly, Ms. Scheier's arrest was prima facie invalid under Washington law. In a footnote, the

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON
705 Second Avenue, Suite 300
Seattle, Washington 98104-1799 / (206) 624-2184

City argues that Ms. Scheier's "trespassing at the BPA site . . . provided actual probable cause to arrest her for second degree trespass." (Motion, p, 17, fn. 2.) First, the City misstates that Ms. Scheier trespassed. The only available evidence indicates she did not. Neither the CAD report (*see* Jolley Decl., **Ex. C**), nor any of the reports of the officers (Gibson Incident Report (First Jolley Decl., **Ex. D**)**,** Macklin Incident Report (First Jolley Decl., **Ex. F**), and Macklin Memorandum (First Jolley Decl., **Ex. G**)), nor any of the contemporaneous accounts from BPA personnel (First Balasubramani Decl., **Ex. G**) mention *anything* about signage or trespass. In fact, the CAD report describes the BPA call as reporting Ms. Scheier as "outside [the] secured gate." (CAD Report (First Jolley Decl., **Ex. C**).) Second, contrary to the City's contentions, Deputy Chief Macklin testified that the officers had no information that Ms. Scheier committed any trespass:

> Q. nobody's told you at this point, hey somebody's committed trespass?
> A. No. I don't have probable cause for trespass, criminal trespass arrest, no.

(Macklin Dep. I, p. 77:10-14.).) Deputy Chief Macklin also testified that "anything [on the BPA substation] that's unfenced is accessible." (Macklin Dep. II, p. 66: 12-14.) The officers thus did not have a valid basis under state law to arrest Ms. Scheier.

2. Ms. Scheier was undeniably arrested under Washington law.

The City also argues that Ms. Scheier was not actually arrested under Washington law. This is also incorrect. Whether a person is under custodial arrest depends on whether a reasonable person would believe herself to be free to leave under similar circumstances. State v. Rivard, 929 P.2d 413, 419 (Wash. 1997). Typical signs of custodial arrest include handcuffing, being asked not to leave, and placement in a patrol vehicle. State v. Radka, 83 P.3d 1038, 1041 (Wash. App. Div. 3 2004); Rivard, 929 P.2d at 419. Here, a wealth of evidence indicates that Ms. Scheier was not free to leave. The reports of the officers uses the word "detained" repeatedly. Additionally, the officers used handcuffs to place Ms. Scheier in the back of Officer Gibson's police vehicle. Finally, the officers themselves testified that Ms. Scheier was not free to leave. (*See* Macklin Dep. I, p. 113: 20-22 ("She wasn't free to leave.").) The City's argument that Ms. Scheier was not arrested is contrary to the evidence. At best, the evidence indicates a factual dispute as to whether Ms. Scheier

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON
705 Second Avenue, Suite 300
Seattle, Washington 98104-1799 / (206) 624-2184

harbored a reasonable belief that she was free to leave or whether she was detained.

E. Summary Judgment is Inappropriate on Plaintiff's Remaining State Law Claims

In addition to claims under section 1983, Ms. Scheier brought state law claims for negligence and invasion of privacy.

1. Ms. Scheier can maintain a claim for negligence under Washington law.

The City argues that "law enforcement activities are not reachable in negligence." (Motion, p. 14: 10-12.) The City also argues that "the public duty doctrine precludes police negligence." Id.

The City's argument that law enforcement activities are not reachable in negligence is contrary to Washington law. The Washington Supreme Court has held that "municipalities are generally held to the same negligence standards as private parties." Keller v. City of Spokane, 146 Wn.2d 237, 242-43 (2002). This duty applies to law enforcement officers as well, who can be held liable in negligence for breaching the general standard of care during the performance of their official duties. Bailey v. Town of Forks, 108 Wn. 2d 262, 265 (1987) ("discretionary decisions by police officers in the field . . . are not 'immune' from liability"); Mason v. Bitton, 85 Wn. 2d 321, 324 (1975) (issues of fact as to whether police officers who joined in high speed chase breached statutory duty of care). The City's arguments that the public duty doctrine bars Ms. Scheier's claims are similarly flawed. The public duty doctrine does not apply in cases such as this, where plaintiff alleges that defendant police officers acted negligently, not that they failed to act. *See* Logan v. Weatherly, No. CV-04-214-FVS, 2006 WL 1582379 at *3-4 (discussing distinction laid out in Coffel v. Clallam County, 47 Wn. App. 397, 403-04 (1987)). As a matter of common sense, the police officers, in detaining and searching Ms. Scheier, did not owe a duty to the entire populace of Washington to conduct the search reasonably – they merely owed a duty to Ms. Scheier. *See* Garnett v. City of Bellevue, 59 Wn. App. 281, 288 (1990) (holding that public duty doctrine does not apply where police allegedly verbally abused plaintiff in public).

2. Ms. Scheier can maintain a claim for invasion of privacy under Washington law.

The tort of invasion of privacy in Washington can consists of either disclosure of private facts (which is not alleged here) or intrusion. Invasion of privacy by intrusion "consists of a

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON
705 Second Avenue, Suite 300
Seattle, Washington 98104-1799 / (206) 624-2184

deliberate intrusion, physical or otherwise, into a person's solitude, seclusion, or private affairs." Fisher v. Dep't of Health, 125 Wn. App. 869, 879 (Wash. Ct. App. 2005). While intent is an element of the tort when the actor is a private entity, "[w]hen the intruder is the government, the intrusion is a violation of article I, section 7 of our constitution . . . [i]ntent is not a factor." Id.

The key question is whether Ms. Scheier was disturbed in her "private affairs or effects" without authority of law. The City argues that if the officers' actions in this case do not constitute an unreasonable intrusion, and if they do, then "every motorist stopped by the police would otherwise have a claim for invasion of privacy." (Motion, p. 15: 13-18.) But this ignores that Ms. Scheier's encounter with the officers was not akin to the encounter of "every motorist." Ms. Scheier was searched and handcuffed and placed in the back of a patrol car. Her car was searched. The police took photographs of her map and inspected her camera. The officers also extensively questioned her. (Gibson Incident Report (First Jolley Decl., **Ex. D**), Macklin Incident Report (First Jolley Decl., **Ex. F**).) The evidence indicates that contrary to the City's arguments, Ms. Scheier's encounter with the officers was far from typical. She suffered intrusion that went beyond a typical traffic stop, and there exists a factual dispute as to whether the intrusions were justified. Accordingly, summary judgment is inappropriate on Ms. Scheier's invasion of privacy claim.

F. The City is Not Entitled to Qualified immunity on Plaintiff's State Law Claims

The City finally argues that it is entitled to qualified immunity. The doctrine of qualified immunity is applied differently in the federal and state contexts. McKinney v. Tukwila, 103 Wn. App. 391, 407 (Wash. Ct. App. 2000) ("State law qualified immunity rests on a different analysis than does qualified immunity under section 1983."). State law qualified immunity does not look to whether a right was "clearly established". Qualified immunity against a civil claim arising out of an arrest is limited to the following situations: (1) "where the peace officer reasonably believed the arrested party committed a felony"; (2) "where the arresting officer had reasonable cause to believe the [misdemeanor] was being committed in his presence and he acted in good faith on that belief"; or (3) "where the statute relied upon for the arrest was subsequently declared unconstitutional." Staats v. Brown, 139 Wn.2d 757, 778 (Wash. 2000). Here, the City does not identify what statute

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON
705 Second Avenue, Suite 300
Seattle, Washington 98104-1799 / (206) 624-2184

the officers relied on when arresting Scheier. (The City's citation to the statute authorizing the officers to generally enforce criminal laws is insufficient, since the City has not pointed to any law Ms. Scheier is thought to have violated.) The City similarly does not identify what felony or misdemeanor the officers thought Ms. Scheier committed. The officers similarly did not point to any such statute or crime in depositions. Accordingly, the City is not entitled to qualified immunity for the actions of the officers.

G. The Court Should Strike the Photographs Attached to the City's Original Motion

In its original summary judgment motion, Defendants relied on photographs which purported to depict the scene at the BPA Facility at the time of the incident. (See First Jolley Decl., **Ex. E**.) The City relies on the same photographs in this Motion. Ms. Scheier objected to Defendants' use of these photographs in her opposition to Defendants' original Motion for Summary Judgment. In response, Defendants offered the declaration of Commander Fred Havener, who testified that "the photographs" were a "fair and accurate depiction of the [facility] at the time of the incident." (*See* Second Havener Decl., ¶ 2.) Since the date Commander Havener submitted his declaration, Ms. Scheier has had an opportunity to depose Commander Havener.

Commander Havener's deposition testimony revealed the following:

Commander Havener had not reviewed photos 1-6 prior to executing the Declaration.	(Havener Dep., p. 26: 4-24 ("I actually don't recall seeing this picture [photo 3] before"); p. 65: 22-25 – p. 66: 1-2 ("This is the first I've seen them [photos 1-6]"); p. 69: 6-16 ("I don't believe I actually reviewed these right here [referring to photos 1-6]").)
Commander Havener did not take the photographs in question.	(Havener Dep., p. 27: 23-24; p. 28: 13-25.)
Commander Havener could not independently verify that the photos (and in particular the no trespass signs) were placed at the facility in the manner depicted in the photographs on the date of the incident.	(Havener Dep., p. 63: 14-24; pp. 64-65; p. 70: 17-22 ("**Q:** So you're relying on third-party information to come to the conclusion that . . . photo 1 is a depiction of the facility as it existed at the time of the incident?; **A:** . . . yes"); p. 71: 10-20; p. 72: 1-10.)
Commander Havener had no idea specifically where the signs were (or are) at the facility.	(Havener Dep., p. 21: 5-9; p. 32: 12-13 ("**Q:** And do you know where [the particular signs are]. . .; **A:** I do not"); p. 35: 16-17 ("**Q:** And how many signs would you say there are?; **A:** I don't . . . know"); p. 39: 3-5; p. 42: 11-14 ("Q: And they're driving southeast and they make a right and . .

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON
705 Second Avenue, Suite 300
Seattle, Washington 98104-1799 / (206) 624-2184

	. enter the facility through that route, where would be the first sign they would encounter?; **A:** As I sit here today, I couldn't tell you. I don't know . . . .").)
Commander Havener undertook no steps to verify whether the photographs had been altered or whether the photographs depicted the facility as it existed on the date of the incident in question.	(Havener Dep., pp. 64-65.)

The photographs are classic hearsay, and inadmissible because Commander Havener's testimony fails to provide even the most basic spatial and geographic context for the pictures. Commander Havener's testimony shows that he is unable to satisfy even the most basic authentication requirements for the photographs and is unable to attest to their accuracy. Accordingly, Ms. Scheier renews her objections to the photographs, and objects to the City's use of the photographs. The photographs should be stricken from the record.

III. CONCLUSION

The City is not entitled to summary judgment. The City took affirmative acts to ratify the violations of the officers when City Manager Bauman wrote to Senator Cantwell that the officers' actions were "justified…when considered in their context." The Snohomish Letter constitutes approval of the officers' actions by an "authorized policymaker." Praprotnik, 485 U.S. at 127. There are also disputed issues of material fact as to whether the policies of the city were the moving force behind the unconstitutional actions of the officers. The officers testified that they escalated the detention and removed Ms. Scheier from her vehicle and placed her in the back of Officer Gibson's vehicle (while handcuffed) due to the City's policies. Finally, the City is not entitled to judgment on Ms. Scheier's state law claims. The City's arguments that Washington law does not provide for these causes of action or that the officers are entitled to qualified immunity are incorrect. Ms. Scheier's state law claims hinge on the validity of her arrest and detention. The existence of material disputes of fact preclude summary judgment on these claims.

For the reasons set forth above, Ms. Scheier respectfully requests that the Court deny the City's Motion for Summary Judgment.

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON
705 Second Avenue, Suite 300
Seattle, Washington 98104-1799 / (206) 624-2184

Respectfully submitted, and dated this 22nd day of September, 2008.

For Plaintiff

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION

Sarah Dunne, WSBA # 34869
705 Second Avenue, Suite 300
Seattle, Washington 98104-1799
Tel: (206) 624-2184
Fax: (206) 624-2190
Email: dunne@aclu-wa.org

BALASUBRAMANI LAW

/s/ Venkat Balasubramani

Venkat Balasubramani, WSBA #28269
8426 40th Ave SW
Seattle, WA 98136
Tel: (206) 529-4827
Fax: (206) 260-3966
Email: venkat@balasubramani.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 22nd day of September, 2008, I caused the foregoing **(1) PLAINTIFF'S OPPOSITION TO THE CITY OF SNOHOMISH'S MOTION FOR SUMMARY JUDGMENT ON MUNICIPAL LIABILITY**; and **(2) THE SECOND DECLARATION OF VENKAT BALASUBRAMANI**, to be filed via the Court's cm/ecf system which will provide notice to counsel for Defendants:

Richard Jolley
Keating, Bucklin & McCormack, Inc., P.S.
800 Fifth Avenue, Suite 4141
Seattle, WA 98104
Tel: 206.623.8861
Fax: 206.223.9423
Email: rjolley@kbmlawyers.com

I declare under penalty of perjury under the laws of the United States and the State of Washington that the foregoing is true and correct and that this declaration was executed on September 22, 2008, at Seattle, Washington.

/s/ Venkat Balasubramani
_____
Venkat Balasubramani

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON
705 Second Avenue, Suite 300
Seattle, Washington 98104-1799 / (206) 624-2184