

No. 24-5618

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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JASON FUHR, individually, and AS EXECUTOR OF THE ESTATE OF  
SHAUN FUHR, DAVONTA TANIYA FUHR,

*Plaintiffs-Appellants,*

v.

CITY OF SEATTLE AND NOAH ZECH,

*Defendants-Appellees,*

On Appeal from the United States District Court  
for the Western District of Washington  
No. 2:23-cv-00600 BJR  
Hon. Barbara J. Rothstein

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**APPELLEES' RESPONSE BRIEF**

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## I. INTRODUCTION

Officer Noah Zech (“Officer Zech”) used deadly force to protect the life of a kidnapped baby being held hostage by a violent felony suspect actively evading police capture. The suspect, Shaun Fuhr (“Fuhr”), took the baby after firing a gun at her mother in a public park during a domestic dispute and fleeing the scene on foot with the gun in his waistband. Fuhr evaded law enforcement through residential neighborhoods for over 30 minutes, breaking into buildings and trespassing on private property, all while making the baby a hostage to his dangerous criminal activity. When he was finally located by officers, Fuhr ignored loud commands to stop and surrender and instead ran away from officers with the baby hanging precariously from one arm. Officers gave chase, and just seconds later, he was shot by Officer Zech. The baby was recovered, unharmed, after the use of deadly force.

Fuhr had ample opportunity to surrender to police, but instead chose to evade, endanger the baby, the public, and officers in the process. Most of these events were captured on body-worn video and/or 911 audio. The district court, after a careful examination of the undisputed material evidence, entered summary judgment in favor of Appellees/Defendants Officer Zech and the City of Seattle (collectively, “Defendants”), finding, among other things, that Officer Zech’s use of deadly force

was reasonable and appropriate under the totality of the circumstances, and that no reasonable jury could come to a different conclusion.

Appellant/Plaintiff, Jason Fuhr, individually and on behalf of the Estate of Shaun Fuhr, and Appellant/Plaintiff, Davonta Fuhr (collectively, “Plaintiffs”) now ask this Court to reverse the district court’s order based on an argument that focuses myopically on a 1-second, freeze frame clip of body-worn video and ignores the rest of the undisputed evidence reflecting Fuhr’s dangerous actions that led to the use of deadly force and his unfortunate death.

Importantly, Plaintiffs failed to address, and therefore waive, several alternative grounds relied upon by the district court in granting summary judgment in favor of Defendants. Those alternative grounds, taken together, dispose of Plaintiffs’ claims in their entirety. By failing to challenge those alternative grounds in their opposition to summary judgment, in their opening brief, or both, Plaintiffs waive any opposition to them.

## **II. JURISDICTIONAL STATEMENT**

Plaintiffs did not include a jurisdictional statement in their opening brief. This is an appeal from a final judgment of the District Court dated August 23, 2024. The

Court has jurisdiction in this matter pursuant to 28 U.S.C. § 1291. See *Gelboim v. Bank of Am. Corp.*, 574 U.S. 405, 135 S. Ct. 897, 902 (2015).

### **III. ISSUES PRESENTED**

1. Whether the Court should decline to reach the merits of Plaintiffs' appellate arguments, because the district court's order can be affirmed on alternative grounds to which Plaintiffs waived any objection by failing to oppose them in district court or address them in their opening brief.
2. Whether the district court properly dismissed Plaintiffs' Fourth Amendment claim because no reasonable jury could find that the use of force was constitutionally unreasonable under the totality of the circumstances shown by the undisputed facts.
3. Whether the district court properly determined that Officer Zech is entitled to qualified immunity because Plaintiffs failed to show that the law governing his actions under the specific circumstances of this case was clearly established.
4. Whether the district court properly dismissed Plaintiffs' negligence claim because Plaintiffs provided no specific facts, evidence, or argument on the

essential elements of breach of duty or causation sufficient to withstand summary judgment.

5. Whether the district court properly dismissed Plaintiffs' outrage claim because Plaintiffs provided no admissible evidence to establish that the use of force was unreasonable or excessive, let alone beyond all possible bounds of decency.
6. Whether the district court properly dismissed Plaintiffs' Washington Law Against Discrimination ("WLAD") claim because Plaintiffs did not provide argument or evidence establishing that Fuhr was shot in a place of public accommodation, that he was discriminated against because of his race, or that such discrimination caused the alleged injury.

#### **IV. STATEMENT OF THE CASE**

##### **A. Statement of Facts**

###### **1. The Initial Call for Police Response / The Scene at the Park**

On April 29, 2020, Fuhr, Ajiona Taylor ("Taylor" or "the mother"), and their 1-year-old baby in common were at Rainier Park in Seattle. 5-ER-905 at 00:35-00:45. At 2:13 p.m., Taylor called 911 and frantically asked, "where you guys at? Please my baby daddy he's got a gun, he's in the park, he just shot in the park he has

my baby!” 5-ER-905 at 00:00-00:15; 2-ER-298. Taylor begged the 911 dispatcher for help:

Taylor: “He’s my baby’s dad, he has my baby. , we have a no contact order already, he just beat me up yesterday, my arm is swollen. , I just want my daughter you know I’m trying to go –

Dispatcher: Ok did he come and take the child from you while you were there?

Taylor: I just ran away because I’m scared, I’m scared!

Dispatcher: Did he have any weapons?

Taylor: He has a gun. I know he has it he shot it in the park, my ear is ringing. he just shot it in Skyway today, he shot it in Skyway.

Dispatcher: Ok ok we have a call in.

Taylor: Please help please not fast enough please, my baby –

Dispatcher: What’s his name?

Taylor: His name is Shaun Fuhr. We already have a no contact order, please, I want my daughter please! She’s only one. Please I’m scared for her!”

5-ER-905 at 00:55-01:45.

A civilian witness, Terrance Roy (“Roy”), was also at Rainier Park and called 911 to report “a guy with a gun and a child” who was involved in an altercation with “possibly his wife.” 2-ER-321 at 00:00-00:15. Roy told Taylor to “run away” after Fuhr pulled a gun. 2-ER-321 at 01:00-01:10. He reported that Fuhr still had

possession of the child, 2-ER-321 at 01:00-01:15, and that Fuhr had placed the gun in the back of his pants. 2-ER-321 at 02:15-02:25. Roy provided a description of Fuhr and Taylor. 2-ER-321 at 01:40-02:15; 02:55-03:30. Roy told dispatch that he left the park with his children so they didn't "catch a bullet." 2-ER-321 at 03:40-03:50. He later told investigators that "we, uh, heard a small explosion and, uh, it spooked them pretty bad. And I just told them it was a firework 'cause it happens around here, but it sounded a little bit like it had a bit of an echo to it, too, so..." 3-ER-329.

## 2. Seattle Police Department Response

Officer Morgan Irwin ("Officer Irwin") arrived at the park at approximately 2:19 p.m. and located Taylor. 2-ER-301. Officer Irwin was familiar with Taylor from prior contacts including domestic violence incidents between Fuhr and Taylor. 2-ER-322 at 21:18:30-21:18:40; 21:19:35-21:19:50.

Taylor was crying and visibly shaking. 2-ER-322; 3-ER-326. Taylor immediately told Officer Irwin that she was trying to get her baby. 2-ER322 at 21:18:35-21:18:40. Her arms were covered in obvious bruises and a clump of hair was hanging off her back. 2-ER-322 at 21:18:30 –21:18:50; 3-ER-326. Officer Irwin broadcast information over the radio after speaking with Taylor and making visual

observations of her obvious bodily injuries and frantic demeanor. 2-ER-322 at 21:18:30-21:19:30; 3-ER-326. Officer Irwin continued to speak with Taylor and learned that Fuhr was in possession of a firearm, had fired a shot at Taylor in the park, and was drunk. 2-ER-322 at 21:19:50-21:19:60; 21:20:00-21:20:30. Officer Irwin observed a fired cartridge case on the basketball court where Taylor indicated Fuhr was located when he fired the gun. 2-ER-322 at 21:20:15-21:20:40. Officer Irwin updated dispatch that, “suspect fired the firearm, I’ve got the shell casing here on the ground, he’s incredibly intoxicated, has the child with him, and the mother of the child believes the child is in grave danger.” 2-ER-322 at 21:20:20-21:20:40. Officer Irwin also requested a K9 track to help locate the endangered child and Fuhr. 2-ER-322 at 21:21:20-21:21:30. Taylor repeatedly begged for help finding her baby. 2-ER-322. After receiving this information, a sergeant allocated additional resources, including a request for SWAT, the Guardian One helicopter, and a phone ping due to the severity of the situation. 3-ER-340 at 21:26:45-21:27:45. Guardian One responded and had a loud presence over the neighborhood while the police search for Fuhr ensued. 3-ER-330.

Officer Corey Fleming and his K9 partner Officer Buddy arrived at the park and began tracking at the location where Fuhr fired his gun on the basketball court.

3-ER-386. K9 Officer Buddy is a generalist dog who is trained to detect and track based on human scent. 3-ER-386. Officers Fleming, Ryan King, Aaron Aguilar, and Mitchell Schaefer ran along with K9 Officer Buddy during the track. 5-ER-907 at 21:26:20-21:26:45. Multiple officers searched the area on foot and in their vehicles. 3-ER-340 at 21:29:55-21:30:10; 21:30:40-21:31:25.

SWAT officers, including Officer Zech, were listening to SPD radio broadcasts at their office. 2-ER-124–125. They received information that a suspect fired a shot and kidnapped an infant around 37th and Genesee. 2-ER-124–125. Sergeant Jason Diamond ordered all available SWAT officers to deploy and assist patrol; accordingly, Officer Zech drove to the scene along with SWAT Officer Brehon Ness. 2-ER-124–125. En route to the scene, they heard a radio update that there was probable cause to arrest Fuhr for felony domestic violence assault with a firearm and kidnapping. 2-ER 297–320; 3-ER-340 at 21:35:10-21:35:25. They drove to where Officer Flemming and K9 Officer Buddy were conducting the K9 track and joined the track on foot. 3-ER 341–348 at 23:23-24:1; 24:2-6; 3-ER349–369 at 21:17-19.

Radio dispatch updated that a 911 caller reported that an individual matching Fuhr’s description, with a baby, was seen breaking into a building that was under

construction around 37th and Dakota, and that a cell tower ping request to Fuhr's number returned coordinates that corresponded to that same building. 2-ER-321; 2-ER-305. The K9 tracking team had also tracked to the same area, with Officers Zech and Ness following them. 3-ER-385–388. Patrol officers had already arrived at that building and were beginning to stage by the time Officer Zech and Officer Ness arrived at the building location with the K9 track team. 3-ER-346.

### 3. Interactions with Shaun Fuhr

Officer Zech's interactions with Fuhr are captured entirely on body-worn video. Officer Zech was standing with patrol officers at the corner of the building to which Fuhr had been tracked, when he spotted a person's arm briefly appearing from around the corner of the building and then being pulled quickly out of view, which alerted him to someone's presence. 3-ER-357; 3-ER-372; 5-ER-907 at 21:49:25-21:49:35; 5-ER-910 at 21:49:25-21:49:35. Officer Zech was standing with Officers Aguilar, King, and Schaefer at that point in time. 3-ER-372. Suddenly a man matching Fuhr's description, and later identified as Fuhr, came into view again as he ran in the opposite direction of the officers while carrying a baby. 3-ER-358; 2-ER-177–229. Fuhr was carrying the baby in one arm, near his hip, and the baby's

head and arms were flopping violently as Fuhr ran from officers. 3-ER-358–359; 3-ER-424; 2-ER-230–265.

Multiple officers issued loud verbal commands to Fuhr to stop. 5-ER-907 at 21:49:35-21:49:45. Fuhr ignored the clear, loud orders to stop, and instead chose to continue running, then went over a fence and out of view behind a neighboring residential townhouse building. 5-ER-907 at 21:49:35-21:49:45; 2-ER-255–283. This sequence of events can be seen and heard on multiple body-worn videos. 5-ER-908 at 21:49:25-21:49:45; 5-ER-909 at 21:49:25-21:49:45; 5-ER-907 at 21:49:25-21:49:45; 5-ER-910 at 21:49:25-21:49:45; 2-ER-177–283. Officers Zech, Aguilar, and King immediately ran along the front of the neighboring residential townhouse building to try to intercept what they believed might be Fuhr’s predicted path of travel southbound through the backyard. 3-ER-360; 5-ER-908 at 21:49:40-21:49:50; 5-ER-909 at 21:49:40-21:49:50; 5-ER-910 at 21:49:40-21:49:50.

Officers Zech, Aguilar, and King rounded a corner and arrived at the southern portion of the residential townhouse building, where Fuhr suddenly reappeared in their view. 5-ER-908 at 21:49:49-21:29:51; 5-ER-909 at 21:49:49-21:29:51; 5-ER-910 at 21:49:49-21:29:51. To the south of the building was a 6 to 8-foot-tall wooden fence. 3-ER-374; 4-ER-535–540. On the east side was a small embankment going

up about 4 feet and the convergence of two wooden fences. 3-ER-374; 4-ER-535–540. Fuhr suddenly emerged from bushes behind the townhouses and headed towards the fence line on the southeast corner of the property. 5-ER-908 at 21:49:50-21:49:51; 5-ER-909 at 21:49:50-21:49:51; 5-ER-910 at 21:49:50-21:49:51; 5-ER-359 at 14-15; 4-ER-535–545.

Fuhr looked to the fence line, turned, looked at Officer Zech, looked at a lower fence line between Fuhr and Officer Zech, and continued advancing toward Officer Zech. 5-ER-908 at 21:49:50-21:49:51; 5-ER-909 at 21:49:50-21:49:51; 5-ER-910 at 21:49:50-21:49:51; 3-ER-361; 3-ER-375; 4-ER-545–588. Fuhr’s hands were down near his waist and he was holding the baby in front of him. 5-ER-910 at 21:49:50-21:49:51; 3-ER-361; 4-ER-545–588. Officer Zech perceived that one hand was holding the baby and one was tucked underneath the baby, out of view. 3-ER-361.

Officer Zech had grave concern for the safety of the baby based on the information he knew. It had been over thirty minutes since Officer Irwin’s initial contact with the baby’s mother, at the park. 3-ER-322 at 21:18:50. 3-ER-363–364. He was aware that there was probable cause to arrest Fuhr for felony domestic violence assault with a firearm and kidnapping. 3-ER-352–353. He was aware that Fuhr kidnapped the baby from the mother and fired a shot in the process, and he

believed it might have been during a domestic violence incident. 3-ER-363; 3-ER-369. He was aware that Fuhr fled the scene with the baby as his kidnapped hostage, and evaded multiple officers, a K9 tracking team, and a loud police helicopter tracking him through the neighborhood. 3-ER-363. He was aware that Fuhr kicked in the door of a residential building to continue to evade law enforcement. 3-ER-363. He knew Fuhr attempted to hide and then ran away from the officers surrounding him, completely disregarding loud commands to stop. 3-ER-363.

Officer Zech believed the way Fuhr was grasping the baby while running from officers and then jumping a fence showed an absolute disregard for the baby's safety. 3-ER-363–364. Officer Aguilar, who had a similar viewpoint during the incident, described it similarly in his post-incident statement: “She was like floppy like, like I guess he was like running like with disregard or something, is what it looked like, I mean like how you'd run with a ball, maybe.” 3-ER-424, ¶ 5.

Officer Zech believed Fuhr was still armed with the gun he had reportedly fired earlier at the park, unaware that Fuhr ditched it. 3-ER-364. Officer Zech was also not aware that Fuhr was intoxicated. 3-ER-363–364. He only learned of these facts later, after the shooting.

After Fuhr ran away from officers and suddenly reappeared from behind the bushes in the adjacent backyard, he advanced approximately 7 to 10 feet toward officers without stopping. 2-ER-138. Officers Zech and Aguilar quickly ordered Fuhr to stop, and again, the order was ignored by Fuhr. 3-ER-366; 5-ER-908 at 21:49:50-21:49:53; 4-ER-545–588. Officer Zech recognized both an imminent threat to the baby’s life, as well as a fleeting window of opportunity to stop that imminent threat. 3-ER-366; 2-ER-127. Officer Zech believed that Fuhr could injure the baby or use the baby as a bargaining chip, shoot the baby, use the baby as a human shield, throw the baby down or at officers to distract officers and flee, or put a gun to the baby’s head, among other possibilities. 2-ER-127. Officer Zech believed Fuhr was still armed and could access the gun. 3-ER-364.

SWAT officers, including Officer Zech, are trained to take advantage of fleeting windows of opportunity to intervene during hostage scenarios. 3-ER-365. SWAT officers are trained to identify and take advantage of such windows of opportunity because the threat of danger to the victims is so high. 3-ER-366; 3-ER-408–409. Officer Zech knew from his hostage training that the baby’s life and safety was the number one priority, above his own life, the life of fellow officers, or Fuhr’s life. 2-ER-127; 3-ER-407–408, 410. SWAT officers, including Officer Zech, are

specially trained to make precision shots in close quarters, including where the hostage is near the hostage taker. 3-ER-407.

Officer Zech saw that the baby was being carried lower on Fuhr's torso and that he had a clear shot to Fuhr's head. 3-ER-367; 5-ER-910 at 21:49:45 -21:49:55; 4-ER-585-590. In that split second moment, Officer Zech aimed his rifle sight at Fuhr's head and fired one shot with the intent of stopping the imminent threat. 3-ER-368; 5-ER-910 at 21:49:45-21:49:55. His shot was placed successfully and had the intended effect of stopping Fuhr, who slid to the ground and released the baby. 5-ER-910 at 21:49:50-21:49:55; 5-ER-908 at 21:49:50-21:49:55.

#### 4. Discovery of Firearm

Immediately after the incident, Officer Fleming and K9 Officer Buddy searched for Fuhr's firearm, which had not been located on Fuhr's person or in the immediate vicinity of the shooting. 3-ER-386. K9 Officer Buddy tracked the same human scent he was previously tracking to a bush in an alley that was approximately 1-1/2 blocks from the location of the shooting. 3-ER-386-387. Officer Fleming retrieved a handgun from the bush. 3-ER-387. The handgun was later matched to the fired cartridge case found on the basketball court where Fuhr reportedly fired a gun,

and another fired cartridge case found later in the car Fuhr drove to the park. 3-ER-378–379.

## **B. Procedural History**

### **1. Plaintiffs' Complaint**

On April 20, 2023, Plaintiff Jason Fuhr, individually and on behalf of the Estate of Shaun Fuhr, filed suit in district court against Defendants. The complaint asserted the following claims, with each claim asserted on behalf of both the Estate and Jason Fuhr individually, without regard to standing:

1. Violation of the Fourth Amendment against Defendants – use of excessive force;
2. Negligence against Defendants - failure to deescalate and the use of force;
3. Wrongful death and survival against Defendants – loss of parent-child relationship and extreme mental anguish under state law;
4. Respondeat superior and indemnification against the City – vicarious liability and indemnification of Officer Zech under state law;
5. Outrage against Defendants – emotional distress suffered by the decedent and Jason Fuhr under state law;

6. Violation of Washington Law Against Discrimination (RCW 49.60) against Defendants - race discrimination under state law;
7. 42 U.S.C. section 1983 claim against Defendants City and Zech - excessive force and unlawful seizure in violation of the Fourth and Fourteenth Amendments;
8. *Monell* liability against Defendant City

3-ER-493–508.

On August 23, 2023, Plaintiffs filed a motion to amend the complaint. 3-ER-459–477. The proposed amended complaint named the decedent’s mother, Davonta Fuhr, as an additional plaintiff but left the remainder of the complaint unchanged. *Id.* Defendants did not oppose Plaintiffs’ motion to amend. *Id.* On February 1, 2024, the district court granted the motion to amend. 3-ER-456–458. Plaintiffs never filed their amended complaint after being granted leave to do so, even though their failure to do so was brought to their attention more than once. 3-ER-435, n.4; 2-ER-32–33. Thus, the operative complaint at the time summary judgment was granted was, and even now is, Plaintiffs’ initial complaint.

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2. Summary Judgment Order

On June 7, 2024, Defendants filed a motion for summary judgment. 3-ER-425–453. Plaintiffs filed a timely opposition, 2-ER-97–123, and Defendants filed a timely reply. 2-ER-24–38. On August 23, 2024, the district court entered an 18-page order granting Defendants’ motion for summary judgment and dismissing all of Plaintiffs’ claims with prejudice.<sup>1</sup> 1-ER-3–20.

The district court found that Plaintiffs failed to respond to Defendants’ arguments that the Estate of Shaun Fuhr was not a party properly before the court because Jason Fuhr, as a convicted felon, was prohibited from serving as a personal representative under Washington law; or that Davonta Fuhr was not a party properly before the court because Plaintiffs never filed the amended complaint adding her as a party. 1-ER-6. The court agreed that these were fatal deficiencies in Plaintiffs’ claims, and since Plaintiffs did not respond to the arguments or request leave to amend, the district court dismissed with prejudice all claims asserted by the Estate

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<sup>1</sup> In the order, the district court also denied as moot the following pending motions filed by Defendants: motion to exclude Plaintiffs’ police practices expert, Gregory Gilbertson; motion to stay trial; and motion to compel paternity test. 1-ER-20. The district court also granted Defendants’ motion to seal the 911 audio and certain body-worn video capturing the shooting, to protect the privacy of the minor child, L.T. *Id.*

of Shaun Fuhr and Davonta Fuhr. 1-ER-6. The district court then addressed the merits of Plaintiffs' causes of action, as follows:

a. Federal Claims

The district court found that Plaintiffs did not oppose Defendants' argument that Cause of Action I, which was asserted directly under the Fourth Amendment rather than through 42 U.S.C. section 1983, was improperly pled, and duplicative of Cause of Action VII to the extent it was construed as pled under 42 U.S.C. section 1983. 1-ER-7. The district court dismissed the cause of action. 1-ER-7.

The district court next addressed Plaintiffs' Cause of Action VII as brought pursuant to 42 U.S.C. section 1983 for violation of the Fourth and Fourteenth Amendment based on allegations that Defendants "used excessive force" and "unlawfully seized Shaun Fuhr." 1-ER-7. The district court dismissed the claim to the extent it was brought under the Fourteenth Amendment, on the grounds that (1) excessive force claims are analyzed under the Fourth Amendment, not the Fourteenth Amendment, and Plaintiffs failed to oppose this argument, (2) any claim by Jason Fuhr, individually, for denial of the "liberty interest in the companionship and society of [his] son," was not properly pled because the claim only pled damages for the deprivation of Shaun Fuhr's rights and Plaintiffs did not respond to this

“critical pleading deficiency,” and (3) any claim by Jason Fuhr, individually, for “denial of the liberty interest in the companionship and society of [his] son,” was not viable because “Plaintiffs have failed to allege in their response to Defendants’ motion any facts that would support a conclusion that [Officer] Zech acted with a purpose of causing “harm unrelated to the legitimate object of arrest.” 1-ER-8–10.

The district court then addressed Plaintiffs’ Cause of Action VII to the extent it asserted a claim under the Fourth Amendment for violation of Shaun Fuhr’s right to be free from excessive force. The district court noted that it was unclear whether the claim was asserted on behalf of Jason Fuhr, individually, or the Estate. 1-ER-8. Either way, the district court found it was not viable on the grounds that (1) Jason Fuhr, individually, could not assert a claim based on the violation of Shaun Fuhr’s right to be free from excessive force because Fourth Amendment claims are personal and may not be vicariously asserted, and Plaintiffs did not respond to this argument, and (2) the Estate did not demonstrate the existence of a material fact issue on the reasonableness of Officer Zech’s use of deadly force. As to the latter ground, the district court analyzed each of the *Graham*<sup>2</sup> factors in light of the undisputed

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<sup>2</sup> *Graham v. Connor*, 490 U.S. 386 (1989)

evidence in the case and found that “no reasonable jury could find that the force [Officer] Zech used to prevent Fuhr from continuing to endanger the life of the child was unconstitutionally excessive.” 1-ER-10–15.

The district court further ruled that, even if a violation of Fuhr’s Fourth Amendment rights had been shown, Officer Zech was entitled to qualified immunity because Plaintiffs did not meet their burden of proof in showing that the right allegedly violated was clearly established at the time. The cases relied upon by Plaintiffs were too dissimilar factually to put Officer Zech on notice that that his use of deadly force would have been unreasonable, given the facts that were known to him at the time. 1-ER-15–17.

Finally, the district court dismissed Cause of Action VII for *Monell*<sup>3</sup> liability against Defendant City of Seattle, finding that it was not adequately pled, discussed, or supported with evidence by Plaintiffs. 1-ER-16–18.

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<sup>3</sup> *Monell v. N.Y. Dept. Soc. Svcs.*, 436 U.S. 658 (1978).

b. State Law Claims

The district court dismissed all of Plaintiffs' state law claims with prejudice. The district court observed at the outset that Plaintiffs waived any objection to Defendants' argument that all state law claims were barred by RCW 4.24.420, by failing to respond to it. 1-ER-17.

As to Plaintiffs' negligence claim, the district court found that Plaintiffs failed to support the essential elements of their negligence claim. 1-ER-17–19. The district court noted that “simply reciting the elements of the claim is insufficient.” 1-ER-19.

The district court dismissed Plaintiffs' outrage claim because Plaintiffs conceded that it rises and falls with their excessive force claim, and the court already determined the excessive force claim lacked merit. 1-ER-19.

The district court dismissed Plaintiffs' claim under the Washington Law Against Discrimination because Plaintiffs failed to provide “any specific allegations, let alone evidence, supporting even an inference that Zech's actions were motivated by Fuhr's race.” 1-ER-19–20.

The district court dismissed Plaintiffs' claims for wrongful death and survivorship because Jason Fuhr was not authorized to bring such claims under

RCW 4.20.010, 4.20.046(2), and 4.20.060, and Plaintiffs failed to respond to Defendants' arguments on this issue. 1-ER-18–19.

Finally, the district court dismissed Plaintiffs' claim for "respondeat superior and indemnification" against Defendant City because "[a]s Defendants point out (and Plaintiffs do not dispute), these purported claims are not independent causes of action against the City." 1-ER-20.

### 3. Plaintiffs' Opening Brief

Plaintiffs filed a timely notice of appeal of the district court's order granting summary judgment. In their opening brief, they appear to argue that the district court's order was erroneous because (1) an issue of fact exists on whether Officer Zech's use of force was reasonable on the Fourth and Fourteenth Amendment claim based on the body-worn video (Opening Brief, pp. 20-37), (2) the district court "wrongfully determined that Noah Zech acted reasonably, and was therefore entitled to qualified immunity" (Opening Brief, p. 38), (3) the district court failed to take into account RCW 10.120.020 and *Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537, 544-45 (2019) on their negligence claim, (4) the district court erred in dismissing their WLAD claim because Officer Zech acted with implicit bias toward Shaun Fuhr (Opening Brief, pp. 54-55), and (5) the district court erred in concluding

that Officer Zech's conduct was not extreme and outrageous on their outrage claim (Opening Brief, pp. 55-56).

Plaintiffs' Opening Brief does not challenge the district court's order to the extent it was based on Plaintiffs' failure to respond to Defendants' summary judgment arguments and Plaintiffs' failure to request leave to amend to correct critical pleading deficiencies. The following additional aspects of the order are also not raised or argued in Plaintiffs' Opening Brief: (1) the dismissal of Cause of Action I as improperly alleging a direct violation of the Fourth Amendment and being duplicative of Cause of Action VII. 1-ER-7; (2) the dismissal of Cause of Action VII as brought under the Fourteenth Amendment by the Estate of Shaun Fuhr on the ground that excessive force claims are analyzed under the Fourth Amendment; (3) dismissal of Cause of Action VII for violation of the Fourteenth Amendment as asserted by Jason Fuhr, individually, as improperly pled and lacking argument or evidence establishing the required "purpose to harm" standard; (4) the dismissal of Cause of Action III for wrongful death, finding that Jason Fuhr in his individual capacity lacked standing to bring any state law claims pursuant to Washington's wrongful death statute because the decedent had surviving children; (5) the dismissal of Cause of Action VIII for *Monell* liability based on Plaintiffs' failure to plead,

argue or proffer evidence to support it; (6) that Plaintiffs waived objection to Defendants' argument that all state law claims were barred by RCW 4.24.420 because they failed to oppose it; (7) dismissal of Cause of Action IV for "respondeat superior and indemnification."

## **V. SUMMARY OF THE ARGUMENT**

The district court's order should be affirmed based on the alternative grounds the district court relied upon in granting summary judgment, which were not argued or opposed by Plaintiffs in district court and/or in their opening brief. By failing to argue or oppose the alternative grounds, Plaintiffs waived any objections to them. Because the alternative grounds dispose of all claims in this case, the Court should affirm the district court's order in its entirety without reaching the merits of Plaintiffs' appellate arguments.

If the court reaches the merits of Plaintiffs' appellate arguments, the district court's order should be affirmed because Plaintiffs have not met their burden of showing the existence of a material fact issue on any of the causes of action discussed in their opening brief: Fourth Amendment excessive force, negligence, WLAD, and outrage.

Plaintiffs' Fourth Amendment excessive force claim fails. Plaintiffs cherry pick and rely on a 1-2 second portion of body-worn video to support their assertions, ignoring the totality of circumstances of the entirety of the encounter. Even this isolated evidence does not support Plaintiffs' contention that Officer Zech knew or should have known that Fuhr was unarmed and surrendering at the time. Nothing shown in that brief portion of body-worn video dispelled the nature of Fuhr's criminal activity and the undisputed risk his behavior presented to the safety of the vulnerable baby he was carrying. Even assuming, however, that a constitutional violation was shown, the district court properly concluded that Officer Zech is entitled to qualified immunity because Plaintiffs did not carry their burden of showing that the right he allegedly violated was clearly established. Under case law as it existed at the time, Officer Zech could have believed his use of deadly force was appropriate to stop a dangerous, fleeing felon who had committed serious crimes involving violence.

Plaintiffs' negligence claim fails as a matter of law because, as the district court properly recognized, Plaintiffs provided no specific facts, evidence, or argument to support the essential elements of breach of duty or causation. Plaintiffs

cannot rely on conclusory statements and characterizations of the facts to withstand summary judgment.

Plaintiffs' outrage claim fails for the same reasons their excessive force claim fails; there is no admissible evidence to support their claim that the use of force was objectively unreasonable, let alone beyond all possible bounds of decency. The district court properly granted summary judgment on this claim.

Finally, Plaintiffs' WLAD claim also fails because Plaintiffs have not shown that Fuhr was shot in a place of public accommodation. This fact alone, which has not been disputed nor even addressed by Plaintiffs, warrants affirmance of the district court's dismissal of this claim. Plaintiffs also failed to provide any evidence of discrimination or causation sufficient to support this claim. The district court properly granted summary judgment on this claim.

## **VI. STANDARD OF REVIEW**

A grant of summary judgment is reviewed de novo. *See Covey v. Hollydale Mobilehome Estates*, 116 F.3d 830, 834 (9th Cir.1997); *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir.1996). "Though [the Court's] review may be de novo, the failure to present and exhaust arguments to the district court is an independent basis for rejecting them." *See Smith v. Berryhill*, 742 F. App'x 253, 255 (9th Cir. 2018).

At the summary judgment stage, the court views the evidence in the light most favorable to the nonmoving party only where there is a “genuine” dispute as to the facts. *Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 1776, 167 L. Ed. 2d 686 (2007). “When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.” *Id.* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348 (1986)). Likewise, “the mere existence of a scintilla of evidence in support of the non-moving party’s position is not sufficient” to overcome summary judgment. *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001). Speculative and conclusory allegations are likewise insufficient. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). When there is objective evidence, like video recordings, courts should “view the facts in the light depicted by the videotape.” *See Scott*, 550 U.S. 372, 381. *See also Hughes v. Rodriguez*, 31 F.4th 1211, 1218 (9th Cir. 2022) (“a district court may properly view the facts in the light depicted by bodycam footage and its accompanying audio, to the extent the footage and audio *blatantly* contradict testimonial evidence”)

(emphasis in original).

## VII. ARGUMENT

### **A. The Court Should Decline to Reach the Merits of Plaintiffs' Appellate Arguments, Because the District Court's Order can be Affirmed on Alternative Grounds that Plaintiffs Failed to Oppose in District Court or Address in Their Opening Brief.**

1. Plaintiffs Waived any Challenge to the Alternative Grounds Relied Upon by the District Court in Granting Summary Judgment by not Opposing them in District Court and Not Arguing them in the Opening Brief.

This Court may affirm the grant of summary judgment on any basis supported by the record and need not reach each ground relied upon by the district court. *Newton v. Diamond*, 388 F.3d 1189, 1192 (9th Cir. 2004). Applying this principle, this Court should not reach the merits of Plaintiffs' appellate arguments because the district court's order can be affirmed on alternative grounds that Plaintiffs waived by not arguing them in district court and/or in their opening brief.

Arguments, claims, or issues not argued by a party in district court are considered abandoned and cannot be raised for the first time on appeal. *See Jenkins v. Cnty. of Riverside*, 398 F.3d 1093, 1095 n.4 (9th Cir. 2005) (claims not argued in opposition to summary judgment are abandoned); *Abogados v. AT&T, Inc.*, 223 F.3d 932, 937 (9th Cir. 2000) (appellant's arguments that were not asserted in district court in opposition to appellees' summary judgment arguments are waived and not

considered on appeal); *Novato Fire Prot. Dist. v. United States*, 181 F.3d 1135, 1141 n. 6 (9th Cir. 1999) (issues not argued on summary judgment in district court are waived on appeal). Similarly, issues that are not “specifically and distinctly argued and raised in a party’s opening brief” generally are not considered on appeal. *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001); *See also Moran v. Screening Pros, LLC*, 25 F.4th 722, 728 (9th Cir. 2022) (“This court ‘will not ordinarily consider matters on appeal that are not specifically and distinctly argued in appellant's opening brief’”); *Collins v. City of San Diego*, 841 F.2d 337, 339 (9th Cir. 1988) (“It is well established in [the Ninth] Circuit that claims which are not addressed in the appellant's brief are deemed abandoned”).

In their opposition to summary judgment in district court, Plaintiffs failed to respond to multiple arguments made by the Defendants. 3-ER-425–453; 2-ER-97–103; 2-ER-24–38; 1-ER-3–20. This failure was not lost on the district court. The district court’s order repeatedly refers to Plaintiffs’ lack of response in opposition to the arguments raised by Defendants, while agreeing with and adopting the arguments as independent grounds supporting the grant of summary judgment for Defendants. 1-ER-3–20. By failing to address potentially dispositive issues in their opposition to summary judgment, Plaintiffs waived the ability to challenge the district court’s

rulings on those issues on appeal. *See Jenkins* at 1095, n.4; *Abogados* at 937; *Novato* at 1141, n.6; *See also Pac. Dawn LLC v. Pritzker*, 831 F.3d 1166, 1178, n.7 (9th Cir. 2016) (finding the plaintiffs' assertion of error was waived on appeal where they did not raise the argument in their opposition to the defendants' motion for summary judgment in district court).

Plaintiffs also waived any error in the district court's rulings to the extent those rulings are not argued their opening appellate brief. *See Arpin*, 261 F.3d at 919; *Collins*, 841 F.2d at 339. In the opening brief, Plaintiffs neither address the substance of those rulings nor raise any challenge to the district court's dismissal of their claims based on their failure to address the substance below. Plaintiffs' utter silence on these issues in both their summary judgment opposition in district court, and their opening brief on appeal, precludes the issues from being considered on appeal. *See Jenkins* at 1095, n.4; *Abogados* at 937; *Novato* at 1141, n.6.; *Pac. Dawn LLC* at 1178; *Arpin*, 261 F.3d at 919; *Collins*, 841 F.2d at 339.

This Court's decision in *Syscom (USA), Inc. v. Nakajima USA, Inc.*, 20-55560, 2022 WL 396030 (9th Cir. Feb. 9, 2022) is analogous. In *Syscom*, Syscom appealed a district court order awarding attorneys' fees to the opposing party. In affirming, this Court held that the district court's order could not be reviewed or

disturbed on appeal because Syscom had not challenged an alternative ground upon which the district court's order was based, and had therefore waived any objection to it:

“Syscom raises a single issue on appeal: whether the district court erred in ruling that the ‘unity of interest’ doctrine did not remain viable after California's 1986 revision of section 1032. We need not reach this issue, however, because the district court also based its conclusion on an independent alternative ground, namely, Syscom's failure to establish that the doctrine applies. Syscom waived any objection to that alternative ground by not challenging it in its opening brief. *See United States v. Kama*, 394 F.3d 1236, 1238 (9th Cir. 2005); *MacKay v. Pfeil*, 827 F.2d 540, 542 n.2 (9th Cir. 1987). **We thus cannot review or disturb the district court's order.**”

*Id.* at \*1 (emphasis added). *See also MacKay v. Pfeil*, 827 F.2d 540, 542 n.2 (9th Cir. 1987) (declining to review a summary judgment order to the extent the appellant did not challenge the alternative grounds relied upon by the district court in granting summary judgment).

Like in *Syscom*, here Plaintiffs' appellate arguments focus entirely on a single aspect of the district court's order –the finding that Officer Zech's use of force was reasonable and appropriate – and disregard the alternative grounds supporting the district court's order. In so doing, Plaintiffs waive any objection to the alternative grounds.

The alternative grounds for dismissal that Plaintiffs declined to argue, both in district court and in their opening brief, were not insignificant or hidden. They comprised a significant part of Defendants' motion for summary judgment and served as primary grounds for the district court's order. Even after Defendants' summary judgment reply and the district court's order alerted Plaintiffs of their failure to oppose these grounds for dismissal, Plaintiffs *still* chose to ignore them in their opening brief on appeal.

Plaintiffs cannot reasonably claim that extraordinary circumstances explain or excuse their wholesale failure to address multiple dispositive issues in both district court and on appeal. Plaintiffs have been represented by the same, experienced counsel throughout this litigation who are well versed in litigating civil rights cases. Nothing prevented Plaintiffs from submitting argument and evidence to advance their position on these issues. The courts and the Defendants are not required to guess or anticipate what Plaintiffs' arguments might be on the alternative grounds.<sup>4</sup>

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<sup>4</sup> To the extent Plaintiffs attempt to address the merits of any previously unargued issues for the first time in their reply brief, the Court should not consider their arguments or any facts or evidence they may advance, whether in the current record or not. *See, e.g., Ramirez v. Lamarque*, 203 F. App'x 77, 79 (9th Cir. 2006) (concurring opinion) (noting unfairness and "problematic incentive" created if Court

Plaintiffs should not be permitted to bury their heads in the sand on potentially dispositive issues and expect that the courts will somehow, magically redeem their ill-fated strategy. The Court should find that Plaintiffs waived any objection to the district court's order to the extent it is based on grounds they did not oppose or argue in district court or in their opening brief.

2. The Court Should Affirm Because the District Court's Alternative Rulings Support the Entry of Summary Judgment on All of Plaintiffs' Causes Of Action.

The district court's order dismissed with prejudice all causes of action brought by the Estate of Shaun Fuhr and Davonta Fuhr on the ground that they were not proper parties before the court, leaving Jason Fuhr, in his individual capacity, as the only proper plaintiff in the case. 1-ER-6. The district court then dismissed with prejudice the only claims Jason Fuhr could assert in his individual capacity in the case: (1) Cause of Action VII for violation of the Fourteenth Amendment, finding it was improperly pled and lacked argument or evidence by Plaintiffs sufficient to establish the required "purpose to harm" standard. 1-ER-8-10; and (2) Cause of

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were to consider appellants' waived argument despite appellees' assiduous avoidance of briefing the merits of the argument in their answering brief to avoid "waiver of waiver").

Action III for wrongful death, finding that Jason Fuhr in his individual capacity lacked standing to bring such claims. 1-ER-18–19. The district court noted that Plaintiffs did not oppose Defendants’ arguments on these issues, and did not request leave to amend their complaint to correct the “critical pleading deficiencies.” 1-ER-4–6, 18–19. By failing to oppose these alternative rulings in district court, Plaintiffs have waived any objection to them. Taken together, these alternative rulings by the district court dispose of all viable claims by the Estate of Shaun Fuhr, Davonta Fuhr, and Jason Fuhr, in his individual capacity.

Like they did in district court, Plaintiffs also ignore these alternative rulings in their opening brief on appeal, with one exception: Plaintiffs briefly address the district court’s dismissal of the Estate of Shaun Fuhr for not appearing through a proper estate representative.<sup>5</sup> (Opening Brief, pp. 20-21). The mention of this issue

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<sup>5</sup> Plaintiffs argue that the district court had “notice” that a new personal representative had been appointed for Shaun Fuhr’s estate based on an unidentified document they filed as an exhibit in opposition to a motion to stay trial that was filed by Defendants a few weeks *after* the summary judgment briefing was complete. (Opening Brief, pp. 20-21). Plaintiffs did not include that document in the excerpts of record, and even if they did, there is nothing indicating that the district court ever saw the later-filed document, let alone considered it, in ruling on Defendants’ summary judgment motion. There is also nothing in the record indicating that Plaintiffs took any steps to substitute in a new personal representative in district

in their opening brief is unavailing, however, because there is no dispute that Plaintiffs failed to argue the issue in district court. *See Jenkins*, 398 F.3d at 1095, n.4; *Novato Fire Prot. Dist.*, 181 F.3d at 1141 n. 6. Issues cannot be raised for the first time on appeal. *Id.* Plaintiffs also never requested leave to amend or to substitute in an appropriate estate representative in district court.

Several other alternative rulings to which Plaintiffs have waived any objections also support affirmance of the district court's order. As to Plaintiffs' federal causes of action, these include: the dismissal of Cause of Action I as improperly alleging a direct violation of the Fourth Amendment and being duplicative of Cause of Action VII. 1-ER-7; the dismissal of Cause of Action VII as brought under the Fourteenth Amendment by the Estate of Shaun Fuhr, on the ground that excessive force claims are analyzed under the Fourth Amendment. 1-ER-7-8; and the dismissal of Cause of Action VIII for *Monell* liability based on Plaintiffs' utter failure to plead, argue or proffer evidence to support it. 1-ER-16–17. As to Plaintiffs' state law claims, the district court dismissed Count IV alleging

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court, even assuming one had been appointed by the state probate court. To date, there is still no competent personal representative appearing on behalf of the Estate in this case.

“respondeat superior and indemnification” for Plaintiffs’ failure to respond to Defendants’ arguments for its dismissal and because it is not a proper cause of action. The district court also noted that Plaintiffs had waived any objection to Defendants’ argument that all state law claims were barred by RCW 4.24.420. 1-ER-17. Plaintiffs’ opening brief does not address any of these alternative grounds for dismissal of their causes of action, and as such, they are waived as well.

The alternative rulings by the district court, not argued or challenged by Plaintiffs, together dispose of all causes of action in this case. As such, the Court need not reach the merits of the issues raised by Plaintiffs in their opening brief, and the Court should simply decline to review or disturb the district court’s order granting summary judgment.

**B. If the Court Reaches the Merits of Plaintiffs’ Arguments, the Court Should Affirm Because the District Court’s Entry of Summary Judgment was Proper.**

1. The District Court Correctly Determined that No Reasonable Jury Could Find for Plaintiffs on Plaintiffs’ Fourth Amendment Excessive Force Claim Brought Pursuant to 42 U.S.C. § 1983.
  - a. Plaintiffs Have Not Established A Fourth Amendment Violation Under The Undisputed Material Facts.

Plaintiffs<sup>6</sup> maintain that the district court erred in determining as a matter of law that Officer Zech's use of force was objectively reasonable under the Fourth Amendment, arguing that genuine issues of fact required this issue to be determined by a jury. The general test for whether a use of force is reasonable or excessive is set forth in *Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865 (1989). Excessive force claims are evaluated under the Fourth Amendment's reasonableness standard, and the court considers "(1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether he is actively resisting arrest or attempting to evade arrest by flight." *Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir. 2005) (citing *Graham*, 490 U.S., at 396).

Reasonableness is assessed from the perspective of an objectively reasonable officer on the scene, rather than with the 20/20 vision of hindsight, and must allow for the fact that "police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount

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<sup>6</sup> As the district court properly determined, only the Estate has standing to assert a claim for violation of the decedent's Fourth Amendment right to be free from the use of excessive force. 1-ER-10. Plaintiffs have not challenged this ruling and have therefore waived any objection to it.

of force that is necessary in a particular situation.” *Graham*, 490 U.S., at 396. “To be sure, an officer will not be held liable if the circumstances under which the force was used evolved so rapidly that a reasonable officer would not have had time to recalibrate the reasonable quantum of force.” *Abbott v. Sangamon Cnty., Ill.*, 705 F.3d 706, 733 (7th Cir. 2013); *see, e.g., Sheehan v. City & Cnty. of San Francisco*, 743 F.3d 1211, 1230 (9th Cir. 2014), *reversed in part on other grounds*, 135 S. Ct. 1765 (2015).

“Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.” *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (quoting *Tennessee v. Garner*, 471 U.S. 1, 11, 105 S.Ct. 1694 (1985)). “Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.” *Garner*, 471 U.S. at 11–12, 105 S.Ct. at 1701; *see also Ting v. United States*, 927 F.2d 1504, 1510 (9th Cir. 1991). “A reasonable use of deadly force encompasses a range of conduct, and the availability of a less intrusive

alternative will not render conduct unreasonable.” *Wilkinson v. Torres*, 610 F.3d 546, 551 (9th Cir. 2010) (citing *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994)). Here, as the district court properly determined, the *Graham* factors weigh in Officer Zech’s favor as a matter of law.

i. Severity of the Crime at Issue

The undisputed facts establish it was objectively reasonable for Officer Zech to believe that Fuhr “committed a crime involving the infliction or threatened infliction of serious physical harm.” *Garner*, 471 U.S. at 11–12, 105 S.Ct. at 1701. As discussed in detail in Section IV(A), *supra*, Fuhr was the reported aggressor in a felony domestic violence and kidnapping incident which culminated in Fuhr firing a gun in a public park, taking a baby against the mother’s will, and fleeing the scene with the baby and armed with the gun.

Fuhr actively evaded arrest during a large and conspicuous police search through a residential area which included a police helicopter, K9 units, and SWAT. Fuhr broke into a building to hide from the police. Fuhr subjected the baby to his patently dangerous criminal activity. When Fuhr was finally spotted, he was observed by more than one officer carrying the baby carelessly in one arm as he disregarded loud orders to stop and ran away from the officers, who had their guns

pointed at him. As the district court noted, Plaintiffs offered no evidence to dispute these facts, all of which were known by Officer Zech at the time he used deadly force and were largely captured on body-worn video. The undisputed evidence of Fuhr's crimes clearly supports the district court's finding that they involved the infliction, or threatened infliction of serious physical harm, particularly to the kidnapped baby, but also to citizens and officers.

Plaintiffs' only challenge to the district court's ruling on this factor appears to be their claim that there was no basis for the finding of probable cause to arrest Fuhr for kidnapping, as reported out on police radio and heard by Officer Zech. (Opening Brief, pp. 34-37). Plaintiffs argue that Fuhr had the right to take his child from her mother whenever he wanted, absent independent verification by officers of the custody information reported by the mother. *Id.* Plaintiffs also argue that Fuhr "did not exhibit intent to inflict extreme mental distress on the child or any other person, his intent seemed focused on having time with his child away from the child's mother." (Opening Brief, p. 37). This argument should be rejected for several reasons. First, it ignores the fact that the probable cause finding was based not only on kidnapping, but also on felony domestic violence assault with a firearm. Second, Plaintiffs offer no evidence to support their conclusory contention that Fuhr had a

custodial right to the baby at the time, or that there was some requirement on the part of officers to obtain custody records before taking action to protect the baby's safety under the exigent circumstances that were rapidly unfolding here. Third, Plaintiffs' characterization of Fuhr's intent in taking the baby is based on pure speculation; they offer no admissible facts or evidence to support it.<sup>7</sup> Fourth, as the district court accurately observed, Plaintiffs' probable cause argument ignores all of the undisputed evidence of Fuhr's conduct that day, which included a visibly frantic mother with significant physical injuries she attributed to Fuhr, a spent shell cartridge and a citizen bystander corroborating the mother's report about Fuhr's firing of the gun at her, the citizen reporting that Fuhr fled the park with the gun in his waistband, Fuhr's reported intoxication, the mother's insistence that her baby was in serious danger with Fuhr, and his active evasion of officers. 1-ER-12. Under these facts, which are undisputed, a jury could not plausibly conclude that Fuhr was, as Plaintiffs claim, simply spending quality time with his child after lawfully taking

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<sup>7</sup> Plaintiffs do not appear to argue on appeal that the opinions of their police practices expert, Gregory Gilbertson, create any issue of fact in this case, and they have therefore waived any argument in that regard. However, to the extent this Court reaches that issue, the Court should remand for the district court to rule on Defendants' motion to exclude Mr. Gilbertson as an expert prior to any determination that his opinion is sufficient to create an issue of fact. 3-ER-443.

her from her mother. The district court properly rejected Plaintiffs' argument that there was no basis for probable cause to support Fuhr's arrest for kidnapping.

ii. Whether the Suspect is Actively Resisting Arrest or Attempting to Evade Arrest by Flight

As the district court correctly determined, the undisputed evidence reflects that Fuhr was actively evading arrest by flight at the time deadly force was used. As discussed in detail in Sections IV(A) and VII(B)(1)(a)(i), *supra*, Officer Zech was aware of the serious nature of Fuhr's reported crimes, including Fuhr's lengthy evasion of the conspicuous police search for him. When he was spotted by Officer Zech and ordered to stop, Fuhr's decision to continue evading by running away with the baby made an already dangerous situation even more dynamic and unpredictable. Indeed, the use of deadly force occurred about 10 seconds later, after Officer Zech swiftly rounded the corner of a building and Fuhr suddenly reappeared in close range, this time advancing towards officers.

Plaintiffs posit that, regardless of the totality of the circumstances, body-worn video of the final 1 to 2 seconds before Fuhr was shot establish that he was not evading. (Opening Brief, pp. 29-30). As the district court observed, this argument is "farfetched" at best. 1-ER-13. First, there is nothing about Fuhr in that very short

moment of body-worn video that would have indicated to a reasonable officer that Fuhr had suddenly switched course and intended to surrender. Instead, he is shown continuously advancing toward officers, holding the baby in front of his body. He does not verbalize anything, nor does he follow previous officer commands, shouted just seconds before and again as officers rounded the corner of the building, to “STOP!” It is pure speculation to imply an intent to surrender on Fuhr’s part, let alone one that Officer Zech could have reasonably perceived in that brief, dynamic moment given the totality of Fuhr’s evasive and non-compliant conduct leading up to it. Second, accepting Plaintiffs’ argument means that the Court is accepting Plaintiffs’ improper invitation to view a second’s worth of video both with the “20/20 vision of hindsight,” *Graham*, 490 U.S. at 396, and in a complete vacuum in contravention of the required “totality of the circumstances” analysis. *Garner*, 471 U.S. at 8–9 (1985). The Court should decline to do so.

The district court correctly concluded that this factor weighed undisputedly in Officer Zech’s favor under the totality of the circumstances. Fuhr was clearly attempting to evade arrest by flight just seconds before and up until the time force was used.

iii. Whether the Suspect Poses an Immediate Threat to the Safety of the Officers or Others

The district court correctly determined that a reasonable officer in Officer Zech's position would have considered Fuhr as posing an immediate threat to the safety of the baby at the time deadly force was used. For the reasons discussed in detail in Sections IV(A) and VII(B)(1)(a)(i) and (ii), *supra*, Fuhr was on the run after committing serious, violent crimes including felony domestic violence assault and the kidnapping of a baby, and was reasonably believed to be armed with the gun that he had just fired at the mother in a public park. Fuhr actively evaded a conspicuous and extended police search by, among other things, trespassing through residential backyards and breaking into a building, with the baby as an innocent hostage to his criminal activity. When he was loudly ordered by officers with their guns pointed at him to stop and surrender, he chose not to do so. Instead, ran away from officers with the baby dangling from one arm, forcing officers into a dynamic and unpredictable foot chase.

Given Fuhr's evidenced desire to continue evading officers at all costs, it was reasonable to believe Fuhr might be willing to harm the baby or sacrifice her safety to achieve that end, including using his gun against her, using her as a shield,

dropping her to access the gun, or throwing her at officers as a distraction.<sup>8</sup> Fuhr's undisputed conduct clearly posed an immediate safety threat to the baby. Officer Zech was not required to wait and see what else Fuhr would do before taking action, because that might risk the baby's safety even further.

Officer Zech's belief that Fuhr posed an immediate threat to the safety of third parties was objectively reasonable based on the situation he confronted. Officer Zech was aware that Fuhr had just broken down a door to hide from police. There were occupied residences nearby that Fuhr could try to enter and barricade himself in, thereby significantly elevating the dangerousness of the situation by putting third party residents at risk. There was a risk that Fuhr would again fire his gun in public, and that bullets from his gun or police guns returning fire would penetrate windows or walls, injuring or killing third parties. Fuhr clearly posed an immediate, serious threat to the safety of third parties.

Finally, Fuhr posed a clear and immediate threat to officer safety. It was objectively reasonable for officers to believe Fuhr was armed with a gun because

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<sup>8</sup> Plaintiffs balk at any assumption by officers that Fuhr might harm his own baby, but Officer Zech did not know Fuhr's relationship to the baby at the time, and even if he did, the dangerous criminal conduct Fuhr engaged in that day with the baby certainly did not evidence the existence of a loving or safe parental relationship.

multiple witnesses reported Fuhr had discharged a gun in the commission of the violent felony for which officers were seeking to arrest him.<sup>9</sup> Fuhr actively evaded arrest up until officers intercepted his path of travel and came within a short range of him. In the short seconds just before the use of force, it was reasonable for Officer Zech to perceive Fuhr as cornered, desperate, and willing to do anything to escape arrest, including firing on officers. *See, e.g., Forrett v. Richardson*, 112 F.3d 416 (9th Cir. 1997) (holding that officer's use of deadly force was reasonable even though violent armed burglary suspect, who was being actively pursued through neighborhoods, was cornered by a fence and later determined to be unarmed).

Plaintiffs argue that Fuhr was unarmed and not a threat to anyone, again relying entirely on a hindsight viewing of body-worn video of the 1 to 2 seconds before he was shot. (Opening Brief, p. 29). The district court correctly rejected this argument. Nothing about Fuhr's appearance in the video gives rise to a reasonable inference that Officer Zech was aware that Fuhr was unarmed or unable to access the gun. Even assuming the video shows the gun was not in his hands, it still could have been in his waistband or quickly accessed if he dropped or threw the baby.

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<sup>9</sup> It is undisputed that officers were unaware that Fuhr had discarded his gun while actively evading capture. This information was not learned until after the shooting.

Plaintiffs also argue that by ditching the gun earlier, it can be inferred that Fuhr intended to surrender, but that argument is similarly unavailing because (1) it is undisputed that officers were unaware Fuhr had ditched his gun, and (2) it is undisputed that Fuhr had already turned down at least one clear opportunity to surrender after ditching the gun.

Plaintiffs also argue that, absent a visible gun or some gesture by Fuhr toward a gun, the use of deadly force by Officer Zech was *per se* unreasonable under *Cruz v. City of Anaheim*, 765 F.3d 1076, 1079 (9th Cir. 2014). (Opening Brief, pp. 29-34). In *Cruz*, officers received a report from a confidential informant and initiated a traffic stop of a suspected drug dealer, Cruz, who was known in the past to carry firearms and who was driving with a broken taillight. Cruz briefly attempted to drive away from officers and hit one of their patrol cars, but then stopped. While getting out of the car he was surrounded by officers and ordered to get on the ground. Officers testified that they saw Cruz reach for a gun as he exited the car, but their accounts differed, and a third-party witness who was on scene and had a limited view of the suspect did not corroborate their testimony. The Ninth Circuit reversed the district court's grant of summary judgment in favor of the officers, finding that it was for the jury to decide whether the suspect reached for

his gun, which was the only factor that would have justified the use of deadly force under the facts of that case.

*Cruz* is materially different from the present case. Officers did not have probable cause to arrest Cruz for having just committed multiple violent felony crimes in a public setting with children nearby. Cruz was not actively evading police capture in the intervening time by running through residential neighborhoods and backyards, breaking into a building, and going over fences. Perhaps most importantly, Cruz was not endangering the life and safety of an innocent baby during his criminal activity. The *Cruz* court analyzed the officers' use of deadly force only in terms of the threat Cruz presented to officer safety, likely because Cruz's suspected crime was not fresh and did not involve "the infliction or threatened infliction of serious physical harm" to third parties or the public at large. *See Garner* at 11. Fuhr's suspected crimes, on the other hand, were fresh and involved the infliction or threatened infliction of serious physical harm to third parties sufficient to justify the use of force to prevent his escape. Not only that, Fuhr's infliction or threatened infliction of serious physical harm involved *a baby*, perhaps the most vulnerable third party imaginable. Even without a visible gun, it cannot be disputed that Fuhr's conduct and the possibility he was still armed

placed the baby at imminent risk. *Cruz* is simply inapposite, as the district court correctly determined.<sup>10</sup> 1-ER-14–15.

The new cases Plaintiffs argue for the first time on appeal are inapposite for essentially the same reasons. *See Curnow v. Ridgecrest Police*, 952 F. 2d 321 (9th Cir. 1991); *Williams v. City of Burlington, Iowa*, 27 F.4th 1346 (8th Cir. 2022); *Poole v. City of Shreveport*, 13 F.4th 420, 425 (5th Cir. 2021). None of these cases compel a different result because they did not involve the use of deadly force to stop an undisputed threat to the life and safety of any third party, let alone a vulnerable baby being held hostage to her father’s dangerous criminal activity.

This case is more closely analogous to *Forrett v. Richardson*, 112 F.3d 416 (9th Cir. 1997). In *Forrett*, the suspect (Forrett) committed a violent armed residential burglary involving shots being fired. After the armed burglary was

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<sup>10</sup> Plaintiffs also cite *Cruz* for the proposition that officer testimony cannot be relied upon to justify a use of force that results in the death of the suspect. *Cruz* does not stand for that proposition, and in any event, the *Cruz* court did not have the benefit of extensive body-worn video largely corroborating the testimony of the officers, as is the case here. *See Thomas v. Durastanti*, 607 F.3d 655, 659 (10th Cir. 2010) (“While a court considering a summary judgment motion based upon qualified immunity usually must adopt the plaintiff’s version of the facts, that is not true to the extent that there is clear contrary video evidence of the incident at issue.”)

complete and Forrett left the scene, a victim called 911 and described his appearance, the truck he was driving, and his weapon. *Id.* at 418. Police conducted a search of the area, and about an hour later, an officer spotted Forrett's truck. Forrett abandoned his truck and fled on foot, and a police chase ensued. *Id.* Forrett ran through yards, jumped fences, and broke into a shed to evade capture. *Id.* Officers cornered him against a wooden fence. They commanded Forrett to surrender, but Forrett testified that he could not discern what the officers were shouting. *Id.* The officers fired several shots at him but missed. He climbed over the fence, and officers shot at him again through the fence, hitting but not killing him. He was taken into custody. *Id.* No weapons were found on his person or in the vicinity, and no officer testified that he saw Forrett with a weapon or holding one in his hands. *Id.* at 419.

In affirming the district court's grant of judgment as a matter of law in favor of the officers, the Ninth Circuit found that the officers' use of deadly force was reasonable to prevent Forrett's escape, despite evidence indicating that he was surrounded, up against a fence, and officers did not see any weapons at the time force was used:

Contrary to Forrett's position, the suspect need not be armed or pose an immediate threat to the officers or others at the time of the

shooting. . . .’[I]f the suspect threatens the officer with a weapon *or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm*, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.”

*Id.* at 420 (quoting *Garner* at 11-12) (italics in original).

In the present case, Fuhr was being actively pursued for crimes of a similar magnitude to Forrett’s involving the infliction or threatened infliction of serious physical harm – harm to the mother (at whom he fired a gun), harm to the baby (in whose presence he fired a gun, and then immediately kidnapped and made a participant in his criminal conduct), harm to the citizens in the park (whom he put at risk by firing his gun in public), and harm to residents in the area of the shooting (who could be at risk from further gunfire or break-ins). Fuhr was engaging in evasive behavior similar to Forrett’s – breaking into a building to avoid capture, running from officers, going over at least one fence and running through backyards. He was doing all this while carrying a baby, which made his conduct even more serious than Forrett’s because it put a defenseless baby’s life and safety directly at risk. As with the officers in *Forrett*, it was objectively reasonable for Officer Zech to believe that the use of deadly force was necessary, in that split-second moment, to prevent Fuhr’s escape and cut off any possibility of continuing or future harm to

the baby, citizens, or to the officers. *See also Vasquez v. City of San Jose*, 634 F. Supp. 3d 712 (N.D. Cal. 2022), *aff'd*, No. 22-16691, 2024 WL 445320 (9th Cir. Feb. 6, 2024), *aff'd*, No. 22-16691, 2024 WL 445320 (9th Cir. Feb. 6, 2024) (applying *Forrett* and granting summary judgment in favor of officers on Fourth Amendment claim based on the shooting and killing of an actively evading suspect in a car surrounded by officers with nowhere to go at the time force was used, whom officers believed had been involved in an earlier drive-by shooting, where officers did not see a weapon, later learning that the suspect was unarmed and not involved in previous incident); *Little v. City of Manhattan Beach*, 21 F. App'x 651, 653 (9th Cir. 2001) (applying *Forrett* and granting summary judgment to officers for shooting unarmed suspect in the back, whom officers believed had just committed armed bank robbery and was running away from them, in order to prevent his escape; observing “[the suspect] did not need a gun to pose a threat of serious harm to them or others.”).

Plaintiffs fail to address any of these cases in their opening brief, despite Defendants’ extensive reliance on them in district court. 2-ER-27–30. These cases support the constitutionality of Officer Zech’s use of force based on Fuhr’s behavior leading up to the shooting and the threat his behavior presented to the life and safety

of the baby. The district court properly found that no reasonable jury could conclude that the use of force was unreasonable. The Court should affirm for the same reasons.

b. The District Court Properly Determined that Officer Zech was Entitled to Qualified Immunity.

Qualified immunity protects officers unless they “(1) ‘violated a federal statutory or constitutional right’ and (2) ‘the unlawfulness of their conduct was clearly established at the time.’” *Moore v. Garnand*, 83 F.4th 743, 750 (9th Cir. 2023). Officer Zech is entitled to qualified immunity under the first prong of the analysis because, as discussed, *supra*, he did not violate Fuhr’s Fourth Amendment rights. *Ballentine v. Tucker*, 28 F.4th 54, 61 (9th Cir. 2022). Officer Zech is also entitled to qualified immunity under the second prong of the qualified immunity analysis because, even assuming the existence of a constitutional violation, the unlawfulness of Officer Zech’s conduct was not clearly established at the time of the incident. *Id.*

Qualified immunity protects police officers for actions that are on the “‘hazy border between excessive and acceptable force.’” *Mullenix v. Luna*, 577 U.S. 7, 18, 136 S. Ct. 305, 312, 193 L. Ed. 2d 255 (2015) (citations omitted). In excessive

force cases, “in addition to the deference officers receive on the underlying constitutional claim, qualified immunity can apply in the event the mistaken belief was reasonable.” *Saucier v. Katz*, 533 U.S. 194, 206, 121 S.Ct. 2151 (2001). In essence, Officer Zech enjoys “a kind of double deference: ‘the substantive constitutional standard protects [his] reasonable factual mistakes’ and ‘qualified immunity protects [him] from liability where [he] reasonably misjudge[d] the legal standard.’” *Weinmann v. McClone*, 787 F.3d 444, 450 (7th Cir. 2015) (quoting *Catlin v. City of Wheaton*, 574 F.3d 361, 369 (7th Cir.2009)).

“It is the plaintiff who bears the burden of showing that the rights allegedly violated were clearly established.” *Vos v. City of Newport Beach*, 892 F.3d 1024, 1035 (9th Cir. 2018) (quoting *Shafer v. County of Santa Barbara*, 868 F.3d 1110, 1118 (9th Cir. 2017)). “The Supreme Court has repeatedly admonished courts ‘not to define clearly established law at a high level of generality.’” *Id.* (quoting *Mullenix*, 136 S.Ct. at 308). The dispositive question is therefore “whether the violative nature of particular conduct is clearly established” in the specific context of the case. *Id.* (internal quotation marks and citation omitted).

The district court found that Plaintiffs failed to carry their burden of showing that the rights Officer Zech allegedly violated were clearly established. It correctly

noted that the two cases relied on by Plaintiffs to show the law was clearly established, *George v. Morris*, 736 F.3d 829, 838 (9th Cir. 2013) and *Harris v. Roderick*, 126 F.3d 1189 (9th Cir. 1997), would not have put Officer Zech on notice that his conduct was unconstitutional because they were too factually dissimilar and did not involve the use of force against a suspect who had just engaged in serious, violent crimes, was actively evading capture, and posed an immediate threat to a third party. 1-ER-15–16.

In their opening brief, Plaintiffs acknowledge that “no Ninth Circuit case law provides for the specific facts in this case.” (Opening Brief, p. 44). Plaintiffs then appear to argue, essentially, that *George* and *Harris* were sufficient to put Officer Zech on notice that his conduct was unconstitutional simply because they both involved officers shooting subjects who had not made any movements toward a gun. (Opening Brief, pp. 43-44). Plaintiffs’ argument fails for the same reasons it failed in district court: the cited cases stand for generally applicable propositions but bear few similarities factually to the case at hand. 1-ER-15. The subject in *George* had not committed a crime, was not evading police, and was not resisting arrest. The subject in *Harris*, who was involved in the factually dissimilar Ruby Ridge standoff with the FBI, was undisputedly not presenting a threat to the safety

of any third party at the time. Neither of these cases would have informed Officer Zech that his use of force, in the particularized situation he confronted where a baby's safety was directly at risk, was unconstitutional.

Moreover, Officer Zech could have reasonably believed his use force was constitutionally appropriate under *Forette* and its progeny, as discussed in the previous section. *See* Section VII(B)(1)(a)(iii), *supra*. Plaintiffs failed to distinguish these cases, or even address them, in their opening brief despite Defendants' extensive reliance on them in district court. 2-ER-27–30. They have, therefore, waived their ability to do so. *Arpin*, 261 F.3d, at 919.

The district court correctly concluded that Plaintiffs failed to carry their burden of establishing that the rights Officer Zech allegedly violated were clearly established. Thus, in the event a constitutional violation is found to have occurred in this case, the Court should still affirm the result below as to Officer Zech based on qualified immunity.

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2. The District Court Properly Entered Summary Judgment On Plaintiffs' Negligence Claim.

The district court dismissed Plaintiffs'<sup>11</sup> negligence claim because their summary judgment response did not identify or provide evidence of any specific actions on the part of Defendants that showed an alleged breach of duty or causation. 1-ER-17-18. In their opening brief, Plaintiffs acknowledge that their summary judgment response was conclusory but argue nothing more was required of them:

The district court claims Appellants failed to provide any specific argument about what duty was breached or how the breach caused injury despite Appellants clearly stating that defendant officers failed to exercise reasonable care according to statutory law. This is a sufficient and specific argument and the district court erred in concluding it failed.

(Opening Brief, pp. 48-49). Plaintiffs cite no authority for the proposition that conclusory argument is sufficient to withstand summary judgment on the element of breach of duty, and that is likely because no such authority exists. Conclusory statements and argument are clearly not sufficient to withstand summary judgment.

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<sup>11</sup> Because Fuhr has surviving children, the Estate is the only proper plaintiff on the state law claims. *See* RCW 4.20.010; RCW 4.20.046(2); RCW 4.20.060. Plaintiffs did not oppose this argument below, do not challenge it on appeal, and have waived any objection to it.

*Reed v. Pizzi*, 15 F.3d 1088 (9th Cir. 1994). Because Plaintiffs failed to provide the requisite argument or evidence to support the breach of any duty, a fact that Plaintiffs appear to admit in their opening brief, the district court properly dismissed this claim. *Id.* Plaintiffs offer no compelling argument as to how or why the district court erred in this determination. As such, the Court should affirm the district court's dismissal of this claim and need not reach the merits of Plaintiffs' remaining arguments.

The district court also dismissed Plaintiffs' negligence claim on the ground they had not met their burden of coming forward with specific argument and evidence to support the element of causation. 1-ER-18. Plaintiffs do not meaningfully discuss this aspect of the district court's order in their opening brief. (Opening Brief, pp. 48-54). Plaintiffs have, therefore, waived any objection to this aspect of the district court's order. *Arpin*, 261 F.3d at 919.

To the extent the Court reaches the merits of Plaintiffs' arguments on their negligence claim, it still fails. Plaintiffs' arguments are muddled, difficult to discern, and remain largely conclusory. Plaintiffs identify some new facts they believe show the breach of a negligence duty but do not identify the evidence in the record that supports them. For example, Plaintiffs allege that "Officer Zech

knew or should have known that [Fuhr] was under the influence of alcohol and that because of this, his reasoning and reaction time to commands likely would have been substantially impaired.” (Opening Brief, p. 49). Plaintiffs identify no evidence to support their allegation that Officer Zech was aware that Fuhr was intoxicated, and indeed, he was not. 3-ER-363–364. Plaintiffs do not identify any specific departures from SPD policy, police standards, or training on any alleged failure to deescalate or use of less-lethal options, or any other alleged breach of duty. Simply identifying a general state statute on use of force (RCW 10.120.020) and then repeating conclusory characterizations of the facts does not suffice to carry their burden on summary judgment. *See Reed*.

To the extent Plaintiffs assert that officers breached their duty by failing to use de-escalation tactics prior to the shooting, their claim also fails. (Opening Brief, pp. 48-49). First, like in district court, Plaintiffs do not articulate in their opening brief precisely how officers failed to deescalate or what less-lethal options should have been employed, nor do they offer any evidence to support their position. *Id.* Second, it is undisputed that officers did attempt to de-escalate by having a large police presence, pointing their weapons, and issuing multiple commands for Fuhr to “STOP!” Fuhr ignored these de-escalation efforts and

instead continued to evade arrest by running away from officers. In the moment of the shooting, de-escalation tactics already failed and further de-escalation was not feasible for the reasons previously discussed, and as articulated by the City's police practices expert. 3-ER-391–422. De-escalation is not required or appropriate if it is not feasible under the circumstances.

Plaintiffs also have not shown that, but for the failure to de-escalate, Fuhr more likely than not would have survived. Plaintiff's evidence in this regard is pure speculation, which is insufficient to sustain a negligence claim. *See Lacy v. Snohomish Cnty.*, 14 Wash. App. 2d 1045 (2020) (trial court properly directed verdict in favor of officers where plaintiff presented no evidence from which a reasonable juror could find, without speculating, that had officers used proper de-escalation tactics and not escalated the situation, the decedent more likely than not would have survived). Plaintiffs do not meaningfully discuss this aspect of the district court's ruling in their opening brief.

To the extent Plaintiffs argue that Officer Zech was negligent in using deadly force on an unarmed suspect, that argument fails for the same reasons articulated in Section VII(B)(1)(a), *supra*. Based on the undisputed facts, it was objectively reasonable for Officer Zech to believe Fuhr was an armed, fleeing, non-compliant,

felony suspect who presented an immediate and serious threat to the child, the public, and officers. Plaintiffs have offered no evidence to support their theory that Officer Zech was aware, or should have been aware, that Fuhr was unarmed at the time force was used.

Plaintiffs devote a significant portion of their negligence argument to discussing *Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537 (2019). (Opening Brief, pp. 50-54). In *Beltran-Serrano*, the Washington Supreme Court held that the public duty doctrine does not immunize a public entity from liability when an officer has affirmatively acted, and a police officer who intentionally shoots a person may be liable in both negligence and intentional tort under Washington law. *Id.* The district court's dismissal of Plaintiffs' negligence claim did not rest on the element of duty, however, as it found that "Plaintiffs have demonstrated that there is, at a minimum, a question of fact as to whether Defendants owed Fuhr a duty of reasonable care" under *Beltran-Serrano*. 1-ER-17. Because the district court's order assumed the existence of a negligence duty in Plaintiffs' favor, it is unclear why Plaintiffs discuss the public duty doctrine at length in their opening brief.

Plaintiffs have not shown any error in the district court's dismissal of their negligence claim. The district court's dismissal of this claim should be affirmed.

3. The District Court Properly Entered Summary Judgment on Plaintiffs' Outrage Claim.

The tort of outrage (intentional infliction of emotional distress) requires the proof of three elements: (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual result to plaintiff of severe emotional distress. *Kloepfel v. Bokor*, 149 Wn.2d 192, 195, 66 P.3d 630 (2003). Claims for outrage must be predicated on behavior that 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.” *Grimsby v. Sampson*, 85 Wn.2d 52, 59, 530 P.2d 291 (1975) (internal citations omitted). Whether the conduct complained of is sufficiently extreme to result in liability is a preliminary question for the Court before a claim of outrage can be allowed to go to the jury. *Pettis v. State*, 98 Wn. App. 553, 563, 990 P.2d 453 (1999).

Plaintiffs' outrage claim fails for essentially the same reasons their excessive force claim fails. *See* Section VII(B)(1)(a), *supra*. They fail to articulate any specific facts or admissible evidence demonstrating an unlawful use of force, let alone one that can be considered “atrocious or utterly intolerable in a civilized society.” *Id.* The district court's dismissal of this claim should be affirmed.

4. The District Court Properly Entered Summary Judgment on Plaintiffs' WLAD Claim.

The district court properly dismissed Plaintiffs' WLAD claim. 1-ER-19–20. The WLAD declares that each person may be free from discrimination based on race, creed, color, national origin, and mental disability. RCW 49.60.030. To show race discrimination, a plaintiff must show: (1) that he is a member of a protected class; (2) the establishment is a place of public accommodation or assemblage; (3) the defendant discriminated against the plaintiff by not treating him in a manner comparable to the treatment it provides to persons outside that class; and (4) the protected status was a substantial factor causing the discrimination. *Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 524-25, 20 P.3d 447, 456 (2001), *review denied*, 145 Wn.2d 1004 (2001).

Plaintiffs do not provide argument or evidence capable of establishing the second, third, or fourth elements of their racial discrimination claim. Fuhr was shot on private property, not in a place of public accommodation. *See White v. City of Tacoma*, No. C12-5987 RBL, 2014 WL 172037, at \*12 (W.D. Wash. Jan. 15, 2014) (dismissing WLAD claim because incident occurred on private property). This factor alone, which has not been disputed or even addressed by Plaintiffs, warrants

affirmance of the district court's dismissal of this claim. As to evidence of discrimination and causation, Plaintiffs argue in conclusory fashion and without citation to legal authority, that Officer Zech's conduct was the result of implicit bias and therefore subject to liability under WLAD. (Opening Brief, p. 54-55). Plaintiffs provide absolutely no facts or evidence to support a finding of implicit bias. Again, conclusory allegations and speculation are not enough to withstand summary judgment. *See Reed* 15 F.3d at 1088. The district court properly dismissed this claim, and the Court should affirm.

### **VIII. CONCLUSION**

For the foregoing reasons, Respondents City of Seattle and Noah Zech respectfully request that the order of the district court granting summary judgment in their favor be affirmed.

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Dated this 10th day of April, 2025.

s/ Rebecca Widen

Rebecca Widen, WSBA# 57339

s/ Catherine E. Riedo

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## CERTIFICATE OF COMPLIANCE

**This brief contains 13,877**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief complies with the word limit of Cir. R. 32-1.

Date: April 10, 2025

s/ Rebecca Widen, WSBA# 57339  
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