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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Cynthia Williams,

) No. CV-09-1511-PHX-LOA

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Plaintiff,

) **ORDER**

11

vs.

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City of Mesa, a municipal corporation;
John Santiago, individually, and in his
capacity as a Mesa Police Officer,

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Defendants.

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This matter arises on the Motion for Summary Judgment by Defendants City of Mesa (“City”) and Mesa Police Officer John Santiago (collectively “Defendants”). (Doc. 37) Defendants argue that because the record lacks sufficient evidence to support Plaintiff’s claims, summary judgment is appropriate on all claims. (*Id.* at 1)

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After review of the briefing, including Plaintiff Cynthia Williams’ (“Plaintiff”) second Response in opposition to the Motion, doc. 50¹; the Defendants’ Reply, doc. 47; the parties’ Statements of Facts, including their Controverting Statement of Facts, docs. 45-46,

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¹ On January 19, 2011, the Court struck Plaintiff’s Response without prejudice for violations of the District Court’s Local Rules pursuant to its inherent authority. *Ready Transportation, Inc., v. AAR Manufacturing, Inc.*, 627 F.3d 402, 404 (9th Cir. 2010) (court’s inherent authority “includes the power to strike items from the docket as a sanction for litigation conduct.”) Plaintiff timely re-filed her Response but the Court will consider only Plaintiff’s arguments and authorities on her excessive force and state law claims. (Docs. 49, 51, 56)

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1 the Court concludes that disputed questions of fact exist for jury resolution on Plaintiff's
2 claims for alleged use of excessive force (Count I), negligence (Count III), negligence *per*
3 *se* (Count IV), and punitive damages on her excessive force claim against Officer Santiago
4 in his individual capacity (Count VIII). Summary judgment is granted on Plaintiff's claims
5 of assault and battery (Count II), negligent supervision and training (Counts VI and VII), and
6 punitive damages against the City, Officer Santiago in his official capacity, and Plaintiff's
7 state law claims (Count VIII).

8 **I. Introduction**

9 Plaintiff commenced this § 1983 action on April 24, 2009, in the Maricopa
10 County Superior Court, State of Arizona. (Doc. 1-4, Exhibit ("Exh") 2 at 5-13) On July
11 22, 2009, the City Defendants and the Mesa Police Department² removed the case to this
12 District Court. (Doc. 1) Federal subject-matter jurisdiction is predicated upon 28 U.S.C.
13 § 1331 (federal question) and supplemental jurisdiction exists over Plaintiff's state law
14 claims pursuant 28 U.S.C. § 1367(a). Upon the voluntary consent of all parties, docs. 6,
15 12, this matter is before the undersigned Magistrate Judge for all purposes including entry
16 of final judgment. 28 U.S.C. § 636(c).

17 **II. Background**

18 In the Complaint, Plaintiff alleges violations of her civil rights under the
19 Fourth Amendment of United States Constitution (Count I: excessive use of force)
20 pursuant to 42 U.S.C. § 1983 based on a traffic stop and subsequent arrest by Mesa police
21 on April 26, 2008. Specifically, the Complaint alleges that, *inter alia*, Officer John
22 Santiago "grabbed Plaintiff and violently slammed her against the Mesa Police patrol
23 vehicle [and] then aggressively and violently grabbed Plaintiff's right arm and began
24 excessively twisting her arm." (Doc. 1-4, ¶ 17 at 7) Plaintiff sustained a serious injury to
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27 ² Defendant Mesa Police Department was dismissed as a party on August 18, 2009
28 because it is not a jural entity subject to suit. (Doc. 8)

1 her right arm during the course of her arrest.³ Plaintiff also alleges several state-law
2 claims: assault and battery (Count II), negligence (Count III), negligence *per se* (Count
3 IV), negligent infliction of emotional distress (Count V),⁴ negligent supervision (Count
4 VI) and negligent training (Count VII). (*Id.* at 5-13) Plaintiff seeks compensatory and
5 punitive damages, attorneys’ fees, litigation costs including expert and non-expert witness
6 fees, and such other relief as the Court may deem just and proper. (*Id.* at 12)

7 **III. Facts**

8 Up until the time of Plaintiff’s arrest, the parties generally do not dispute
9 the material facts. Because this matter arises on Defendants’ Motion for Summary
10 Judgment, the Court views the facts in the light most favorable to Plaintiff. *Adams v.*
11 *Speers*, 473 F.3d 989, 990-91 (9th Cir. 2007).

12 At 1:00 a.m. on April 26, 2008, Mesa Police Officer Joseph Panagakis
13 observed Plaintiff driving at an excessive speed (65 m.p.h.⁵) in the center lane (left turn
14 only) westbound on University Drive near Higley in Mesa, Arizona. (Defendants’ State-
15 ment of Facts (“DSOF”), ¶ 1 at 1; doc. 38) When he pulled Plaintiff over and approached
16 her vehicle, Officer Panagakis observed she was wearing only a shear negligee and
17 matching thong, “frantically crying.” (Plaintiff’s Statement of Facts (“PSOF”), ¶ 1 at 5-6,
18 doc. 45; Exhibit (“Exh”) A at 27, 108-110) Plaintiff indicates she snuck out of her
19 boyfriend Sam’s house in a rush to go to her home to avoid an argument and confron-
20 tation with him. (PSOF, ¶ 1 at 5-6) Plaintiff immediately admitted to Officer Panagakis,
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22 ³ Plaintiff sustained a spiral fracture to her right humerus a few inches above her
23 elbow, requiring open reduction and internal fixation. (PSOF, ¶ 29, doc. 45 at 9; DSOF, ¶ 37)

24 ⁴ On February 14, 2011, the parties stipulated to the dismissal with prejudice of
25 Plaintiff’s claim for negligent infliction of emotional distress. (Docs. 56, 58)

26 ⁵ Plaintiff testified in her deposition that she was driving at the posted speed limit.
27 (Plaintiff’s depo, Exh A, at 116; doc. 45 at 116) In his deposition, Officer Panagakis testified
28 that when he pulled her over, Plaintiff admitted to him she was speeding. (Officer
Panagakis’s depo, Exh 1, at 28, doc. 38-2 at 5)

1 who was familiar with Plaintiff from prior police contact, that she was driving on a
2 suspended license. (DSOF, ¶¶ 2, 4-6) Because Plaintiff was embarrassed about her attire,
3 Officer Panagakis instructed Plaintiff to remain in her car while he returned to his police
4 vehicle to run a computer check on her. The computer check confirmed Plaintiff's driving
5 privilege was suspended. (DSOF, ¶¶ 7-8; Exh 1 at 28) After verifying her driving
6 privilege was suspended, Officer Panagakis radioed for backup Mesa police officers to
7 assist him in conducting an inventory of the contents of Plaintiff's vehicle, calling a tow
8 truck and impounding her vehicle.⁶ (DSOF, ¶¶ 9-10) Pursuant to the Mesa Police
9 Department's policy, Mesa officers conduct an inventory search of a vehicle before
10 having it towed. (DSOF ¶ 17)

11 To assist Officer Panagakis with the impound process, Mesa Officers John
12 Santiago, Travis Rowland and Edwin Nickerson arrived at the scene. (DSOF ¶ 11, PSOF
13 ¶ 9) Upon their arrival, and although Plaintiff denies she was angry, the officers observed
14 Plaintiff shouting into a cell phone, banging her head and hands on the steering wheel,
15 stomping her feet, and thrashing back and forth in her car seat. (DSOF ¶ 12, PSOF ¶ 8)
16 While Officer Nickerson was conducting the inventory of Plaintiff's vehicle, he
17 discovered a home-made crack pipe with the tip wrapped in burnt aluminum foil in the
18 front center console.⁷ (DSOF ¶ 21) Plaintiff denies the crack pipe was hers. (PSOF ¶ 34)

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20 ⁶ Officer Panagakis was required to "cause the removal and either immobilization
21 or impoundment" of Plaintiff's vehicle for thirty days since he determined that Plaintiff was
22 driving a vehicle while her "driving privilege [was] suspended[.]" Arizona Revised Statutes
23 ("A.R.S.") § 28-3511(A)(1), (E) (2008); *State v. Organ*, 225 Ariz. 43, 234 P.3d
24 611(Az.Ct.App. 2010); *Salazar v. City of Maywood*, ___ F.3d ___, 2011 WL 477686 (9th Cir.
25 2011) (city statute, which provides for notice and an opportunity to be heard, permitting
impoundment of vehicles for up to thirty days does not violate vehicle owners' constitutional
rights when an individual is found to be driving on a suspended or revoked license or without
ever having been issued a driver's license.)

26 ⁷ "[A]lthough crack and powder cocaine are different forms of the same drug, the
27 routes of administration, their physiological and psychological effects, and the manner in
28 which they are sold set the two forms of the drug apart. Crack is normally smoked in a glass
pipe, while powder cocaine is most often ingested nasally. Because it is smoked, crack has

1 Before the crack pipe was discovered, Officer Santiago approached
2 Plaintiff, still seated in her vehicle, allowed her to finish putting on her slacks laying on
3 the passenger's seat,⁸ and escorted her to a nearby sidewalk. (DSOF ¶ 13-15) While on
4 the sidewalk approximately 20 to 30 feet from her vehicle, Plaintiff asked if she could
5 have her purse and cell phone she had left in the vehicle so she could call her boyfriend.
6 (PSOF ¶13-14; Plaintiff's depo, Exh A, at 131) At this time, Officers Nickerson and
7 Rowland were beginning their inventory of her vehicle.

8 In her deposition, Plaintiff testified, "I kept asking for my phone. They were
9 over there searching my car, and I said, 'Well, can I just get my phone,' . . . because I
10 want to call [my boyfriend] before the tow truck comes to get my car. They just kept
11 saying, 'Wait. Wait a minute. Wait a minute.'" (Plaintiff's depo, Exh A, at 105; doc. 45 at
12 105) Plaintiff claims she took one or two steps towards her car to retrieve her phone, at
13 least, 20 feet away when one of the officers said "stop" or "stay still." (PSOF ¶ 14, 16;
14 Plaintiff's depo, Exh A, at 125-126) Plaintiff admits that Officer Panagakis told her twice
15 not to go back to her car. However, she denies she was told three or more times not to go
16 to her vehicle and denies she was told if she tried to go to her vehicle again, she would be
17 arrested. (PSOF, ¶ 16; Plaintiff's depo, Exh A, at 123, 126-127)

18 Fifty years of age at the time, about 5 feet 2 inches tall, and weighing only
19 115 pounds or so, Plaintiff claims that without any warning, Officer Santiago, a former

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21 a quicker and more intense effect on the brain than powder cocaine ingested nasally, causing
22 a greater desire for more. Crack is also sold in smaller quantities and lower unit prices than
23 powder cocaine, thereby reducing the financial barrier which had previously limited cocaine
24 usage." *United States v. Harding*, 971 F.2d 410, 413 (9th Cir. 1992) (footnote omitted). As
25 footnote 3 indicates, most cocaine users will smoke crack while few are willing to inject
26 cocaine into their arms. *Id.*

27 This information is offered for background purposes only and is immaterial to this
28 summary judgment motion because Plaintiff was neither arrested nor charged with
Possession of Drug Paraphernalia, a Class 6 felony and punishable by a sentence of 6 months
to 1.5 years in prison under Arizona law. A.R.S. §§ 13-3415(A), 13-702(A), (D).

⁸ At some time before her arrest, Plaintiff also put on a jacket.

1 Navy serviceman trained in hand-to-hand combat, standing about 6 feet 3 inches, and
2 weighing 250 pounds, grabbed Plaintiff by the right arm and fractured it in the process of
3 placing her hands in handcuffs behind her back. (PSOF ¶¶ 19, 43, 48-49; Plaintiff’s depo,
4 Exh A, at 125-126) “[H]e just ripped, popped my arm, and threw it behind my back. It
5 was never - it was like without warning.” (Plaintiff’s depo, Exh A, at 127, 140) Plaintiff
6 claims Officer Santiago grabbed her at the elbow, “had me in some kind of hold,” and “he
7 hit my elbow with his hand.” (*Id.* at 134-135; DSOF, ¶ 39⁹)

8 Plaintiff denies she struggled with Officer Santiago, denies Officer
9 Panagakis touched her or was even on the sidewalk when Officer Santiago broke her arm,
10 denies she tried to get away from Officer Santiago, and claims she was only reacting to
11 him hurting her by trying to move her body to a position that relieved the pain. (Plaintiff’s
12 depo, Exh A, at 133, 134, 140) After breaking her arm, Plaintiff claims Officer Santiago
13 immediately twisted her arm around her back and put on the handcuffs. She testified she
14 immediately screamed, “My arm, my arm.” Officer Santiago asked, “Are you hurt?”
15 Plaintiff responded, “Yes, [m]y arm, my arm.” Officer Santiago then removed the
16 handcuffs and asked her if she wanted him to call an ambulance. She said, “Yes.” (*Id.* at
17 142) An ambulance arrived shortly thereafter and eventually transported Plaintiff to a
18 local hospital. (PSOF, ¶ 27)

19 Plaintiff was never cited for a traffic violation nor charged with a crime
20 arising out of the events of April 26, 2008. (PSOF, ¶ 38) Plaintiff denies, and there is no
21 non-opinion evidence to dispute, that Plaintiff consumed alcohol or used or possessed
22 illicit drugs before she was stopped by Officer Panagakis. (*Id.*, ¶¶ 31-33, 37) Defendants
23 admit that Plaintiff never assaulted or attempted to assault any of the police officers. (*Id.*, ¶

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26 ⁹ Defendants point out that Plaintiff testified that “[Officer Santiago] hit my elbow
27 with his hand [and] [t]hat’s what caused my arm to break.” (DCSOF, ¶ 39, Plaintiff’s depo,
28 Exh 3 at 135, doc. 38-4 at 12) Plaintiff’s counsel, however, does not dispute that Plaintiff’s
own expert witnesses acknowledge that Plaintiff’s arm was not broken because Officer
Santiago “hit her.” (*Id.*)

1 40)

2 Defendants tell a much different story. Defendants contend that Officer
3 Panagakis escorted Plaintiff to the sidewalk away from roadway traffic and began
4 explaining to her why he was citing her. As he did so, Plaintiff “wasn’t paying attention
5 to what [he] was saying and she kept looking over at Officer Nickerson, who was starting
6 his inventory of [her] vehicle[.]” (Officer Panagakis’ depo, Exh 1, at 29-30, doc. 38-2 at
7 7) Plaintiff was “very agitated,” “antsy,” and said, “[W]hat’s he doing in my car? There’s
8 nothing in there. I have nothing. I need my purse [and] cell phone. And she kept going
9 toward the vehicle.” (*Id.* at 30, PSOF, ¶ 18) Officers Santiago and Panagakis were both
10 on the sidewalk with Plaintiff at this time. Officer Panagakis explained to her that Officer
11 Nickerson was inventorying her vehicle because it was being impounded and that she
12 needed to “[I]et us do our job.” (*Id.*)

13 According to Defendants, the first time Plaintiff started to walk toward
14 Officer Nickerson and her car, Officer Panagakis told her to stop and placed himself
15 between Plaintiff and her vehicle to block her path but she “kept trying to go around
16 [him].” (*Id.*) Three times, Defendants claim, Plaintiff was told to stay away from Officer
17 Nickerson and her vehicle, but she continued to try to walk towards Officer Nickerson,
18 saying that she needed her purse and phone. (*Id.*)

19 After Plaintiff’s second or third attempt to go to her vehicle, and because
20 she refused to comply with his commands, Officer Panagakis grabbed her left arm and
21 wrist and again escorted her back to the sidewalk. (*Id.* at 30-31) At this time, Officer
22 Panagakis told Plaintiff, “if you’re going to keep this up, I will arrest you.” (*Id.* at 31)
23 Nevertheless, Plaintiff again tried to go to her vehicle and this time, rather than citing and
24 releasing her as he had planned, Officer Panagakis arrested her because he “couldn’t stop
25 her from continuing to interrupt on (sic) the inventory and then interrupting the traffic
26 stop.” (*Id.* at 55) When Officer Panagakis grabbed her left arm, Officer Santiago grabbed
27 her right arm. (*Id.* at 31) Plaintiff immediately pulled away from Officer Panagakis’
28 grasp but Officer Santiago was able to hold on to her right arm and hand as he physically

1 escorted her over to Officer Panagakis' patrol car. (*Id.* at 31, 55; DSOF ¶¶ 22-24) As he
2 had been trained to do, Officer Santiago used an "O.C.C.S. lock hold"¹⁰ on Plaintiff's
3 right hand and arm as Plaintiff fought to get loose. (DSOF ¶ 25; Officer Santiago's depo,
4 Exh 2 at 148, doc. 38-3 at 6) Plaintiff began "flailing," "twisting," and "spinning" "like
5 a "Tasmanian devil." (Officer Panagakis' depo, Exh 1, at 31, 62) The struggle continued
6 to the front of Officer Panagakis' patrol car where Officer Santiago pinned her between
7 the patrol car and himself with his leg while he held on to her right hand and arm.
8 (Officer Santiago's depo, Exh 2 at 148) Plaintiff "continued to resist, she would go
9 down, come up, go down, come up and try to twist around her leg and fall." (*Id.*) At this
10 time, Officer Santiago heard a "pop in her arm" but she continued resisting and fighting.
11 (*Id.* at 148-149) Plaintiff did not immediately scream in pain or complain that she was
12 injured but later did so after she was placed in the police vehicle. (DSOF ¶¶ 25-27) As
13 Plaintiff sat in the police vehicle, the officers heard her yell that her arm hurt so the
14 officers promptly assisted her from the patrol car, removed her handcuffs, and helped take
15 off her jacket. At that point, the two officers saw that her upper right arm was misshapen.
16 (PSOF, ¶¶ 31-33) Officer Santiago then called the fire department for emergency medical
17 assistance and his supervisor to report the incident. Fire department paramedics treated
18 Plaintiff at the scene and she was transported by ambulance to Banner Gateway Hospital.
19 (*Id.*, ¶¶ 34-36)

20 Defendants' Reply argues that "[i]t is true that Plaintiff remembers some
21 details differently than do the officers, but these details are not material to the motion for
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24 ¹⁰ Officer Santiago described an O'Donnell Continuous Control System ("O.C.C.S.")
25 lock hold as "a control hold." Generally, a police officer stands behind an arrestee and grasps
26 the arrestee's right hand with the officer's right hand and then the arrestee's right forearm
27 between the wrist and elbow with the officer's left hand. The arrestee's right "arm is grabbed,
28 twisted and [is] rotated" behind the arrestee's back at which time the officer places his
handcuffs on the arrestee's right wrist. "[I]t's a technique which uses pain compliance,
depending on the person's tolerance." (Officer Santiago's depo, Exh C at 149-158, doc. 41-3
at 50-52)

1 summary judgment. Both officers testified that Officer Panagakis grabbed Plaintiff's left
2 hand, but she pulled away from him three times. Plaintiff denies that Officer Panagakis
3 ever touched her. But Officer Panagakis is not a named defendant, and it is not necessary
4 in evaluating the propriety of Officer Santiago's actions to determine that Plaintiff was at
5 the same time pulling away from Officer Panagakis." (Doc. 47 at 3) Defendants point out
6 the many inconsistencies in the testimony. "Officer Santiago testified that he was holding
7 the Plaintiff's arm when she thrashed forward and backward into him and that is when her
8 arm broke. Plaintiff has the burden of proving (sic) that she suffered injury because of
9 excessive force by Officer Santiago. Here, Plaintiff does not have evidence that excessive
10 force was used instead she simply argues that she suffered injury." The Court disagrees.

11 **IV. Summary Judgment Standard**

12 A moving party may, at any time, move for summary judgment on all or
13 any part of a claim. Fed.R.Civ.P. 56. The Court may only grant summary judgment if the
14 pleadings and supporting documents, viewed in the light most favorable to the non-
15 moving party, determines that "there is no genuine issue of material fact and that the
16 moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *Celotex*
17 *Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Substantive law determines which facts
18 are material. *Anderson v. Liberty Lobby, Inc.*, 447 U.S. 242, 248 (1986). "Only disputes
19 over facts that might affect the outcome of the suit under the governing law will properly
20 preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248. In considering the
21 evidence, the Court is not to weigh the evidence and determine the truth of the matter, but
22 to determine whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 249. The
23 moving party need not disprove matters on which the opponent has the burden of proof at
24 trial. *Celotex*, 477 U.S. at 323.

25 The party opposing summary judgment "may not rest upon the mere allega-
26 tions or denials of [the party's] pleadings, but . . . must set forth specific facts showing
27 that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *Matsushita Elec. Industries*
28 *Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 685-87 (1986). There is no genuine issue

1 for trial unless there is sufficient evidence favoring the non-moving party. If the evidence
2 is merely colorable or is not significantly probative, summary judgment may be granted.
3 *Anderson*, 477 U.S. at 249-50. However, “[t]he evidence of the non-movant is to be
4 believed, and all justifiable inferences are to be drawn in his [or her] favor.” *Id.* at 255.
5 Allegations of civil rights violations are to be liberally construed. *Thomas v. Youngblood*,
6 545 F.2d 1171, 1192 (9th Cir. 1976).

7 When considering a motion for summary judgment based on qualified
8 immunity, district “courts are required to view the facts and draw reasonable inferences
9 ‘in the light most favorable to the party opposing the [summary judgment] motion.’” *Scott*
10 *v. Harris*, 550 U.S. 372, 378 (2007) (alteration in original) (citations omitted). “However,
11 when the facts, as alleged by the non-moving party, are unsupported by the record such
12 that no reasonable jury could believe them, we need not rely on those facts for purposes
13 of ruling on the summary judgment motion.” *Wilkinson v. Torres*, 610 F.3d 546, 550 (9th
14 Cir. 2010) (citing *Scott*, 550 U.S. at 380); *City of Vernon v. Southern Cal. Edison Co.*,
15 955 F.2d 1361, 1369 (9th Cir. 1992), *cert. denied*, 506 U.S. 908 (1992) (a party cannot
16 defeat a summary judgment motion by producing a “mere scintilla of evidence to support
17 its case.”).

18 The facts which establish a genuine issue of fact must be in *both* the district
19 court’s file and set forth in the parties’ briefings. *Carmen v. San Francisco Unified School*
20 *District*, 237 F.3d 1026, 1029 (9th Cir. 2001); Rule 56(c)(3), Fed.R.Civ.P. The trial court

21 may determine whether there is a genuine issue of fact, on summary
22 judgment, based on the papers submitted on the motion and such other
23 papers as may be on file and specifically referred to and facts therein set
24 forth in the motion papers. Though the court has discretion in appropriate
25 circumstances to consider other materials, it need not do so. *The district*
court need not examine the entire file for evidence establishing a genuine
issue of fact, where the evidence is not set forth in the opposing papers with
adequate references so that it could conveniently be found.

26 *Id.* at 1031 (emphasis added).

27 **V. Traffic Stop**

28 Temporary detention of individuals during a police automobile stop, even if

1 only for a brief period, constitutes a seizure within the meaning of the Fourth Amend-
2 ment. Thus, an automobile stop is subject to the constitutional requirement that the
3 seizure not be “unreasonable” under the circumstances. *Whren v. United States*, 517 U.S.
4 806, 809-10 (1996)). Traffic stops are investigatory stops, which require only a showing
5 of reasonable suspicion, *i.e.*, whether under the totality of the circumstances, Officer
6 Panagakis had a reasonable suspicion that a traffic law violation occurred. *Arizona v.*
7 *Johnson*, ___ U.S. ___, 129 S.Ct. 781, 784 (2009) (permitting a limited stop “when the
8 police officer reasonably suspects” a traffic violation); *United States v. Lopez- Soto*, 205
9 F.3d 1101, 1105 (9th Cir. 2000) (“[T]he Fourth Amendment requires only reasonable
10 suspicion in the context of traffic stops.”). Reasonable suspicion requires “specific,
11 articulable facts which, together with objective and reasonable inferences, form a basis
12 for suspecting that a particular person is engaged in criminal conduct.” *United States v.*
13 *Thomas*, 211 F.3d 1186, 1189 (9th Cir. 2000) (internal quotations omitted). Reasonable
14 suspicion is less than probable cause, but more than an “inchoate and unparticularized
15 suspicion or ‘hunch.’ ” *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (quoting *Terry v.*
16 *Ohio*, 392 U.S. 1, 27 (1968)).

17 Here, Plaintiff does not challenge whether Officer Panagakis had reason-
18 able suspicion to stop Plaintiff or whether probable cause existed to arrest her because of
19 her undisputed admission at the scene she was driving on a suspended license.

20 **VI. Qualified Immunity**

21 The Fourth Amendment guarantees “[t]he right of the people to be secure in
22 their persons, houses, papers, and effects, against unreasonable searches and seizures.”
23 U.S. Const., Amend. IV. It is clearly established that “[t]he use of excessive force by
24 police officers in an arrest violates the arrestee’s Fourth Amendment right to be free from
25 an unreasonable seizure.” *White v. Pierce County*, 797 F.2d 812, 816 (9th Cir. 1986). The
26 Ninth Circuit has held that a § 1983 claim may be based upon the Fourth Amendment if
27 the police used excessive force during an arrest. *Robins v. Harum*, 773 F.2d 1004 (9th
28 Cir. 1985).

1 At the summary judgment stage in § 1983 actions where the plaintiff has
2 alleged a violation of the Fourth Amendment, the qualified immunity question is closely
3 related, though not identical, to the question on the merits: whether the plaintiff has raised
4 a triable issue regarding the constitutional violation. Defendants argue that they are
5 entitled to qualified immunity on Plaintiff’s claim of use of excessive force. The Court
6 must determine, viewed in the light most favorable to Plaintiff, whether the facts alleged
7 show Officer Santiago’s conduct violated a constitutional right. *Saucier v. Katz*, 533 U.S.
8 194, 201 (2001). Where the facts are disputed, their resolution and determinations of
9 credibility “are manifestly the province of the jury.” *Santos v. Gates*, 287 F.3d 846, 852
10 (9th Cir. 2002).

11 Police officers and other state officials are entitled to qualified immunity
12 from section 1983 suits. *Davis v. Scherer*, 468 U.S. 183, 194 n. 12 (1984); *Wood v.*
13 *Ostrander*, 879 F.2d 583, 591 (9th Cir. 1989). “Qualified immunity balances two
14 important interests - the need to hold public officials accountable when they exercise
15 power irresponsibly and the need to shield officials from harassment, distraction, and
16 liability when they perform their duties reasonably. The protection of qualified immunity
17 applies regardless of whether the [police officer’s] error is a mistake of law, a mistake of
18 fact, or a mistake based on mixed questions of law and fact.” *Pearson v. Callahan*, 555
19 U.S. 223, ___, 129 S.Ct. 808, 815 (2009) (citation and internal quotation marks omitted).

20 In *Saucier*, *receded from by Pearson*, 129 S.Ct. at 815, the Supreme Court
21 instructed lower courts deciding summary judgment motions based on qualified immunity
22 to consider “this threshold question: Taken in light most favorable to the party asserting
23 the injury, do the facts alleged show the officer’s conduct violated a constitutional right?”
24 *Id.* at 201. If not, then “there is no necessity for further inquiries concerning qualified
25 immunity.” *Id.* If so, then “the next, sequential step is to ask whether the right was
26 clearly established.” *Id.* A constitutional right is clearly established when, “on a
27 favorable view of the other parties’ submissions[,]” “it would be clear to a reasonable
28 officer that his conduct was unlawful in the situation he confronted.” *Id.*

1 If the right is not clearly established, the individual public officials are
2 entitled to qualified immunity if a reasonable official could have believed that his or her
3 conduct was lawful. *Thompson v. Souza*, 111 F.3d 694, 698 (9th Cir. 1997). The Supreme
4 Court’s 2009 decision in *Pearson* clarified that a district court is “permitted to exercise
5 [its] sound discretion in deciding which of the two prongs of the qualified immunity
6 analysis should be addressed first in light of the circumstances in the particular case at
7 hand.” *Pearson*, 129 S.Ct. at 818. The Court will consider the pending summary
8 judgment motion in view of the foregoing principles.

9 **A. Excessive Force**

10 Plaintiff claims that Officer Santiago used excessive force in effectuating
11 her arrest in violation of her rights under the Fourth Amendment. The Fourth Amendment
12 requires police officers to use only an amount of force that is objectively reasonable in
13 light of all the surrounding circumstances. *Graham v. Connor*, 490 U.S. 386, 397 (1989).
14 In the Ninth Circuit, courts evaluate claims of excessive force under the objective
15 reasonableness standard. *Pierce v. Multnomah County*, 76 F.3d 1032, 1043 (9th Cir.
16 1996). “[T]he reasonableness inquiry in an excessive force case is an objective one: the
17 question is whether the officers’ actions are ‘objectively reasonable’ in light of the facts
18 and circumstances confronting them, without regard to their underlying intent or
19 motivation.” *Graham*, 490 U.S. at 397. Trial courts must balance “the nature and quality
20 of the intrusion on the individual’s Fourth Amendment interests against the
21 countervailing governmental interests at stake.” *Id.* at 396 (internal citations omitted).
22 Assessing the “nature and quality” of a given “intrusion” requires the factfinder to
23 evaluate the “type and amount of force inflicted.” *Chew v. Gates*, 27 F.3d 1432, 1440 (9th
24 Cir. 1994). The governmental interest is measured by considering: (1) the severity of the
25 crime at issue; (2) whether the suspect posed an immediate threat to the safety of the
26 officers or others; (3) whether the suspect was actively resisting arrest, and any other
27 exigent circumstances present at the time. *Graham*, 490 U.S. at 394; *Deorle v.*
28 *Rutherford*, 272 F.3d 1272, 1280 (9th Cir. 2001). Because this balancing “nearly always

1 requires a jury to sift through disputed factual contentions, and to draw inferences
2 therefrom, [the Ninth Circuit] has held on many occasions that summary judgment or
3 judgment as a matter of law in excessive force cases should be granted sparingly.”
4 *Santos*, 287 F.3d at 853.

5 The Ninth Circuit has directed that the “inquiry is not limited to the specific
6 *Graham* factors, . . . [the court] must look to whatever specific factors may be appropriate
7 in a particular case, whether or not listed in *Graham*, and then must consider ‘whether the
8 totality of the circumstances justifies a particular sort of seizure.’ ” *Franklin v. Foxworth*,
9 31 F.3d 873, 876 (9th Cir. 1994) (quoting *Graham*, 490 U.S. at 396); *Smith v. City of*
10 *Hemet*, 394 F.3d 689, 701 (9th Cir. 2005)).

11 Analyzing the *Graham* factors in the light most favorable to Plaintiff, it is
12 undisputed that Plaintiff was driving on a suspended license, a minor, non-violent traffic
13 offense. “Traffic violations generally will not support the use of a significant level of
14 force.” *Bryan v. MacPherson*, 630 F.3d 805, 828 (9th Cir. 2010) (citing *Deville v.*
15 *Marcantel*, 567 F.3d 156, 167 (5th Cir. 2009) (“Deville was stopped for a minor traffic
16 violation . . . making the need for force substantially lower than if she had been suspected
17 of a serious crime.”)). There is no objective evidence that Plaintiff consumed alcohol or
18 used illicit drugs at the time, or within a reasonable time before, she was stopped by
19 Officer Panagakis. In fact, Officer Panagakis was planning to simply cite and release
20 Plaintiff but he changed his mind and decided to arrest her when she failed to follow his
21 instructions to stop trying to return to her vehicle. The failure to comply with a police
22 officer’s lawful order, however, is only a lower level misdemeanor under Arizona law¹¹

24 ¹¹ Arizona criminalizes the failure to comply with a police officer’s lawful order as
25 a Class 2 misdemeanor, carrying up to four months in jail. *Bohnert v. Mitchell*, 2010 WL
26 3767566, * 10 (D.Ariz. 2010) (quoting A.R.S. § 28-622(A) (“A person shall not wilfully fail
27 or refuse to comply with any lawful order or direction of a police officer invested by law with
28 authority to direct, control or regulate traffic.”)). *See also, State v. Gonzalez*, 221 Ariz. 82, 84,
210 P.3d 1253, 1255 (Az.Ct.App. 2009) (the misdemeanor offense of Failure to Obey a
Police Officer pursuant to A.R.S. § 28-622 “requires proof that: (1) a person (2) wilfully (3)

1 and, without more, does not justify a significant level of force. This factor weighs in favor
2 Plaintiff.

3 The “most important” factor under *Graham* is whether the suspect posed
4 an “*immediate* threat to the safety of the officers or others.” *Smith*, 394 F.3d at 702 (citing
5 *Chew*, 27 F.3d at 1441) (emphasis added). Defendants admit that Plaintiff never assaulted
6 or attempted to assault any of the police officers. There is no evidence that she posed any
7 danger, much less an immediate danger, to the safety of the officers or anyone else at the
8 scene. Because Plaintiff was dressed in a sheer negligee and thong when she was stopped,
9 it was obvious to the police officers that Plaintiff was not concealing or carrying a
10 firearm or a dangerous instrument. While the officers were rightly concerned that Plaintiff
11 could have become a danger to the two officers while their attention was focused on
12 conducting the inventory, there were a total of four armed Mesa police officers at the
13 scene and the two officers conducting the inventory were, at least, 20 feet away from
14 Plaintiff who, according to Defendants, was between Officers Panagakis and Santiago
15 when she repeatedly asked for her purse and cell phone. There was very little, if anything,
16 Plaintiff could have done to harm the officers under the circumstances. There was no
17 apparent factual or legal reason why one of the officers could not have promptly retrieved
18 her two personal items from her car as she had requested numerous times. Because
19 Plaintiff denies the crack pipe was hers or, inferentially, that she knew it was in her
20 vehicle, and it is inappropriate at the summary judgment stage for the Court to speculate
21 that Plaintiff’s real intent in returning to her car was to hide or destroy the crack pipe.
22 This *Graham* factor also weighs in favor Plaintiff.

23 The *Graham* factors of resistance to arrest and risk of flight also favor
24 Plaintiff. There is no evidence that Plaintiff fled or attempted to flee the scene before or
25 after Officer Panagakis pulled her over. Until after she had requested her purse and cell

26 _____
27 failed or refused to comply with (4) any lawful order or direction (5) of a police officer
28 invested by law with authority to direct, control or regulate traffic.”).

1 phone from her vehicle several times, Plaintiff was cooperative and complied with all of
2 the officers' instructions. Although she admits Officer Panagakis told her twice not to go
3 to her vehicle, Plaintiff denies she was so instructed more than that and denies she was
4 warned if she tried to go to her vehicle one more time, she would be arrested. Plaintiff, a
5 petite, older woman, denies she struggled with the much larger Officer Santiago. Clearly,
6 there is a genuine dispute of material fact whether Plaintiff struggled with Officer
7 Santiago. For summary judgment purposes, her testimony may be fairly described as
8 minimally or passively struggling after Officer Santiago, without warning, grabbed her
9 right arm and began hurting her with his forceful grip. Plaintiff claims she was simply
10 trying to find a position to relieve the pain inflicted by Officer Santiago.

11 The amount of force used by Officer Santiago is another *Graham* factor to
12 consider. The reasonableness of the force used is determined by balancing the force
13 applied against the need for that force. *Deorle*, 272 F.3d at 1279. Here, the quantum of
14 force used was not as severe as the discharge of a firearm, Taser, or blow from a baton.
15 Nevertheless, Officer Santiago's O.C.C.S. hold on, or torque applied to, Plaintiff's arm
16 was forceful enough to audibly cause a serious spiral fracture to her upper arm (humerus).
17 According to Plaintiff's biomechanical expert, Joseph D. Peles, Ph.D, Officer Santiago
18 "deviated from [the O.C.C.S.] hold and produced excessive torque or internal rotation to
19 the humerus to cause [Plaintiff's] fracture. . . it's my conclusion he did more than . . . the
20 hold as he was taught or as the manual teaches." (PSOF, ¶ 54; Dr. Peles' depo, Exh F at
21 14, doc. 45-6 at 1) Dr. Peles further opined that Plaintiff's fracture could not have been
22 caused by the movements of Plaintiff's body. (Dr. Peles' depo, Exh F at 16) "[T]he only
23 way I can see that occur would be from the actions of Officer Santiago." (*Id.*) Of course,
24 "[t]he issue[] of proximate causation . . . involve[s] application of law to fact, which is
25 left to the factfinder, subject to limited review." *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S.
26 830, 840-841 (1996); *Laisure-Radke v. Par Pharmaceutical, Inc.*, 426 F.Supp.2d 1163,
27 1173 (W.D.Wash. 2006) ("Cause in fact is usually a jury question.") (citation omitted).

28 The Ninth Circuit also permits a district court to consider the severity of the

1 injury as another factor to be considered in evaluating “whether the force used was
2 reasonable in light of *all* the relevant circumstances.” *Hammer v. Gross*, 932 F.2d 842,
3 846 (9th Cir. 1991) (*en banc*) (emphasis in original). “[I]f the extent of the injury to
4 [plaintiff] is serious enough, a jury could conclude that [the officer] used force in excess
5 of what was reasonable, even if [plaintiff] had been resisting at the time.” *LaLonde v.*
6 *County of Riverside*, 204 F.3d 947, 959 (9th Cir. 2000). Of course, when the
7 circumstances show there is no need for force, any force used is constitutionally
8 unreasonable. *Fontana v. Haskin*, 262 F.3d 871, 880 (9th Cir. 2001). Here, Circuit Judge
9 Beezer’s wisdom expressed in his concurring and dissenting opinion in a recent Ninth
10 Circuit excessive force case rings true:

11 Although it is true that the officers did not use tasers, batons, or other
12 weapons to subdue [plaintiff], that is not to say that the use of brute force
13 and advantage in weight and size cannot be excessive. To say that would
14 give officers a free pass as long as they just used their hands. The officers
15 could always point to other weapons “they could have used.” I do not mean
16 to suggest that “no court may grant summary judgment on excessive force
17 where the police officers are physically much larger than the suspect,”
18 Rather, I just think in light of the short time that [plaintiff] resisted, her
19 minor crimes, the vast difference in size and weight, and [a witness’]
20 corroborating testimony, that a reasonable jury could conclude that the
21 officers used excessive force. In light of these facts, a reasonable jury could
22 find that the officers used excessive force when they pulled [plaintiff’s]
23 arms around her back, when they used their body weight to keep her down
24 even after she had been handcuffed, or when they left her “handcuffed [on
25 the floor] so tight that it left scars.

19 *Luchtel v. Hagemann*, 623 F.3d 975, 988 (9th Cir. 2010) Considering the facts in the light
20 most favorable to Plaintiff, as the Court must, the Court concludes that a reasonable jury
21 could find that Officer Santiago used an unreasonable amount of force under the
22 circumstances of this case.

24 The Court is mindful that “[n]ot every push or shove, even if it may later
25 seem unnecessary in the peace of a judge’s chambers violates the Fourth Amendment.”
26 *Graham*, 490 U.S. at 396. Additionally, the Ninth Circuit has held that equally or more
27 aggressive police conduct than used here was objectively reasonable, affirming summary
28 judgment decisions in favor of police officers. *Tatum v. City and County of San Fran-*

1 *cisco*, 441 F.3d 1090, 1096 (9th Cir. 2006) (positioning plaintiff’s arm behind his back in
2 a bar arm control, placing him against a wall and then forcing him to the ground was not
3 excessive force where the plaintiff ignored the officer’s commands and spun around
4 partially escaping the officer’s grasp, even though the plaintiff died from a cocaine over-
5 dose); *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 921-22 (9th Cir. 2001)
6 (twisting plaintiff’s left arm behind her with enough force to lift her off the ground and
7 break her watch band while attempting to handcuff her was held to be reasonable where
8 the plaintiff refused to show transit identification upon request, refused to hand over purse
9 when warned that non-compliance would lead to arrest, stiffened her arm and attempted
10 to pull free when the officer grabbed her arm). These cases are factually distinguishable
11 from the case here when viewing the facts most favorable to Plaintiff.

12 At the summary judgment stage, “[c]redibility determinations, the weighing
13 of the evidence, and the drawing of legitimate inferences from the facts are jury functions,
14 not those of a judge.” *Anderson*, 477 U.S. at 255; *Dominguez-Curry v. Nevada Transp.*
15 *Dep’t*, 424 F.3d 1027, 1035-36 (9th Cir. 2005) (“The district court . . . improperly
16 dismissed Dominguez’s allegations as consisting of nothing more than ‘self-serving
17 statements in her own deposition and affidavit.’ Such observations go to whether
18 Dominguez is credible, a determination that is exclusively within the province of the
19 factfinder at trial, not the district court on summary judgment[.]”). The Ninth Circuit has
20 repeatedly stated that whether the force used to arrest an individual is reasonable is
21 “ordinarily a question of fact for the jury.” *Liston v. County of Riverside*, 120 F.3d 965,
22 976 n. 10 (9th Cir. 1997) (citing, among others, *Alexander v. County of Los Angeles*, 64
23 F.3d 1315, 1322 (9th Cir. 1995); *Forrester v. City of San Diego*, 25 F.3d 804, 806 (9th Cir.
24 1994)). When viewed in the light most favorable to the Plaintiff, no reasonable police
25 officer could believe that under these circumstances that the use of such force to badly
26 fracture Plaintiff’s arm was justified. In this light, a reasonable jury could find Officer
27 Santiago violated Plaintiff’s rights under the Fourth Amendment by using unreasonable
28 and unnecessary force in breaking her arm. Considering the severity and extent of the

1 force used, the *Graham* factors, and the availability of other means of avoiding or
2 accomplishing the arrest, the question whether the force used here was reasonable is a
3 matter that cannot be resolved in favor of Defendants on summary judgment.

4 **B. Clearly Established**

5 Under the qualified immunity analysis, “[i]f a [Constitutional] violation
6 could be made out on a favorable view of the party’s submissions” the Court must ask the
7 next question: whether the right was clearly established. *Saucier*, 533 U.S. at 201.
8 Qualified immunity operates “to protect officers from the sometimes ‘hazy border
9 between excessive and acceptable force[.]’” *Id.* at 206 (citation omitted). “Because the
10 focus is on whether [Officer Santiago] had fair notice that [his] conduct was unlawful,
11 reasonable-ness is judged against the backdrop of the law at the time of the conduct. If the
12 law at that time did not clearly establish that [Officer Santiago’s] conduct would violate
13 the Constitution, [he] should not be subject to liability or, indeed, even the burdens of
14 litigation.” *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) “Of course, in an obvious
15 case, the[] standards [enunciated in *Graham*] can ‘clearly establish’ the answer, even
16 without a body of relevant case law.” *Id.*

17 “The relevant, dispositive inquiry in determining whether a right is clearly
18 established is whether it would be clear to a reasonable officer that his conduct was
19 unlawful in the situation confronted.” *Saucier*, 533 U.S. at 202. The Fourth Amendment
20 prohibits a wide range of governmental intrusions on the person. “The Fourth Amend-
21 ment’s requirement that a seizure be reasonable prohibits more than the unnecessary
22 strike of a nightstick, sting of a bullet, and thud of a boot.” *Fontana v. Haskin*, 262 F.3d
23 871, 878 (9th Cir. 2001). Even “[t]he use of handcuffs is the use of force, and such force
24 must be objectively reasonable under the circumstances.” *Muehler v. Mena*, 544 U.S. 93,
25 102 (2005) (concurring opinion of Justice Kennedy citing *Graham*).

26 The right to be free from excessive force in handcuffing is clearly
27 established in federal precedent. See, e.g., *Meredith v. Erath*, 342 F.3d 1057, 1061 (9th
28 Cir. 2003) (rejecting qualified immunity because it was “clearly established” that the

1 amount of force used in handcuffing the plaintiff was excessive); *Hansen v. Black*, 885
2 F.2d 642, 645 (9th Cir. 1989) (“[T]he officers used excess force on Hansen by unreason-
3 ably injuring her wrist and arm as they handcuffed her.”). Like the Sixth Circuit
4 concluded in a similar case in *Solomon v. Auburn Hills Police Dept.*, 389 F.3d 167 (6th
5 Cir. 2004) (while arresting plaintiff, police officer pinned her against a wall with his
6 weight, his leg in between hers and twisted plaintiff’s arm behind her with such force that
7 she sustained a comminuted fracture in several places), Officer Santiago is not entitled to
8 qualified immunity on summary judgment on Plaintiff’s excessive force claim.

9 **VII. State Law Claims**

10 **A. Assault and Battery**

11 Incorporating the Complaint’s prior allegations, Count II alleges that
12 Officer Santiago “committed the common law tort of assault and battery under Arizona
13 law when he used unreasonable and excessive force against the Plaintiff.” (Doc. 1-4 at 9)
14 Defendants contend that “there is no evidence that Officer Santiago acted with malice or
15 intended to cause injury, which is a necessary element of this claim[,]” citing *Garcia v.*
16 *United States*, 826 F.2d 806 (9th Cir. 1987). (Doc. 37 at 9)

17 “To establish the tort of assault in Arizona, Plaintiff must prove that
18 [Officer Santiago] acted *with intent to cause a harmful or offensive contact* or imminent
19 apprehension thereof.” *Joseph v. Dillard’s, Inc.*, 2009 WL 5185393 at * 16 (citing *Garcia*
20 *v. United States*, 826 F.2d 806, 809 n. 9 (9th Cir. 1987) and Restatement (Second) of
21 Torts § 21 (1965)) (emphasis added); *Al-Asadi v. City of Phoenix*, 2010 WL 3419728, * 6
22 (D.Ariz. 2010) (“A person commits [assault and battery] under Arizona law where he
23 knowingly touches another person *with the intent to injure* and either fractures a body part
24 or otherwise causes serious physical injury. A.R.S. §§ 13-1203(A), 13-1204(A)(1).”) (emphasis added). “Similarly, to establish the tort of battery, Plaintiff must show that
25 [Officer Santiago] ‘intentionally caused a harmful or offensive contact’ with Plaintiff’s
26 person.” *Id.* (quoting *Johnson v. Pankratz*, 196 Ariz. 621, 623, 2 P.3d 1266, 1268 (Az.Ct.
27 App. 2000) (citing Restatement (Second) of Torts § 13 (1965))). *See also, Howell v.*
28

1 *Palmer*, 2009 WL 2710091, * 3 (Az.Ct.App., Aug. 28, 2009). “Contact is offensive if it
2 ‘offends a reasonable sense of personal dignity.’” *Joseph*, 2009 WL 5185393 at * 16
3 (citing Restatement (Second) of Torts § 19 (1965)). “The plaintiff must establish each of
4 the elements by a preponderance of the evidence.” *Howell*, 2009 WL 2710091, * 3 (citing
5 *Aileen H. Char Life Interest v. Maricopa County*, 208 Ariz. 286, 291, 93 P.3d 486, 491
6 (Az.Ct.App. 2004)).

7 Plaintiff has produced no evidence that Officer Santiago intended to cause
8 harm or injury to Plaintiff. Even when viewing the facts and all inferences in Plaintiff’s
9 favor, the Court concludes that Officer Santiago is entitled to summary judgment as a
10 matter of law on Plaintiff’s assault and battery claim alleged in Count II.

11 **B. Negligence**

12 Plaintiff alleges in Count III of the Complaint that Officer Santiago
13 “committed the common law tort of negligence under Arizona law when he used
14 unreasonable and excessive force against Plaintiff.” (Doc. 1-4 at 10) Defendants argue
15 Plaintiff’s negligence claim fails because Officer Santiago was justified in using force to
16 handcuff Plaintiff who was resisting arrest. (Doc. 37 at 8) The Court disagrees for
17 purposes of summary judgment.

18 “To establish a negligence claim, a plaintiff must prove four elements: (1) a
19 duty requiring the defendant to conform to a certain standard of care; (2) the defendant’s
20 failure to conform to that standard; (3) a reasonably close causal connection between the
21 defendant’s conduct and the plaintiff’s resulting injury; and (4) actual damages.” *Las*
22 *Corrientes, L.L.C. v. The Sundt Companies, Inc.*, 2010 WL 3025520, * 2 (Az.Ct.App.,
23 Aug. 3, 2010) (citing *Ontiveros v. Borak*, 136 Ariz. 500, 504, 667 P.2d 200, 204 (1983)).
24 “To survive a motion for summary judgment, a plaintiff must produce admissible
25 evidence from which a reasonable jury could find in his favor on each element.” *Id.*
26 (citing *Nat’l Bank of Ariz. v. Thruston*, 218 Ariz. 112, 116-17, 180 P.3d 977, 981-82
27 (Az.Ct.App.2008)).

28 “A plaintiff must prove both causation-in-fact and proximate causation.” *Id.*

1 (citing *Rogers ex rel. Standley v. Retrum*, 170 Ariz. 399, 401, 825 P.2d 20, 22 (Az.Ct.
2 App. 1991)). Under Arizona law, causation-in-fact exists when the defendant’s conduct
3 contributed, even if only to a small degree, to the plaintiff’s harm and the harm would not
4 have occurred but for the defendant’s conduct. *Ontiveros*, 136 Ariz. at 505, 667 P.2d at
5 205. “The first element, whether a duty exists, is a matter of law for the court to decide.”
6 *Gipson v. Kasey*, 214 Ariz. 141, 143, 150 P.3d 228, 230 (Ariz. 2007) (citing *Markowitz*
7 *v. Ariz. Parks Bd.*, 146 Ariz. 352, 356, 706 P.2d 364, 368 (Ariz. 1985)). “The other
8 elements, including breach and causation, are factual issues usually decided by the jury.”
9 *Id.* (footnote omitted).

10 A police officer has a “duty not to inflict bodily harm or death” upon a
11 misdemeanor “in order to effect arrest.” *Sonoran Desert Investigations, Inc. v. Miller*,
12 213 Ariz. 274, 281, 141 P.3d 754, 761 (Az.Ct.App. 2006) (citation omitted). Viewing the
13 evidence in the light most favorable to Plaintiff, sufficient admissible evidence has been
14 presented to create a jury issue on Plaintiff’s negligence claim. Defendants’ Motion in
15 this regard will be denied.

16 C. Negligence *Per Se*

17 The Complaint alleges in Count IV that Officer Santiago “was negligent per
18 se pursuant to A.R.S. 13-3881(B).”¹² (Doc. 1-4 at 10) Because Defendants do not provide
19 any argument or legal authority explaining why summary judgment should be granted on
20 Count IV, summary judgment on Plaintiff’s negligence *per se* count¹³ will be denied.

21
22 ¹² A.R.S. § 13-3881(B) provides:

23 B. No unnecessary or unreasonable force shall be used in making an arrest, and the
24 person arrested shall not be subjected to any greater restraint than necessary for his
25 detention.

26 A.R.S. § 13-3881(B).

27 ¹³ “The doctrine of negligence per se . . . is a doctrine applicable to negligence claims
28 whereby a Plaintiff can show the duty and breach elements based on violation of a statute
that replaces the general duty of care with a particular standard. Causation and damages must

1 LRCiv 7.2(b) (“[T]he moving party shall serve and file with the motion’s papers a
2 memorandum setting forth the points and authorities relied upon in support of the
3 motion.”)

4 **D. Negligent Supervision and Training**

5 Count VI of the Complaint alleges the City “created an unreasonable risk of
6 harm to the Plaintiff by failing to adequately supervise, control or otherwise monitor the
7 activities of” Officer Santiago which caused Plaintiff’s damages. (Doc. 1-4 at 11) Count
8 VII claims that the City “created an unreasonable risk of harm to the Plaintiff for failing
9 to adequately train its employee Defendant John Santiago[.]” Plaintiff further alleges the
10 City was “negligent for failing to adequately train its employee regarding use of force.”
11 (*Id.* at 12)

12 Defendants argue that, *inter alia*, “Plaintiff’s expert has not offered an
13 opinion that Officer Santiago should have been trained in a different way, or that that
14 supervision in any manner contributed to the incident. Without evidence as to what
15 training or supervision should have been offered, Plaintiff’s state law claims are similarly
16 insufficient.”¹⁴ (Doc. 37 at 8) Plaintiff contends that “Officer Santiago initially failed to

17 _____
18 still be proved to show liability.” *Gomez v. Countrywide Bank, FSB*, 2009 WL 3617650, *
19 8 (D.Nev. 2009). “[N]egligence per se’ is not a separate cause of action apart from
20 negligence, but rather it is a doctrine whereby a plaintiff can satisfy the duty and breach
21 elements of a negligence cause of action as a matter of law without submitting the breach
22 issue to the fact-finder for a reasonableness finding.” *Id.* at 11; *Gunnell v. Arizona Public
23 Service Co.*, 202 Ariz. 388, 392, 46 P.3d 399, 403 (Ariz. 2002) (“Violation of a statutory
24 standard of care is usually held to be negligence per se.”).

25
26 ¹⁴ Because Plaintiff did not fairly state an Eighth or Fourteenth Amendment claim in
27 her Complaint against the City for its alleged deliberate indifference to the public’s safety
28 and the rights of others by its training and supervision of its officers’ use of force, the Court
will only address Plaintiff’s state law claims of negligent supervision and training. See, doc.
55 regarding Plaintiff’s failure to allege a *Monell* claim.

1 pass the OCCS training section, it is clear that the City of Mesa failed to supervise his use
2 of these holds, knowing his trouble with them and his history, and it also failed to
3 properly train him as well as other officers in the use of these hold techniques knowing
4 that they involved a greater risk of injury.” (Doc. 50 at 13) Plaintiff’s Response fails to
5 cite facts either in the record or her Statement of Facts that support her claims of
6 negligent supervision and training. *See*, LRCiv 56.1(b) (“Any party opposing a motion for
7 summary judgment must . . . set forth in that paragraph and a reference to the specific
8 admissible portion of the record supporting the party’s position if the fact is disputed[.]”);
9 *Carmen*, 237 F.3d at 1029 (“[T]he district court need not examine the entire file for
10 evidence establishing a genuine issue of fact, where the evidence is not set forth in the
11 opposing papers with adequate references so that it could conveniently be found.”).
12 Neither side cites to any state law cases for support or opposition to Defendants’ Motion
13 on these state law claims.

14 To prove negligent supervision and retention, Plaintiff must show that the
15 City knew or should have known that Officer Santiago was unfit or not a competent
16 police officer and that the City’s retention of, and failure to supervise, Officer Santiago
17 caused injury to Plaintiff. *Humana Hosp. Desert Valley v. Superior Ct. (Edison)*, 742
18 P.2d 1382, 1386 (Az.Ct.App. 1987); *City of Phoenix v. Peterson*, 462 P.2d 829, 832
19 (Az.Ct.App. 1969); *Joseph*, 2009 WL 5185393 at 18 (“An employer is liable for the
20 tortious conduct of its employee if the employer was negligent or reckless in hiring,
21 supervising, or otherwise training the employee.”). “If the theory of the employee’s
22 underlying tort fails, an employer cannot be negligent as a matter of law for hiring or
23 retaining the employee.” *Kuehn v. Stanley*, 208 Ariz. 124, 130, 91 P.3d 346, 352
24 (Az.Ct.App. 2004)

25 The City contends that “Plaintiff has no evidence that the City inadequately
26 trained or supervised its officers.” (Doc. 47 at 8) “Mere proof of a single incident of
27 errant behavior is a clearly insufficient basis for imposing liability on [a municipality].”
28 *Merritt v. County of Los Angeles*, 875 F.2d 765, 770 (9th Cir. 1989); *City of Canton, Ohio*

1 *v. Harris*, 489 U.S. 378, 391 (1989) (“adequately trained officers occasionally make
2 mistakes; the fact that they do says little about the training program or the legal basis for
3 holding the city liable”).

4 There is no evidence that Officer Santiago was unfit for his position on
5 April 26, 2008 or that the excessive force allegedly used in this case was reasonably
6 foreseeable by the City. The facts proffered by Plaintiff that as a recruit for the Mesa
7 Police Department in 2001, Officer Santiago initially did not pass the defense tactics final
8 exam, in part, due to incorrect hand placement which he later passed; was involved in a
9 police shooting¹⁵ in 2001; and was involved in two patrol vehicle accidents do not create
10 a question of fact that the City negligently trained or supervised Officer Santiago such
11 that the City may be liable for his alleged use of excessive force in 2008. (PSOF, ¶¶ 50-
12 51, Exh C, doc. 45 at 12) With the dearth of evidence provided on Officer Santiago’s
13 training and supervision, no jury could reasonably conclude that the City negligently
14 trained and supervised Officer Santiago and such negligence ultimately caused Plaintiff’s
15 injuries. Summary judgment will be granted on Plaintiff’s claims of negligent supervision
16 and training. *Celotex*, 477 U.S. at 322 (stating that summary judgment is appropriate
17 against a party who “fails to make a showing sufficient to establish the existence of an
18 element essential to that party’s case”); *Ward v. Mount Calvary Lutheran Church*, 178
19 Ariz. 350, 357, 873 P.2d 688, 695 (Az.Ct.App. 1994) (summary judgment was
20 appropriate when, even inferring negligent supervision in absence of facts establishing
21 such negligence, causation evidence was wholly absent).

22 **E. Punitive Damages**

23 Count VIII alleges Plaintiff is entitled to punitive damages because “the
24 aforementioned acts, omissions, and violations of the Defendants were attended by
25 wanton and willful disregard for the rights and feelings of the Plaintiff.” (Doc. 1-4 at 12)

27 ¹⁵ Officer Santiago was exonerated as a result of the shooting investigation. (Officer
28 Santiago’s depo, Exh C at 16, doc. 41-3 at 6)

1 Defendants argue that Plaintiff may not recover punitive damages against the City or
2 Officer Santiago acting in his official capacity, citing A.R.S. § 12-820.04, *City of*
3 *Newport v. Fact Concerts, Inc.* 453 U.S. 247 (1981); *Mitchell v. Dupnik*, 75 F.3d 517, 527
4 (9th Cir. 1996). (Doc. 37 at 9) “To the extent Plaintiff seeks punitive damages against the
5 City, or against Defendant Santiago acting in his official capacity, such claims must be
6 dismissed.” (*Id.*) Plaintiff responds that she “is entitled to seek punitive damages under
7 Section 1983 against Officer Santiago in his individual capacity[,]” citing *Coffelt v. City*
8 *of Glendale*, 2007 WL 4200507 (D.Ariz. 2007). (Doc. 50 at 17)

9 Plaintiff’s own authority establishes that Arizona law forecloses the
10 recovery of punitive damages against the City on her state law claims and federal law
11 precludes the recovery of punitive damages against the City on her § 1983 claim. “A.R.S.
12 § 12-820.04 is squarely in point: ‘Neither a public entity nor a public employee acting
13 within the scope of his employment is liable for punitive or exemplary damages[.]’ [and]
14 The Supreme Court’s decision in *City of Newport v. Fact Concerts, Inc.* holds that
15 municipalities are immune from such claims.” *Coffelt*, 2007 WL 4200507 at 4 (footnote
16 omitted). *See also, Al-Asadi*, 2010 WL 3419728, * 5-7 (discussion of municipal
17 immunity in Arizona). Plaintiff does not attempt to distinguish the application of this
18 statute or Supreme Court decision to her punitive damages claims against the City or
19 Officer Santiago. Plaintiff, however, does contend that she is entitled to an award of
20 punitive damages on her state law claims against Officer Santiago. Relying upon
21 *Rawlings v. Apodaca*, 151 Ariz. 149, 162, 726 P.2d 565, 578 (Ariz. 1986), Plaintiff
22 argues that “[t]he question as to whether Officer Santiago’s evil mind may be inferred
23 from his conduct is one that should be left to the jury. It is quite possible that a jury could
24 find that Officer Santiago acted with an evil mind when he twisted Ms. Williams’ arm
25 with such force that it snapped.” (Doc. 50 at 17) She also asserts she is entitled to seek
26 punitive damages under her § 1983 claim against Officer Santiago in his individual
27 capacity. (*Id.*)

28 Under federal law, a jury may award punitive damages in a § 1983 case

1 alleging excessive use of force either “when a defendant’s conduct was driven by evil
2 motive or intent, or when it involves a reckless or callous indifference to the
3 constitutional rights of others.” *Dang v. Cross*, 422 F.3d 800, 807 (9th Cir. 2005) (citation
4 and internal quotation marks omitted); *Smith v. Wade*, 461 U.S. 30, 33 (1983) (punitive
5 damages may be awarded “if the conduct of one or more of the defendants is shown to be
6 a reckless or callous disregard of, or indifference to, the rights or safety of others.”). The
7 plaintiff alleging a § 1983 claim has the burden of proving that punitive damages should
8 be awarded by a preponderance of the evidence. *Sar Pala Ra Anan v. Kimbrell*, 2006 WL
9 548422, * 3-4 (E.D.Cal. 2006) (quoting Model Civ. Jury Instr. 9th Cir. 7.5 (2005)).¹⁶

10 The Court finds that on the question of Plaintiff’s § 1983 claim of
11 unreasonable force during arrest, there are sufficient facts from which a reasonable jury
12 could infer that the punitive damages standard was met against Officer Santiago in his
13 individual capacity. Defendants’ request for summary judgment on Plaintiff’s § 1983
14 claim for punitive damages will be denied.

15 In Arizona, “[p]unitive damages are awarded only in the most egregious of
16 cases, where [a plaintiff proves by clear and convincing evidence that the defendant
17 engaged in] reprehensible conduct and acted with an evil mind.” *Medasys Acquisition*
18 *Corp. v. SDMS, P.C.*, 203 Ariz. 420, 424, 55 P.3d 763, 767 (Ariz. 2002) (internal
19 quotation marks omitted) (quoting *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326,
20 331-332, 723 P.2d 675, 680-681 (Ariz. 1986)). “For that reason, punitive damages should
21 rarely be awarded. In those cases in which they are appropriate, punitive damages should
22 be available to deter egregious conduct.” *Id.*

23 To obtain punitive damages in Arizona, a plaintiff must prove that
24 defendant’s evil hand was guided by an evil mind. *Rawlings*, 151 Ariz. at 162, 726 P.2d
25 at 578. It is the “evil mind” that distinguishes action justifying the imposition of punitive

26
27 ¹⁶ The current Ninth Circuit Model Civil Jury Instruction on punitive damages, 5.5,
28 offers a choice of either standard - preponderance or clear and convincing. Model Civ. Jury
Instr. 9th Cir. 5.5 (2007).

1 damages. *Linthicum*, 150 Ariz. 326, 331, 723 P.2d 675, 680 (Ariz. 1986). “Punitive
2 damages may not be awarded absent a showing of ‘something more’ than mere tortious
3 conduct.” *Piper v. Bear Med. Sys., Inc.*, 180 Ariz. 170, 183, 883 P.2d 407, 417 (Az.Ct.
4 App. 1993) (quoting *Linthicum*, 150 Ariz. at 330, 723 P.2d at 679). “The requisite
5 ‘something more,’ or ‘evil mind,’ is established by evidence that defendant either (1)
6 ‘intended to injure the plaintiff . . . [or (2)] consciously pursued a course of conduct
7 knowing that it created a substantial risk of significant harm to others.’” *Gurule v.*
8 *Illinois Mut. Life & Cas. Co.*, 152 Ariz. 600, 602, 734 P.2d 85, 87 (Ariz. 1987) (quoting
9 *Rawlings*, 151 Ariz. at 162, 726 P.2d at 578).

10 While the necessary evil mind may be inferred, it is still this evil mind in
11 addition to outwardly aggravated, outrageous, malicious, or fraudulent conduct which is
12 required for punitive damages. *Linthicum*, 150 Ariz. at 331, 723 P.2d at 680. The quality
13 of the defendant’s conduct is relevant only because it provides one form of evidence from
14 which the defendant’s motives may be inferred. *Gurule*, 152 Ariz. at 602, 734 P.2d at 87.
15 The more outrageous or egregious the conduct, the more compelling the inference of an
16 evil mind is. *Id.* Nevertheless, the inquiry in every punitive damage case focuses on the
17 defendant’s state of mind, which may be established by either direct or circumstantial
18 evidence. *Id.*

19 The Court has already concluded there is no evidence, direct or
20 circumstantial, that Officer Santiago intended to cause harm or injury to Plaintiff. There is
21 little, if any, evidence in the record, much less evidence of a clear and convincing nature,
22 that suggests Officer Santiago acted with an “evil mind.” The Arizona Supreme Court
23 “has made it clear that a jury will not be permitted to consider an award of punitive
24 damages if the evidence supporting such an award is only slight and inconclusive.” *White*
25 *v. Mitchell*, 157 Ariz. 523, 529, 759 P.2d 1327,1333 (Az.Ct.App. 1988) (quoting *Filasky*
26 *v. Preferred Risk Mutual Insurance Co.*, 152 Ariz. 591, 599, 734 P.2d 76, 84 (Ariz.
27 1987)). Because the evidence presented does not meet Arizona’s high standard to warrant
28 an award of punitive damages, summary judgment on Plaintiff’s claim for punitive

1 damages on Plaintiff's state law claims will be granted.

2 **VIII. Conclusion**

3 In conclusion, Defendants' Motion for Summary Judgment is granted in
4 part and denied in part. The Court concludes that disputed questions of fact exist for jury
5 resolution on Plaintiff's claims for alleged use of excessive force (Count I), negligence
6 (Count III), negligence *per se* (Count IV), and punitive damages on her excessive force
7 claim against Officer Santiago in his individual capacity (Count VIII). Summary
8 judgment is granted on Plaintiff's claims of assault and battery (Count II), negligent
9 supervision and training (Counts VI and VII), and punitive damages against the City,
10 Officer Santiago in his official capacity, and Plaintiff's state law claims (Count VIII).

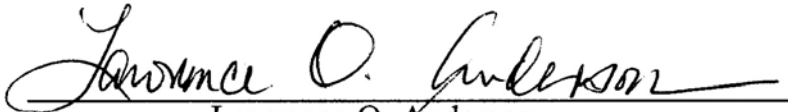
11 Accordingly,

12 **IT IS ORDERED** that Defendants' Motion for Summary Judgment, doc.
13 37, is **GRANTED** in part and **DENIED** in part as follows:

14 1. Defendants' Motion for Summary Judgment on Plaintiff's claims of use
15 of excessive force in violation of her Fourth Amendment rights (Count I), negligence
16 (Count III), negligence *per se* (Count IV), and punitive damages on her excessive force
17 claim against Officer Santiago in his individual capacity (Count VIII) are **DENIED**.

18 2. Defendants' Motion for Summary Judgment on Plaintiff's claims of
19 assault and battery (Count II), negligent supervision and training (Counts VI and VII),
20 and punitive damages (Count VIII) against the City, Officer Santiago in his official
21 capacity, and on Plaintiff's state law claims are **GRANTED**.

22 Dated this 8th day of March, 2011.

23
24 
25 Lawrence O. Anderson
26 United States Magistrate Judge
27
28