No. 100102-9

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

DAVID O'DEA,

Petitioner,

vs.

CITY OF TACOMA, a municipal subdivision of the State of Washington; and the TACOMA POLICE DEPARTMENT, an agency of the City of Tacoma,

Respondents.

APPEAL FROM DIVISION II
OF THE COURT OF APPEALS
No. 54240-4-II

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

David O'Dea, petitioner, respectfully requests that this Court accept review of the Court of Appeals decision in case number 54240-4-II terminating review designated in Part II of this petition.

II. COURT OF APPEALS DECISION

Lt. O'Dea respectfully requests that this Court review the Court of Appeals decision, affirming the trial court's decision in this case. The Court of Appeals' decision ratified the Tacoma Police Department's use of 20/20 hindsight in determining that Lt. O'Dea violated the Department's use of force policy. Further, even though the Court of Appeals acknowledged the existence of a wrongful discharge claim in violation of public policy, the court determined that Lt. O'Dea could not establish all causation elements to support such claim even though Lt. O'Dea was terminated for preserving a human life.

Respectfully, the Court of Appeals erred in its decision, and this court should accept review.

A copy of the decision from the Court of Appeals, Division II, terminating review which was filed on May 18, 2021 is attached as Exhibit "A".

III. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err in affirming the trial court's decision when Lt. O'Dea's discharge violated public policy and Lt.

O'Dea's action furthered the public policy of protecting human life by not targeting the source of the deadly threat he faced.

IV. STATEMENT OF THE CASE

A. *Procedural History*

On May 11, 2018, appellant Lt. O'Dea filed a complaint for damages against the City of Tacoma and the Tacoma Police Department (hereafter TPD) for wrongful termination, intentional and negligent infliction of emotional distress, and defamation. CP 1-40. On September 5, 2019, defendants filed a motion for summary judgment, with supporting materials. CP 43-64, 65-139, 140-214. Lt. O'Dea filed a response and supporting materials on October 2, 2019. CP 215-239, 240-515. Plaintiff filed errata on October 3, 2019. CP 516-518. Defendants filed a reply on October 14, 2019. CP 519-530, 531-631, 632-635. On October 18, 2019, Pierce County Superior Court entered an order granting defendants' motion for summary judgment, dismissing all of Lt. O'Dea's claims against the City of Tacoma and TPD. CP 636-638. Lt. O'Dea filed a notice of appeal on October 24, 2019. CP 639-644. On May 18, 2021, the Court of Appeals affirmed the trial court's dismissal of Lt. O'Dea's claim. A motion for reconsideration was filed on June 7, 2021. The Court of Appeals denied the motion for reconsideration on July 20, 2021. This petition follows.

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B. *Facts*

On August 6, 2016, Lt. O'Dea was working patrol as a Police Lieutenant and Shift Commander for TPD when he heard Officer Huebner's initial call requesting an additional unit and a supervisor in the south end of the city. CP 242, 251.

Officer Huebner had been dispatched to a reported traffic accident. As Lt. O'Dea continued to the police station to complete his administrative task, he heard Officer Huebner's second call for a supervisor and ETA from that call. Lt. O'Dea responded. CP 242-43, 252.

When Lt. O'Dea arrived at the scene, he observed Officers Huebner, Waddell and Koskovich present, standing by a maroon Nissan. Officers Koskovich and Waddell were standing on either side of the Nissan with their handguns drawn at the low ready position focused on the occupant. The Nissan was running and was occupied by a single person, Jose Mendoza Davalos, who was sitting in the driver's seat. Lt. O'Dea noted that Mendoza Davalos had a hoodie pulled up over his head despite the warm weather, and he was slouched down in the driver's seat. Officer Huebner was standing behind a patrol car that was parked behind the Nissan. The patrol car was running and its emergency lights were operating. CP 243, 253-54.

When Lt. O'Dea spoke to Officer Huebner, Officer Huebner explained that he was dispatched to the location for a report of a traffic accident, after which Officer Huebner determined the event was a road rage incident involving Mendoza Davalos, who Officer Huebner deemed the aggressor. Officer Huebner

allowed the other involved driver to leave due to Mendoza Davalos' erratic behavior. CP 243, 253-54.

Officer Huebner said that while he was trying to discuss the traffic incident with Mendoza Davalos, Mendoza Davalos was not cooperative. After interacting with Mendoza Davalos, Mendoza Davalos began to leave the parking lot in his vehicle with Officer Huebner following. Rather than leave the parking lot, however, Mendoza Davalos looked into his rearview mirror, smiled and put his car in reverse and rammed Officer Huebner's patrol vehicle. CP 243, 255.

While receiving Officer Huebner's briefing, Lt. O'Dea could hear and see Officers Waddell and Koskovich providing verbal commands to Mendoza Davalos to turn off the car, show his hands, and exit the vehicle. Officer Waddell advised that Mendoza Davalos was reaching around inside of the Nissan as if he was looking for a weapon. The inside of the vehicle had not been searched. CP 244, 256, 310-11.

While officers were standing at the low ready over the vehicle, Mendoza Davalos called 911. The 911 dispatcher conferenced a Spanish interpreter into Mendoza Davalos' 911 call. Through the interpreter, the 911 dispatcher asked Mendoza Davalos if he had a gun, but he did not answer. Mendoza Davalos told the dispatcher that the officers should put their guns down or he would run over them. CP 311, 314.

While the 911 dispatcher was talking to Mendoza Davalos on the phone, Lt. O'Dea advised Dispatch to have Tacoma Fire respond and stage in the event their assistance was needed. He did this for several reasons:

1) Mendoza Davalos was refusing to exit the vehicle; if force was used, he might be injured;

2) to administer aid in case any officers were injured as well as making sure Officer Huebner was not injured; and

3) Mendoza Davalos's actions were not rational, and Lt. O'Dea felt that Mendoza Davalos might be suffering some sort of mental health crisis, suffering from the effects of drugs, or experiencing some kind of health crisis.

CP 244, 257-58.

While dispatch was relaying the information about Mendoza Davalos, Lt. O'Dea directed Officer Huebner to move his patrol car closer to the Nissan to better pin it against the concrete parking curb in front. Suddenly, Mendoza Davalos' vehicle surged over the concrete curb it was against. Out of his peripheral vision, Lt. O'Dea saw Officer Waddell, who was standing at the left front fender of Mendoza Davalos' vehicle, violently move backward as if he had been struck by the vehicle. CP 245, 262-63.

As Lt. O'Dea moved, Mendoza Davalos accelerated and backed his vehicle over the curb and into the vehicle parked to its immediate left with such force that it pushed the vehicle entirely out of the parking space and into the vehicle next to it, partially pushing that vehicle out of its parking space. Lt. O'Dea believed that Mendoza Davalos was going to continue to force his way out of the parking lot while he was backing up, and Lt. O'Dea continued to try to stay to the north and out of the vehicle's path. Lt. O'Dea observed Officer Koskovich, with what appeared to be a flashlight in his hand, break out the Nissan's front passenger window as it was accelerating forward. The Nissan then stopped, pulled forward, and made a tight right turn. Lt. O'Dea could see the front wheels of the

Nissan turn sharply to the right, and he now believed that Mendoza Davalos was going to continue to make the right turn and exit the parking lot through the only entrance/exit to the south. CP 245, 266-269.

As Lt. O'Dea continued to move out of the vehicle's path the Nissan continued to accelerate forward in a tight right-hand turn. As Lt. O'Dea now moved laterally through the parking lot, he noted that the Nissan was now making a left-hand turn, travelling and accelerating directly toward him. Lt. O'Dea believed Mendoza Davalos was trying to run him over as there was no entrance/exit to the north. Lt. O'Dea also feared that Mendoza Davalos might have already seriously injured Officer Waddell as Lt. O'Dea could no longer see him. CP 245, CP 266-69.

When the vehicle was about 5 to 7 feet in front of him and was continuing to accelerate, Lt. O'Dea drew his department issued handgun. Lt. O'Dea clearly recalled being center mass of the vehicle, with headlights equidistant apart and the engine revving. Lt. O'Dea feared for his life and believed that Mendoza Davalos was going to use the Nissan to intentionally kill him. As the Nissan continued to accelerate toward Lt. O'Dea, he raised his handgun from low ready position to a firing position. CP 246, 269-71.

Lt. O'Dea did not have a clear sight-line of Mendoza Davalos as he was sitting low in the Nissan, and was short in stature. Lt. O'Dea also knew that other officers were on scene, and while none were in his direct line of sight, Lt. O'Dea was unsure exactly where they were if he was to fire through the windshield at Mendoza Davalos, thus risk striking the other officers present. Applying the

OODA loop principles taught by TPD, Lt. O'Dea determined his best option would be to shoot at the vehicle and get inside of Mendoza Davalos's OODA loop, allowing Lt. O'Dea enough time to reach the vehicles parked to his right. CP 246, 269-71, 335-36.

As the Nissan continued to close the distance, Lt. O'Dea continued to laterally move away. Everything was happening simultaneously. Lt. O'Dea cleared his backdrop for the angle of his shooting. During the process of electing to shoot, Lt. O'Dea considered that Mendoza Davalos may have mental health issues, given his behavior, and that his primary duty as a police officer is to preserve life. As the vehicle rapidly approached at approximately 15-20 miles per hour, Lt. O'Dea began firing while moving laterally and rotating his body to keep a clear sight line while the Nissan continued to accelerate toward him. Lt. O'Dea continued to move and fire until the Nissan's front left tire went flat and it began to veer its wheels to the right in an effort to escape the rounds being fired, and the vehicle and Mendoza Davalos were no longer a deadly threat. Lt. O'Dea barely escaped being struck by the vehicle. The vehicle was close enough to him that he could have reached out and touched it with his hand. CP 246-47. It was a life-threatening situation. CP 380-81.

Mendoza Davalos was taken into custody, safely, a few moments later. The time from when Mendoza Davalos accelerated toward Lt. O'Dea and when Lt. O'Dea fired "[t]he shots from start to finish were – within 2 seconds of themselves." CP 246, 270, 279, 338, 340-41.

The other police officers involved, Officers Huebner, Waddell and Koskovich, prepared incident reports regarding this event. Officer Huebner confirmed that Mendoza Davalos threatened to run them over, that Lt. O'Dea was in danger of being struck by Mendoza Davalos' vehicle, and that Lt. O'Dea fired in the direction of the vehicle as it rapidly approached him. CP 351, 353-54, 368.

Significantly, Officer Waddell reported as follows:

> Waddell: And I wasn't exactly sure where the Lieutenant was. I just know he was right in between that Ford Escape and, and the suspect vehicle. So, I mean it could have easily been ....
>
> Reopelle: The Lieutenant was pinned between the suspect's vehicle and that Escape?
>
> Waddell: Right.
>
> Reopelle: Okay.
>
> Waddell: There was and the, the gap was closing quickly cause he was accelerating.
>
> Reopelle: Okay. So how far do you think that car was away from the Lieutenant when it started to make its right hand turn?
>
> Waddell: Uh, feet, maybe three, four feet, maybe five, somewhere in that area.
>
> Reopelle: So, that's pretty close.
>
> Waddell: Very, very, very close. It was very close quarters.
>
> Reopelle: Okay. And so then when are the shots fired in relation to that?
>
> Waddell: Basically, as the vehicle, if this would be the Lieutenant, the car is going this direction, right as the car about gets here as I'm, I'm running this direction, is right when I start hearing the shots and the car is kinda just brushing by him while the sho, while the shots were happening right in this, right in that spectrum of time.
> Reopelle: Okay. And so, correct me if I get this wrong, okay, cause I want this to be your words but I'm watching you draw this here. So, you're kinda drawing that the Lieutenant starts shooting when the, when the,

> when the vehicle is slightly in front of him but then the car passes him and he continues shooting.
>
> Waddell: It's pretty simultaneous and quickly but he stopped shooting right as basically the front half of the vehicle had passed him. That's about when the string of shots happened is when right, he had about a couple feet before the car was gonna hit him. And then he, it appeared that's when he started shooting and then right when the car was passed him only, only like a couple feet and this is happening instantaneously that's when the shots kinda stopped.

CP 381 (emphasis added).

Mendoza Davalos entered a guilty plea to assault in the third degree and malicious mischief in the third degree. In his guilty plea, he admitted trying to assault Lt. O'Dea with his vehicle. CP 385-403.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Lt. O'Dea respectfully requests that this Court accept review of this case as it involves law enforcement's use of deadly force, which is a timely issue and an issue of substantial public interest that should be determined by the Supreme Court pursuant to RAP 13.4(b)(4).

A. LT. O'DEA'S TERMINATION VIOLATED PUBLIC POLICY THAT FAVORS THE PROTECTION OF HUMAN LIFE.

1. Use of Force Cannot Be Judged With 20/20 Hindsight.

An officer's use of force is measured under an objective reasonableness standard, in light of the totality of the circumstances. Graham v. Connor, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). See also Tennessee v. Garner, 471 U.S. 1, 8-9, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985).

> Because "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue,

> whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

(internal citations omitted) Graham, 490 U.S. at 396.

In applying this standard, courts have repeatedly admonished that "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Id. (emphasis added) "The calculus of reasonableness must embody allowance 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 of force that is necessary in a particular situation." Id. at 396-97. Officers are not required to use the least intrusive means when responding to exigent circumstances; they only need act within the range of reasonable conduct. Scott v. Henrich, 39 F.3d 912,915 (9th Cir. 1994).

Use of deadly force is reasonable where an officer has probable cause to believe the suspect poses a threat of death or serious physical harm to the officer or others. Garner, 471 U.S. at 11.

Here, Lt. O'Dea testified that Mendoza Davalos posed a threat of death or serious bodily injury to him as Mendoza Davalos' vehicle accelerated toward him and that the events were rapidly occurring. Lt. O'Dea's beliefs were consistent with the officers who witnessed the event and who also believed that Mendoza Davalos' actions posed a threat of death or serious bodily injury to Lt. O'Dea. CP 368, 422, 426, 441, 444-45. Given that all officers present acknowledged that

Lt. O'Dea faced a life or death situation, his actions in defending himself per Graham supra, cannot be judged with 20/20 hindsight.

2. Tacoma Police Department's Use of Force Policy Respects the Value of All Human Life.

TPD's Use of Force Policy grants officers discretion in determining what level of force is necessary when addressing any given situation. CP 457-67. The Use of Force Policy does not establish "absolutes" as to what level of force must be used to address a threat.

Significantly, TPD's use of deadly force is permissive, not mandatory, when an officer is faced with an imminent threat of death or serious bodily injury. If a reasonable alternative to the use of deadly force exists, an officer may choose such alternative, and his actions will still be within Policy and cannot be judged with 20/20 hindsight.

TPD defines the reasonable officer standard consistent with the reasonableness standards set forth in Graham, supra. CP 458. Further, TPD defines the principles of deadly force application as follows:

> **B) Principles of Deadly Force Application**
>
> The Tacoma Police Department recognizes and respects the value of all human life. Procedures and training are designed to resolve confrontations prior to escalation to the point *deadly force* may be applied. During the performance of their duties and as a last resort, Officers may apply *deadly force* when confronted with an *imminent danger* of death or *serious bodily injury* to protect themselves or others.

CP 465.

> In applying the appropriate Use of Force, the Policy states as follows:
>
> Risk is assessed objectively based on the on-scene *reasonable Officer's* perspective taking into account the facts and circumstances of the

> particular situation that are known to the Officer. Due to the fact that Officer-citizen confrontations occur in environments that are potentially unpredictable and are tense, uncertain and rapidly evolving, **Officers may use *tools* and *tactics* outside the parameters of departmental training.**

CP 457-58.

Lt. O'Dea received firearm training from TPD and from the Navy. Significantly, part of Lt. O'Dea's TPD training involved the Observe, Orient, Decide, Act (OODA) loop principles which were succinctly explained by former TPD Range Sergeant, James Barrett. CP 472-478. In essence, it involves the officer's ability to observe and react to a situation. Id.

Importantly, Sgt. Barrett recognized that TPD's Use of Force Policy authorizes an officer, who is faced with the potential of death or serious bodily injury, to consider tactics that are outside of training provided by TPD. CP 469-472.

Lt. O'Dea used all of his training when defending himself against Mendoza Davalos' life-threatening attack. Lt. O'Dea determined that he did not need to target or "eliminate" the threat facing him in order to save himself and Mendoza Davalos. Nowhere within TPD's Policy does it **require** an officer to target or eliminate the threat. In fact, the Policy expressly allows officers to "use tools and tactics outside the parameters of departmental training" when responding to a situation. Lt. O'Dea used a tactic outside the parameters of his training, successfully spared a life in the process, yet he was terminated. Nothing is more patently offensive.

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3. *Public Policy Values Human Life.*

This Court previously held that "[s]ociety places the highest priority on the protection of human life. This fundamental public policy is clearly evidenced by countless statutes and judicial decisions." Gardner v. Loomis Armored Inc., 128 Wn.2d 931, 944, 913 P.2d 377 (1966).

Loomis' "fundamental" company rule forbid armored truck drivers from leaving their trucks unattended, and the employee handbook stated that violation of this rule would be grounds for termination. Gardner, 128 Wn.2d at 934-35. Mr. Gardner was fired for violating this rule by exiting his truck during an incident wherein he sought to protect another individual.

In Gardner, this court noted that "employees may not be discharged for reasons that contravene public policy," Id. at 935, and adopted four elements of a public policy tort case. Id. at 941.

4. *Lt. O'Dea's Termination Violates Gardner Which Recognized a Wrongful Termination Claim in Violation of Public Policy.*

The Court of Appeals' decision acknowledged that protecting human life is a clear mandate of public policy and that Lt. O'Dea satisfied the clarity element of the Gardner test. Additionally, the Court of Appeals noted as follows,

> The purpose of the jeopardy element is to ensure that "an employer's personnel management decisions will not be challenged unless a public policy is *genuinely* threatened." Gardner, 128 Wn.2d at 941-42 (emphasis added). To satisfy the jeopardy element, O'Dea must show that his "conduct *directly relate*[*d*] to the public policy, or was *necessary* for the effective enforcement of the public policy." Id. at 945. "Additionally, [O'Dea] must show how the threat of dismissal will discourage others from engaging in the desirable conduct." Id.

The Court of Appeals held that Lt. O'Dea could not establish the jeopardy or causation elements because Lt. O'Dea could not establish that his termination was not based on his decision not to shoot Mendoza Davalos. Rather, the Court of Appeals stated as follows with respect to why the City terminated Lt. O'Dea:

> Ramsdell was explicit that he did *not* terminate O'Dea because O'Dea decided not to shoot at Mendoza Davalos. In Ramsdell's sworn affidavit, he stated, "I terminated Mr. O'Dea's employment because he violated the Tacoma Police Department use of force policy by using deadly force when it was not necessary or reasonable." CP at 141. Ramsdell concluded that O'Dea's use of force was not necessary or reasonable because O'Dea fired his weapon when the car was already passing him. He continued, "I terminated Mr. O'Dea from his position with [the Department] ***because Mr. O'Dea never should have fired his weapon*** under the circumstances." Id.

Although the Court of Appeals stated the Department's decision to terminate was based on its opinion Lt. O'Dea should not have fired his weapon under the circumstances, the Court of Appeals recognized that this was "a rapidly evolving situation" with a non-compliant individual and that "at some point" Lt. O'Dea was in front of a moving vehicle. CP 148, Court of Appeals' decision at 18. The Court of Appeals then ratified the Department's 20/20 hindsight stating that even though Lt. O'Dea believed he was in imminent threat of death or serious bodily injury at the time of the application of force, that based upon the City's review, Lt. O'Dea was not in imminent danger. This is the exact hindsight analysis expressly prohibited by Graham v. Connor, supra.

Lt. O'Dea's intention in firing at the vehicle was to get inside of Mendoza Davalos' OODA loop, to not be struck by his vehicle, and to not harm his fellow officers, a principle that is known to and taught by Sgt. Barrett, the TPD use of force subject matter expert. CP 246, 269-71, 335-36.

a. Jeopardy Element.

Although the Court of Appeals held that Lt. O'Dea did not establish the jeopardy element, there is no question that he was terminated for his failure to target Mendoza Davalos, even though Mendoza Davalos presented as an imminent threat. Lt. O'Dea reasonably believed that the use of deadly force was an option, which he elected not to use, but he certainly could have done so based upon Mendoza Davalos' actions. See CP 481. Further, the City used 20/20 hindsight in its review of Lt. O'Dea's actions and decision to justify his termination even though the event Lt. O'Dea faced was tense, very uncertain, and occurring rapidly. See Graham, supra, at 396-97.

Even though Lt. O'Dea clearly believed his life was in danger, he made a conscious decision not to shoot or "target" Mendoza Davalos because of concerns about his fellow officers' location and his concerns that Mendoza Davalos may be suffering from mental deficiencies. Lt. O'Dea was aware that if he shot at Mendoza Davalos, but missed, he might endanger his fellow officers. Additionally, shooting Mendoza Davalos would not eliminate Lt. O'Dea's possible death or serious bodily injury as the vehicle would continue toward him if Mendoza Davalos was no longer able to control his vehicle. CP 491.

TPD's Policy of when to use deadly force is elective, not mandatory. But here, based upon the Court of Appeals' decision, Lt. O'Dea was mandated to target the threat, Mendoza Davalos, to save his job. Lt. O'Dea, based upon his perception at the time of the event, reasonably believed he was going to die if he

did not react. But because his reaction did not involve shooting at Mendoza Davalos, he was terminated.

As testified to by Chief Ramsdell, had Lt. O'Dea targeted Mendoza Davalos, he would have saved his job because the shooting would have been within Policy. CP 484. But because Lt. O'Dea spared Mendoza Davalos' life, he was terminated. Chief Ramsdell testified that in all officer involved shootings where the officer "targeted" the threat, no termination occurred. CP 485-86, 486-87, 490-92, 493-505, 511, 513. Significantly, Chief Ramsdell says it would have been better had Lt. O'Dea shot Mendoza Davalos. CP 484.

Given that Lt. O'Dea was terminated for not shooting Mendoza Davalos, Chief Ramsdell is accurate. But given the uproar around the country involving officer involved shootings, where citizens are needlessly killed, Lt. O'Dea's decision to save a life rather than to take a life should be applauded. By choosing life over death, Lt. O'Dea satisfies the jeopardy element.

b. Causation Element

Without question, Lt. O'Dea was terminated because he did not "target" Mendoza Davalos. Chief Ramsdell testified as follows:

> Q All right. So had Lieutenant O'Dea shot at Mr. Davalos when Mr. Davalos was coming toward him, are you saying that would not have been a policy violation?
>
> A If Lieutenant O'Dea at the time believed that his life was in imminent threat of death or serious bodily injury, and the subject was going at him, and he really felt that his life was in danger, if he shot at the subject, that would be within policy --
>
> Q Okay. All right.
>
> A -- and the appropriate thing to do --

Q All right. Very good.

A -- if his life was in jeopardy --

Q All right.

A -- or others.

CP 481.

With respect to shooting at a vehicle, the Chief stated as follows:

A It's not within our policy to shoot at a vehicle. It's not in our training to shoot at a vehicle or shoot at the tires. That's not what we're -- that's not within the policy.

CP 483.

Lt. O'Dea chose Mendoza Davalos' life over death but he was terminated because he determined that targeting Mendoza Davalos was not necessary to address the threat.

The Court of Appeals considered the different levels of review that supported the Department's termination decision, but their review shows that materials issues of fact exist. The findings by the Shooting Review Board illustrate that significant material issues of fact exist. Of the six individuals that were on the Board, two voted that the shooting was out of policy, CP 313-18, two voted that the shooting was reasonable and within Department policy due to extraordinary circumstances with a recommendation of no further action, CP 319-25, and the two citizen members indicated that the force was not reasonable and not within Policy, but recommended retraining as opposed to termination. CP 326-31. Accordingly, there are material issues of fact given the findings of the Shooting Review Board.

Further, Chief Ramsdell testified that although shooting at a vehicle is not within TPD's Use of Force Policy, such shooting could be done if it was the last resort. CP 482. Pursuant to TPD's Use of Force Policy, Paragraph 3.1.6(e), the policy states as follows regarding deadly force used against a subject in a moving vehicle.

> *Deadly Force* should not be used against a subject in a moving vehicle unless it is necessary to protect against *imminent danger* to the life of the Officer or others.

CP 465 (underlines added). Clearly, shooting at a vehicle is authorized under limited circumstances, and, significantly, Chief Ramsdell has ratified, as within Policy, prior officer involved shootings where the officer shot at a vehicle as opposed to targeting the specific threat. CP 485-86, 490-92, 493-505, 511, 513. Given that the operative standard is "should not" as opposed to "shall not", Lt. O'Dea's actions fall within policy as his actions were necessary to protect against imminent danger to his life.

The Court of Appeals also acknowledged that reasonable minds could differ as to whether termination was proper:

> While a reasonable person in Ramsdell's position might have reached a different conclusion or made a different decision under the circumstances, that is not the test for whether a prima facie case of wrongful discharge in violation of public policy has been established. This claim is a narrow exception to the employment at will doctrine, and it applies only where an employee is terminated for conduct that furthers an identified public policy.

Court of Appeals decision at 20.

The cause of Lt. O'Dea's termination was because he did not target Mendoza Davalos, but Lt. O'Dea's actions were within Department Policy as he

was not required to use deadly force against Mendoza Davalos. Rather, his actions furthered an identified public policy. Again, by choosing life over death, Lt. O'Dea was terminated, and he has established the causation element.

c. Pretextual Reason for Discharge.

The Court of Appeals without analysis, held that Lt. O'Dea failed to establish that his discharge was pretextual. As set forth above, Lt. O'Dea established the first three Gardner elements. CP 53-54. Although Lt. O'Dea acknowledges his prior discipline for a pursuit violation, for which he had already been sanctioned, his termination is based on the City's position that he violated the Use of Force Policy by not targeting Mendoza Davalos, not because of the pursuit violation.

Given that a police officer has discretion on when to use deadly force, and is not mandated to do so even when Lt. O'Dea reasonably believed Mendoza Davalos presented an imminent threat of death or serious bodily injury, which fact was confirmed by all officers present at the scene and by Mendoza Davalos' own admission in his guilty plea statement, no other basis existed for Lt. O'Dea's termination. The City's entire circular argument centers on its assertion that Lt. O'Dea did not have probable cause to shoot because if he had probable cause, he would have targeted Mendoza Davalos. More succinctly, he had to shoot at Mendoza Davalos to save his job. The Court of Appeals' decision affirms this mandate, even though such is not supported by TPD's Use of Force Policy and is based on the City's 20/20 hindsight, expressly forbidden by Conner v. Graham, supra. Although targeting the source of the imminent threat is allowed in a use of

deadly force situation, it is not mandated per their policy. Respectfully, Lt. O'Dea satisfies the pretext element.

VI. CONCLUSION

Lt. O'Dea's use of force in this situation was consistent with TPD's Use of Force Policy that allows police officers to use "tools and tactics outside the parameters of department training" when responding to an event. Lt. O'Dea's actions saved Mendoza Davalos' life. Unfortunately, saving Mendoza Davalos' life caused Lt. O'Dea's termination. Accordingly, Lt. O'Dea satisfies all of the Gardner factors as his actions furthered the public policy of preserving human life, and this Court should grant this petition.

The Court of Appeals' decision creates a situation where an officer's discretion on whether to use deadly force is eliminated. Had Lt. O'Dea targeted Mendoza Davalos, he would still be employed, and Mendoza Davalos would be dead or seriously injured. But because Lt. O'Dea sought to divert Mendoza Davalos' attention, as opposed to eliminating him, Mendoza Davalos survived, but Lt. O'Dea was terminated. Such decision certainly directs law enforcement that when faced with an event where deadly force can be used, it's safer to eliminate the threat, i.e., don't spare the individual. If you do, you risk being terminated. At a time when law enforcement's use of force is continually questioned, this decision sends the wrong message to law enforcement as the decision mandates the use of deadly force if you want to save your job.

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Based on the arguments, records and files contained herein, Lt. O'Dea respectfully requests that this Court accept review of this matter.

Respectfully submitted this 19th day of August, 2021.

HESTER LAW GROUP, INC., P.S.
Attorneys for Petitioner

By: _____
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CERTIFICATE OF SERVICE

I certify that on the day below set forth, I caused a true and correct copy of the document to which this certificate is attached to be served on the following in the manner indicated below:

Counsel for Respondents: Jean P. Homan Deputy City Attorney Tacoma City Attorney's Office 747 Market Street, Suite 1120 Tacoma, WA 98402	☒U.S. Mail ☐Hand Delivery ☐ABC-Legal Messengers ☐Email
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Signed at Tacoma, Washington this 19th day of August, 2020.

Kathy Herbstler

Filed
Washington State
Court of Appeals
Division Two

May 18, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

DAVID O'DEA, Appellant, v. CITY OF TACOMA, a municipal subdivision of the State of Washington; and the TACOMA POLICE DEPARTMENT, an agency of the City of Tacoma, Respondent.	No. 54240-4-II UNPUBLISHED OPINION

GLASGOW, A.C. J.—Former Tacoma Police Department Lieutenant David O'Dea fired 11 shots at a car driven by Jose Manuel Mendoza Davalos as Mendoza Davalos was attempting to flee a group of officers. After an internal investigation, the Tacoma Police Department terminated O'Dea for violating the Department's use of force policy and exhibiting a lack of judgment that caused concern for community safety.

O'Dea argues the Department terminated him because he did not shoot directly at Mendoza Davalos and instead shot at the tires of the car, sparing Mendoza Davalos's life. O'Dea filed a complaint for damages against the City of Tacoma, alleging wrongful discharge in violation of public policy, in particular the public policy of preserving human life. He also alleged intentional infliction of emotional distress and negligent infliction of emotional distress. The trial court granted summary judgment in favor of the City.

The record shows that the Department terminated O'Dea because he discharged his weapon in a situation where the Department believed it was unreasonable and unnecessary to do so and

because O'Dea demonstrated a pattern of poor decision-making. Even viewing the evidence in the light most favorable to O'Dea, he cannot establish the causation element of a wrongful discharge claim by showing that public-policy-linked conduct caused his termination.

We therefore conclude that the trial court did not err when it granted summary judgment in favor of the City and dismissed O'Dea's wrongful discharge claim. The trial court also did not err when it granted summary judgment to the City on O'Dea's emotional distress claims. We affirm.

FACTS

In 2017, the Department terminated O'Dea. It found that he violated the Department's use of force policy by firing multiple shots at Mendoza Davalos's car when it was not an imminent threat to him. The Department also found that O'Dea's performance was unsatisfactory during and after this incident and that he carried a backup weapon without the necessary qualification. Former Tacoma Police Chief Don Ramsdell explained, however, that the "disciplinary decision would be the same even without the minor violations." Clerk's Papers (CP) at 151.

In his notice of intent to terminate, Ramsdell also considered that O'Dea initiated a pursuit on Halloween night 2015 that caused "a multi-vehicle collision resulting in significant injuries to citizens and substantial damage to property." *Id.* After that incident, the Department found that O'Dea's performance was unsatisfactory and that he violated Department policies relating to vehicle pursuits. The Department suspended O'Dea for 40 hours and notified him that "any further violation of the Tacoma Police Department Policies . . . may result in more severe discipline, up to and including termination of employment." CP at 210.

Ramsdell stated that his decision to terminate O'Dea after the shooting incident was "rooted [in] a reoccurring pattern of poor [judgment]," as well as O'Dea's repeated failure to take responsibility for his actions. CP at 151.

I. USE OF FORCE INCIDENT

O'Dea responded to a call for assistance from Officer Edwin Huebner. Huebner was in the parking lot of an apartment complex in Tacoma investigating a possible traffic collision. Mendoza Davalos, who was one of the drivers involved in the incident, became angry with Huebner, backed into Huebner's patrol car, locked himself in his own car, and then refused to respond to officer commands.

Multiple officers were called to the scene. O'Dea, who was a supervisor, arrived soon after Officers Travis Waddell and Ryan Koskovich. O'Dea learned that Mendoza Davalos had "rammed" Huebner's patrol car. CP at 243. He saw Waddell and Koskovich with their guns drawn in a low ready position.

Mendoza Davalos called 911, and the officers attempted to communicate with him through dispatch, but he remained noncompliant. At one point, Mendoza Davalos told dispatch that if the officers did not move out of the way, he would run them over. The record suggests that at least some of the officers on scene heard dispatch relay this statement when it was made.

While O'Dea was speaking with Huebner, Mendoza Davalos began to drive. O'Dea saw the car "surge[] up over the . . . curb" in front of it and saw Waddell "violently move backwards," which caused O'Dea to believe that Waddell may have been hit by the car. CP at 262. Mendoza Davalos then reversed more forcefully into the car that had been parked next to him. That car was

pushed into the adjacent parking space, and Koskovich was forced to jump out of the way to avoid being hit.

O'Dea began to move away from Mendoza Davalos's car. He thought Mendoza Davalos was preparing to make a right turn toward the only exit in the parking lot, but then Mendoza Davalos turned the wheels back to the left and drove forward, putting O'Dea in the car's path. O'Dea saw the car accelerating "directly toward" him and believed that Mendoza Davalos was "trying to run [him] over." CP at 245. O'Dea recalled being five to seven feet in front of the car, "in [the] center of the vehicle," with the headlights equally distant from him. CP at 268. He "did not believe that [he] had enough time or distance to escape." CP at 246. O'Dea explained, "I knew he was going to kill me if I just stood there . . . . and if I continue[d] to move, he was going to kill me. He was going to hit me. I had to do something to change that dynamic." CP at 271.

O'Dea stated that he began moving to the right driver's side of the car, and he began firing shots toward the front of the vehicle, specifically the front left tire. O'Dea "determined [that his] best option would be to shoot at the vehicle and to get inside of Mendoza Davalos's OODA loop[1] [thought process], allowing [O'Dea] enough time to reach a [vehicle] to [his] right." CP at 246. O'Dea admitted he did not know where any of the other three officers were positioned, and he was concerned that firing at Mendoza Davalos would endanger their lives. He fired 11 times.

When O'Dea began firing, Waddell was running alongside the car and was forced to stop suddenly because he was "essentially running into [O'Dea's] line of fire." CP at 381. Waddell was within 10 to 12 feet of O'Dea when he began firing, and it took Waddell about 8 feet to decelerate

[1] "OODA" stands for "observe, orient, decide and act." CP at 270. It is a principle used to describe the decision-making process.

and stop running. Koskovich initially stated that he was not in danger of being hit, but he later expressed concern that he was in close proximity to O'Dea and bullet fragments were retrieved about 35 feet from where O'Dea had been firing. O'Dea admitted that he "had no clear idea" where Koskovich was when he started firing, but he claimed Koskovich was "not in the immediate vicinity" and "not in [his] line of vision at all." CP at 121.

Shortly after the shots were fired, Huebner was able to stop Mendoza Davalos's car by blocking it with his own car, and Huebner, Waddell, and Koskovich were able to remove Mendoza Davalos from the car and arrest him.

Huebner, Waddell, and Koskovich were interviewed multiple times after the incident. Huebner said that the car drove directly toward O'Dea "[a]t first," but then it "veered" away. CP at 354. He reported that O'Dea was out of the way and not in danger, but then O'Dea "stepped forward," toward the car, and began firing as the car was "passing by." CP at 618.

Waddell reported that O'Dea "jumped out of the way" and began to shoot. CP at 445. He said O'Dea was "kind of at the front and the side" of the car when he started firing, "about at a 45 to 60 degree angle from the vehicle," and the car was "brushing by him . . . while the shots were happening." CP at 381, 444.

On the night of the incident, Koskovich recounted that he observed O'Dea backpedal and fire "in the direction of the car as it's driving at him." CP at 368. Later on, during his Internal Affairs interview, Koskovich stated that O'Dea was "just off to the side of the vehicle . . . within a foot or two of the vehicle as he was firing" and that he fired as the vehicle was passing him. CP at 417. In an affidavit in support of the City's motion for summary judgment, Koskovich stated,

"When Lt. O'Dea fired his weapon, he was out of the way of Mendoza Davalos['s] car and not in imminent danger." CP at 633.

Mendoza Davalos pleaded guilty to third degree assault and third degree malicious mischief. In his guilty plea to the assault charge, Mendoza Davalos wrote, "I drove my vehicle in [O'Dea's] direction and he believed I was going to hit him with my car, causing him to attempt . . . to alter my vehicle's path by firing his gun . . . resulting in his gun's bullet fragments [bouncing] off my vehicle and strik[ing] O'Dea causing bodily injury." CP at 401. O'Dea had lacerations on his chin and left forearm and a contusion on his left forearm.

II. POLICIES AND TRAINING

It is a guiding principle of the Department's use of force policy that "[t]he Tacoma Police Department recognizes and respects the value of all human life." CP at 465. The Department's "[p]rocedures and training are designed to resolve confrontations prior to escalation to the point deadly force may be applied." *Id.* (emphasis omitted).[2]

Officers "shall use only that force which is reasonable." CP at 457 (emphasis omitted). And an application of force is considered "[n]ecessary" if "no reasonably effective alternative to the use of force appeared to exist and . . . the amount of force used was reasonable to effect the lawful purpose intended." CP at 458 (emphasis omitted).

To review a use of force, the Department employs a "Reasonable Officer Standard," which it defines as a "[s]tandard of professional conduct relating to force application based on training, experience, facts and perceptions known to the [o]fficer at the time." CP at 458 (emphasis omitted).

[2] "Emphasis omitted" may also include "bold face omitted" when citing to clerk's papers.

The Department's policy allows for the use of "tools and tactics outside the parameters of departmental training," but officers must generally act consistently with departmental training. *Id.* (emphasis omitted). All uses of force outside of departmental training "shall meet the same standard of reasonableness as those which have been previously identified and approved." *Id.* Any "application of force must proportionally de-escalate or cease . . . when control is gained or [the] threat is removed." *Id.* (emphasis omitted).

The Department's policy considers the use of a firearm to be deadly force and indicates that it can only be used in response to life-threatening danger. "Deadly force should not be used against a subject in a moving vehicle unless it is necessary to protect against imminent danger to the life of the [o]fficer or others." CP at 465 (emphasis omitted). "When a law enforcement [o]fficer is pursuing a fleeing suspect, [they] may use deadly force only to prevent escape if the [o]fficer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the [o]fficer or others." *Id.*

The Department has trained officers that deadly force should not be used to stop a moving vehicle. Former Sergeant James Barrett, who developed and conducted use of force trainings for the Department and served as the Department's "firearm and use of deadly force subject matter expert," stated that he never trained officers to disable a vehicle with a firearm and that the proper tools for disabling a vehicle are spike strips and pursuit intervention techniques. CP at 582. He further stated that if a moving vehicle is posing an imminent threat to an officer's life, the "intended target should be the subject posing the threat," meaning the driver. CP at 583. Chief Ramsdell similarly emphasized that officers are not trained to shoot at moving vehicles—they can shoot at the subject, or driver, of a vehicle only as a last resort. *See* CP at 482-83. O'Dea's police practices

expert also admitted that he was "not aware of any such training that says shoot the tires of a vehicle." CP at 491. He stated that "in most cases [this tactic] is ineffective [because t]he vehicle just keeps driving." *Id.*

O'Dea agreed that the Department had not trained him to shoot to disable a moving vehicle, but he argued that he received "similar" training on how to shoot at a moving suspect and this circumstance was "not all that different." CP at 306. Moreover, O'Dea does not recall any training that specifically instructed officers *not* to shoot at the tires or engine block. O'Dea maintains that by using tools and tactics outside of the Department's models and training, he was able to preserve life in a deadly force situation. He argues, "If I could see another way [besides shooting at the driver himself,] . . . I should be allowed to exercise that [option]." CP at 109. In contrast, Ramsdell characterized the relevant question in this case as whether O'Dea was justified in shooting his gun *at all.*

III. INVESTIGATION AND REVIEW

The incident triggered several layers of Department review. First, four of six members of the Deadly Force Review Board concluded that O'Dea's use of force was not reasonable and not within Department policy. This board is comprised of two management representatives, two union representatives, and two citizen representatives. The two management representatives recommended an internal investigation of possible policy violations.

Internal Affairs then investigated O'Dea on allegations of violating Department policies related to use of force, unsatisfactory performance, and equipment violations. Internal Affairs interviewed the three officers who were present during the shooting, three officers who showed up to assist after the shooting, several officers who were involved in forensic processing of the

evidence, the officer responsible for the Department's firearms training, and O'Dea himself. Internal Affairs sustained all of the allegations against O'Dea.

A Department detective who performed forensic analysis stated that "there were no defects located to the tire tread of the front left tire . . . the defects were from the side." CP at 165. He concluded that there was nothing to indicate that O'Dea was standing in front of the car when he began shooting and estimated that O'Dea was probably standing "in front of the door hinge, next to the door hinge, or behind it." *Id.* Another detective who analyzed the forensic evidence reported that the bullet strikes were "almost perpendicular to the wheel rather than from the front of the vehicle," and he believed O'Dea was standing "almost perpendicular, right at the left front wheel directly to the side of the vehicle as he was shooting." *Id.* He also noted "additional shots farther down the car." *Id.*

Internal Affairs relied on the forensic analysts' conclusions that O'Dea likely fired "while standing at the side of the vehicle" and stated that this "interpretation of the evidence coincided with Officers Huebner, Koskovich, and Waddell's statements that Lt. O'Dea was standing to the side of the suspect vehicle when he fired his weapon." CP at 173.[3]

Internal Affairs recognized that O'Dea believed Mendoza Davalos posed a significant danger, but it found that "O'Dea's determination to shoot at the vehicle's tire due to his fear of being struck by the suspect's car [was] negated by the fact that he was shooting at the tires of the vehicle as it was driving past him rather than driving towards him." *Id.* It found that he violated the use of force policy.

[3] The Internal Affairs report is in the record, but the City did not submit declarations or deposition testimony from the detectives who performed the forensic analysis.

In his complaint, O'Dea claimed that he provided a statement from a mechanic familiar with ballistic evidence and that he hired a forensic scientist to conduct a second inspection of the car, but the scientist was not permitted to remove the front left tire to examine it. According to O'Dea, the mechanic determined that there was damage "coming from the front of the vehicle traveling to the back of the vehicle." CP at 29. The record on appeal does not include any declaration or deposition testimony from the mechanic or the forensic scientist.

Internal Affairs also found O'Dea's performance was unsatisfactory due to his "poor decision[-]making." CP at 173. He failed to follow the Department's use of force policy, failed to inform dispatch and incoming officers that shots had been fired, and failed to follow other Department protocols after the shooting. He also violated the equipment policy because he did not have a current qualification to carry a backup handgun.

Internal Affairs noted O'Dea's 2015 suspension as well, which was imposed after the Halloween high-speed chase he initiated resulted in a collision and injuries, some serious, to members of the public, including children. Internal Affairs recommended termination, stating, "Lt. O'Dea has continued to make unsatisfactory decisions and his performance[] does not meet the standards expected of a Tacoma Police Officer, especially a Lieutenant." CP at 174. It concluded, "Lt. O'Dea does not model the behavior and actions expected of a seasoned law enforcement officer or commander. Lt. O'Dea's last two incidents have created a danger to himself, the officers around him, and the public." CP at 175.

Following a *Loudermill*[4] hearing where O'Dea and his union representative were permitted to speak, Chief Ramsdell accepted Internal Affairs' recommendation and terminated O'Dea. In a sworn affidavit, Ramsdell explained:

> I terminated Mr. O'Dea's employment because he violated the Tacoma Police Department use of force policy by using deadly force when it was not necessary or reasonable. When confronted with an actively resistant suspect who was trying to flee, Mr. O'Dea fired his weapon at the tires of the vehicle eleven times. At the moment Mr. O'Dea fired his weapon, the suspect vehicle was *passing* him and was not an imminent threat to either Mr. O'Dea or any of the officers present at the scene.
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> . . . I understand that Mr. O'Dea is claiming that I terminated his employment because he did not shoot the driver of the vehicle, but instead aimed at the tires of the car – in other words, that I terminated his employment "because he decided not to shoot at and/or kill Mr. Mendoza-Davalos[.]" That is not why I terminated Mr. O'Dea. I terminated Mr. O'Dea from his position with [the Department] ***because Mr. O'Dea never should have fired his weapon*** under the circumstances. Although Mr. O'Dea states that he believed he was in imminent danger, a reasonable police officer facing the same circumstances would not have viewed the suspect as an imminent threat and would not have considered the use of deadly force necessary.
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> . . . Another factor in my decision to terminate Mr. O'Dea's employment was a reoccurring pattern of poor judgment and his lack of accountability for his actions and decisions. In 2015, I suspended Mr. O'Dea for 40 hours for violating the Department's pursuit policy in an incident that resulted in a serious motor vehicle accident where multiple persons were injured. Despite a clear violation of the pursuit policy and significant discipline, Mr. O'Dea refused to take responsibility for this incident. Similarly, Mr. O'Dea continues to claim that his use of deadly force was not a violation of the use of force policy. His decision-making in both situations was dangerous and he is either unable or unwilling to admit it. Because of this, I have no reasonable basis to believe that he will not continue to exercise extremely poor judgment and engage in dangerous behavior, which ultimately puts the public and other officers at risk.

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[4] *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 547, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985) (due process requires providing some public employees with a "pretermination opportunity to respond").

CP at 141-42 (footnote omitted) (citation omitted). Ramsdell further explained in his notice of intent to terminate, "Although I appreciate [O'Dea's] perspective and opinions on what happened that day, I must base my decision on what I would expect a reasonable officer to do in that situation." CP at 148. He added, "While I do not believe in general, the use of deadly force was within policy, I also find that the decision to shoot at the tires was not within policy nor consistent with training." CP at 149.

O'Dea appealed to the Discipline Review Board, which unanimously upheld the termination.

IV. O'DEA'S LAWSUIT AGAINST THE CITY

In 2018, O'Dea sued the City[5] for damages. He alleged wrongful discharge in violation of public policy, intentional infliction of emotional distress (outrage), negligent infliction of emotional distress, and defamation. The City filed a motion for summary judgment on all claims. In his response, O'Dea conceded that he could not establish defamation.

At a hearing on the motion, the trial court considered how shooting at a vehicle 11 times could endanger other officers and anyone nearby. The trial court explained,

> Whether or not the vehicle was headed for Mr. O'Dea or whether it had turned off before the discharge of the weapon or whether both things were true, the use of deadly force and firing off eleven rounds in an urban setting under these circumstances -- to discharge an officer on that basis does not, in my view, violate some kind of public policy. It advances public safety.

[5] The Tacoma Police Department is a department of the city of Tacoma and not a separate legal entity.

Verbatim Report of Proceedings at 20.[6] The trial court granted the City's motion for summary judgment on the remaining claims. O'Dea appeals.

ANALYSIS

I. SUMMARY JUDGMENT STANDARD

A motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." CR 56(c). "A genuine issue is one upon which reasonable people may disagree; a material fact is one controlling the litigation's outcome." *Youker v. Douglas County*, 178 Wn. App. 793, 796, 327 P.3d 1243 (2014). When determining whether a genuine issue of material fact exists, this court considers all evidence in the light most favorable to the nonmoving party. *Vargas v. Inland Wash., LLC*, 194 Wn.2d 720, 728, 452 P.3d 1205 (2019). If, after reviewing all the evidence, a reasonable person could reach only one conclusion, summary judgment is proper. *Id.*

If a defendant files a motion for summary judgment and shows an "'absence of evidence to support the [plaintiff]'s case,'" then the burden shifts to the plaintiff to set forth specific facts showing a genuine issue of material fact for trial. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)); *see also M.E. & J.E. through McKasy v. City of Tacoma*, 15 Wn. App.

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[6] O'Dea assigns error to the trial court "assum[ing] facts not in evidence when it suggested that Lt. O'Dea's 'random' shots placed other citizens in danger." Br. of Appellant at 2. The record does not identify specific citizens as endangered by O'Dea's actions, but Koskovich did describe the area as "busy." CP at 369. Regardless, O'Dea does not develop this argument in his brief, so we deem it waived. RAP 10.3(a)(6); *Riley v. Iron Gate Self Storage*, 198 Wn. App. 692, 713, 395 P.3d 1059 (2017) ("If an appellant's brief does not include argument or authority to support its assignment of error, the assignment of error is waived.").

2d 21, 31, 471 P.3d 950 (2020), *review denied*, 196 Wn.2d 1035 (2021). If the plaintiff "'fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,'" summary judgment is proper. *Young*, 112 Wn.2d at 225 (quoting *Celotex Corp.*, 477 U.S. at 322). We review the superior court's order granting summary judgment de novo. *Vargas*, 194 Wn.2d at 728.

II. WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY

The Washington Supreme Court has recognized a cause of action in tort for wrongful discharge that "contravenes a clear mandate of public policy." *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 232, 685 P.2d 1081 (1984). Generally, this tort arises in four specific scenarios: where an employee is fired for "refusing to commit an illegal act;" for "performing a public duty or obligation, such as serving jury duty;" for "exercising a legal right or privilege, such as filing workers' compensation claims;" or for "reporting employer misconduct, *i.e.*, whistleblowing." *Gardner v. Loomis Armored Inc.*, 128 Wn.2d 931, 936, 913 P.2d 377 (1996). But a claim may exist outside of these scenarios if the plaintiff satisfies a four-part test. *Martin v. Gonzaga Univ.*, 191 Wn.2d 712, 723, 425 P.3d 837 (2018) (affirming the use of the four-part "Perritt test" for cases that do "not fit neatly into one of those four recognized categories" (citing Henry H. Perritt Jr., *Workplace Torts: Rights and Liabilities* (1991))). "The plaintiff[] must prove the existence of a clear public policy (the *clarity* element)[,] . . . that discouraging the conduct in which they engaged would jeopardize the public policy (the *jeopardy* element)[,] . . . [and] that the public-policy-linked conduct caused the dismissal (the *causation* element)." *Gardner*, 128 Wn.2d at 941 (citing Perritt, *supra*, §§ 3.7, .14, .19). Finally, if the plaintiff satisfies the first three elements, then "[t]he

defendant must not be able to offer an overriding justification for the dismissal (the *absence of justification* element)." *Id.* (citing Perritt, *supra*, § 3.21).

This cause of action is a "narrow" exception to the at will employment doctrine. *Thompson*, 102 Wn.2d at 232. It is therefore the employee's burden to prove that their dismissal contravenes public policy. *Id.* Once an employee shows a violation of public policy, the burden shifts to the employer to prove that the dismissal was for legitimate, nonpretextual reasons. *Gardner*, 128 Wn.2d at 936. "This protects against frivolous lawsuits and allows trial courts to weed out cases that do not involve any public policy principle. It also allows employers to make personnel decisions without fear of incurring civil liability." *Thompson*, 102 Wn.2d at 232. The exception "should be applied cautiously so as to not swallow the rule" that employers generally need not explain their employment decisions to the courts. *Briggs v. Nova Servs.*, 166 Wn.2d 794, 802, 213 P.3d 910 (2009).

A. Clarity Element

O'Dea claims his actions furthered the public policy of protecting human life. "The City does not dispute that society places a high priority on human life," and we agree. Br. of Resp't at 13.

The Supreme Court has previously recognized a public policy of prioritizing the protection of human life. It described this policy as "fundamental" and "clearly evidenced by countless statutes and judicial decisions." *Gardner*, 128 Wn.2d at 944.

In *Gardner*, the plaintiff was a "guard and driver of an armored car." *Id.* at 933. Gardner's employer had a company rule that if an employee left their armored car unattended for any reason, that was grounds for termination. *Id.* at 934-35. While in an armored car, Gardner saw a man

chasing a woman with a knife. *Id.* at 934. The woman screamed for help, and Gardner left the armored car to help her. *Id.* The Supreme Court held that Gardner could not be terminated for violating the company rule where the violation occurred "because he saw a woman who faced imminent life-threatening harm, and he reasonably believed his intervention was necessary to save her life." *Id.* at 950. The court recognized a "public policy encouraging such heroic conduct." *Id.*

The Supreme Court applied *Gardner* in *Ellis v. City of Seattle*, 142 Wn.2d 450, 13 P.3d 1065 (2000). There, a sound technician was discharged for "'gross insubordination'" after he refused his employer's order to disable part of an arena's fire alarm system without authorization to do so. *Id.* at 457. Ellis was "concerned about the potential danger to human life that might occur if he had to alter the designed operation of the fire alarm system," and the Supreme Court recognized that "[p]ublic policy should encourage the safe operation of fire alarm systems." *Id.* at 466.

The Department also "recognizes and respects the value of all human life" in its use of force policy. CP at 465. Officers are instructed that the need for deadly force "arises when there is no reasonable alternative," and they may apply deadly force only "as a last resort . . . to protect themselves or others." *Id.*

Protecting human life is a clear mandate of public policy. *See Gardner*, 128 Wn.2d at 950; *Ellis*, 142 Wn.2d at 466; *see also* CP at 465. O'Dea has satisfied the clarity element of the *Gardner* test.

B. Jeopardy Element

O'Dea claims that by terminating him for shooting at the tires of the car, rather than at Mendoza Davalos, the Department jeopardized the public policy of protecting human life. If

O'Dea were fired because he chose not to shoot at Mendoza Davalos, as he asserts, then he could satisfy the jeopardy element.

The purpose of the jeopardy element is to ensure that "an employer's personnel management decisions will not be challenged unless a public policy is *genuinely* threatened." *Gardner*, 128 Wn.2d at 941-42 (emphasis added). To satisfy the jeopardy element, O'Dea must show that his "conduct *directly relate*[*d*] to the public policy, or was *necessary* for the effective enforcement of the public policy." *Id.* at 945. "Additionally, [O'Dea] must show how the threat of dismissal will discourage others from engaging in the desirable conduct." *Id.*

The decision not to shoot at another person directly relates to the public policy of protecting human life. If O'Dea were dismissed because he made the decision not to shoot at Mendoza Davalos, his termination would jeopardize the identified public policy. His dismissal might discourage other officers from choosing viable alternatives to shooting at suspects, and this would jeopardize the public policy of prioritizing the protection of human life.

C. Causation Element

However, O'Dea's decision not to shoot at Mendoza Davalos was not the basis for O'Dea's termination. In briefing and in oral argument, O'Dea argued that he was terminated because he "chose not to shoot at or 'target' Mendoza Davalos when his actions threatened Lt. O'Dea's life." Br. of Appellant at 16. But O'Dea was not terminated because he chose to shoot at the tires, rather than shoot at Mendoza Davalos. Chief Ramsdell clearly stated that the Department terminated O'Dea because he chose to discharge his firearm at all, and O'Dea has not presented evidence to the contrary.

To satisfy the causation element, O'Dea "must prove that the public-policy-linked conduct caused the dismissal." *Gardner*, 128 Wn.2d at 941. O'Dea need not prove that this was the sole cause of his dismissal, but he must prove that it was a cause. *Wilmot v. Kaiser Alum. & Chem. Corp.*, 118 Wn.2d 46, 70, 821 P.2d 18 (1991).

Ramsdell was explicit that he did *not* terminate O'Dea because O'Dea decided not to shoot at Mendoza Davalos. In Ramsdell's sworn affidavit, he stated, "I terminated Mr. O'Dea's employment because he violated the Tacoma Police Department use of force policy by using deadly force when it was not necessary or reasonable." CP at 141. Ramsdell concluded that O'Dea's use of force was not necessary or reasonable because O'Dea fired his weapon when the car was already passing him. He continued, "I terminated Mr. O'Dea from his position with [the Department] ***because Mr. O'Dea never should have fired his weapon*** under the circumstances." *Id.*

In his notice of intent to terminate, Ramsdell acknowledged that this was "a rapidly evolving situation" with a noncompliant individual and that, "at some point," O'Dea was in front of a moving vehicle. CP at 148. He acknowledged that O'Dea felt his own life was in danger and believed it was necessary to shoot to save himself. However, Ramsdell explained that "what matters when determining whether the use of deadly force was within policy is whether [O'Dea was] in imminent threat of death or serious bodily injury *at the time of the application of force*." CP at 149 (emphasis added). According to Ramsdell, the evidence was "clear" that when O'Dea

started shooting, he had already avoided being hit by the car, and he was not in imminent danger. *Id.*[7]

Ramsdell did express "serious concern" with O'Dea's decision to shoot at the tires because he did not see how this action would have stopped the vehicle from moving. *Id.* But this was a secondary concern. Both Ramsdell's sworn declaration and the Internal Affairs conclusions identified O'Dea's decision to use his firearm *at all* as the reason for his termination.

In addition, Ramsdell stated that "[a]nother factor in [his] decision to terminate Mr. O'Dea's employment was a reoccurring pattern of poor judgment." CP at 142. Ramsdell considered O'Dea's 2015 vehicle pursuit, which resulted in injuries to multiple people, and he noted that O'Dea never took full responsibility for his actions in that incident. Ramsdell concluded, "I have no reasonable basis to believe that [O'Dea] will not continue to exercise extremely poor judgment and engage in dangerous behavior, which ultimately puts the public and other officers at risk." *Id.*

There is no genuine issue of material fact regarding the cause of O'Dea's termination. The Department terminated O'Dea because it disapproved of his use of force. Ramsdell relied on the investigation conducted by Internal Affairs and concluded that when O'Dea fired his weapon, it was not reasonable or necessary. He also expressed concern that O'Dea had repeatedly violated Department policies and endangered others.

[7] Ramsdell reviewed the contrary evidence offered by O'Dea's mechanic, but he found that the mechanic conducted a different type of forensic analysis than the Department and, therefore, Ramsdell did not rely on the mechanic's analysis. The mechanic's analysis was not provided to the trial court, and it is not in this record.

While a reasonable person in Ramsdell's position might have reached a different conclusion or made a different decision under the circumstances, that is not the test for whether a prima facie case of wrongful discharge in violation of public policy has been established. This claim is a narrow exception to the employment at will doctrine, and it applies only where an employee is terminated for conduct that furthers an identified public policy.

O'Dea fails to satisfy the causation element of the *Gardner* test because his termination was *not* caused by the conduct that O'Dea claims is linked to the identified public policy—his decision to shoot at the car rather than Mendoza Davalos, thereby preserving Mendoza Davalos's life. It was caused by his decision to use his firearm at all. The Department did not terminate O'Dea for engaging in conduct that furthered the public policy of protecting human life; it terminated him because it believed that his conduct was unreasonable, unnecessary, and unsafe. Because O'Dea cannot establish this element of a wrongful discharge claim, his claim fails as a matter of law, and we must affirm the trial court's grant of summary judgment to the City.[8]

III. ADDITIONAL TORT CLAIMS

O'Dea neglected to assign error in his opening brief to the trial court's dismissal of his other two claims, as required by RAP 10.3(a)(4). However, "[w]e have 'discretion to decide an issue a party fails to argue in its initial brief, especially where . . . the party raised it below and addresses it in a reply brief.'" *Ctr. for Biological Diversity v. Dep't of Fish & Wildlife*, 14 Wn. App. 2d 945, 978, 474 P.3d 1107 (2020) (alteration in original) (quoting *In re Recall Charges*

[8] Although we do not reach the absence of justification element, we note that O'Dea also failed to establish that the Department's justification for his termination was pretextual.

Against Seattle Sch. Dist. No. 1 Dirs., 162 Wn.2d 501, 513, 173 P.3d 265 (2007)). We exercise our discretion to briefly address the arguments raised in O'Dea's reply brief.

A. Negligent Infliction of Emotional Distress

O'Dea argues that his termination was a negligent infliction of emotional distress. But negligent infliction of emotional distress claims are not cognizable where they arise from employee discipline.

"Negligent infliction of emotional distress may be a cognizable claim in the workplace *when it does not result from an employer's disciplinary acts*." *Strong v. Terrell*, 147 Wn. App. 376, 387, 195 P.3d 977 (2008) (emphasis added). Generally, "employers do not owe employees a duty to use reasonable care to avoid the inadvertent infliction of emotional distress when responding to workplace disputes." *Bishop v. State*, 77 Wn. App. 228, 235, 889 P.2d 959 (1995). This includes disputes that result in an employee's termination because "employers, not the courts, are in the best position to determine whether such disputes should be resolved by employee counseling, discipline, transfers, terminations or no action at all," and "the courts cannot guarantee a stress-free workplace." *Id.* at 234.

Here, the Department's termination of O'Dea was a disciplinary action. O'Dea relies on *Cagle v. Burns & Roe, Inc.*, 106 Wn.2d 911, 726 P.2d 434 (1986), but that case does not address a stand-alone claim of negligent infliction of emotional distress. Instead, it considers "whether, and on what standard of proof," emotional distress damages are recoverable, should a plaintiff establish a claim of wrongful discharge in violation of public policy. *Id.* at 912. If O'Dea were able to prove the elements of his wrongful discharge claim, then he could also present an argument that emotional distress damages were warranted. But O'Dea is unable to establish a wrongful discharge

claim, and a separate cause of action for negligent infliction of emotional distress claim is not cognizable.

B. Intentional Infliction of Emotional Distress (Outrage)

O'Dea also argues that "his termination was outrageous because he spared Mr. Mendoza Davalos' life." Appellant's Reply Br. at 11. We disagree.

To establish a claim of outrage, O'Dea must show "'(1) extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) actual result to the plaintiff of severe emotional distress.'" *Snyder v. Med. Serv. Corp. of E. Wash.*, 145 Wn.2d 233, 242, 35 P.3d 1158 (2001) (internal quotation marks omitted) (quoting *Birklid v. Boeing Co.*, 127 Wn.2d 853, 867, 904 P.2d 278 (1995)). "'The conduct in question must be *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*.'" *Birklid*, 127 Wn.2d at 867 (internal quotation marks omitted) (quoting *Dicomes v. State*, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989)). Whether certain conduct is sufficiently outrageous to establish an outrage claim is ordinarily a question for the jury, "'but it is initially for the court to determine if reasonable minds could differ on whether the conduct was sufficiently extreme to result in liability.'" *Id.* (quoting *Dicomes*, 113 Wn.2d at 630).

Here, reasonable minds would agree that O'Dea's termination was not sufficiently extreme to establish liability. If O'Dea were correct that the Department terminated him for not shooting at Mendoza Davalos, then perhaps he would have an outrage claim. However, the Department thoroughly explained that it terminated O'Dea because he fired his weapon in a situation where the Department believed it was unreasonable, unnecessary, and unsafe to do so and because O'Dea

demonstrated a pattern of poor decision-making. Neither the Department's offered justification for his termination, nor its manner of terminating him, which involved extensive investigation and multiple levels of review, was so outrageous or extreme that it could be regarded as "'atrocious'" or "'utterly intolerable in a civilized community.'" *Birklid*, 127 Wn.2d at 867 (emphasis omitted) (internal quotation marks omitted) (quoting *Dicomes*, 113 Wn.2d at 630). Summary judgment dismissal of O'Dea's intentional infliction of emotional distress claim was proper.

CONCLUSION

We affirm the trial court's grant of summary judgment on O'Dea's claims of wrongful discharge in violation of public policy, negligent infliction of emotional distress, and intentional infliction of emotional distress.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Glasgow, ACJ

Glasgow, A.C.J.

We concur:

Maxa, J.

Maxa, J.

Sutton, J.

Sutton, J.

HESTER LAW GROUP, INC., P.S.

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