NO. 101143-1

SUPREME COURT
OF THE STATE OF WASHINGTON

LISA EARL,

Appellant,

v.

CITY OF TACOMA,

Respondent.

CITY OF TACOMA'S ANSWER TO PLAINTIFF'S PETITION FOR REVIEW

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I. INTRODUCTION

This case concerns only a simple and straight-forward application of existing legislation and well-settled Washington State caselaw to determine the statute of limitation period in a Public Records Act ("PRA") claim.

Notably, the Petition for Discretionary Review ("Petition") filed by Lisa Earl ("Earl") provides a detailed discussion of the shooting of her daughter, Jacqueline Salyers ("Salyers"), Earl's conspiracy theories involving the Tacoma Police Department ("TPD") and its officers, and blatantly false assertions that "Tacoma has frequently been sued for the actions of its SWAT team which has killed and injured several people." This PRA case is not about the shooting of Salyers. This PRA case is not about any police conspiracy. And this PRA case is not about Tacoma's SWAT team killing or injuring people. This case is *only* about the application of the statute of limitations imposed by the PRA and when either equitable tolling or the discovery rule apply.

In June of 2016, Earl made an extensive public records request to the City of Tacoma. The City, in good faith, searched its records and fulfilled her request in two installments that comprised more than 1000 pages. Years later, in the course of civil litigation, the City produced a single three page document that Earl now contends was responsive to her June 2016 request, but was not produced by the City in the context of the PRA request. This litigation relates *only* to that single 3-page document - the "Command Post Log."

In August 2019, almost *three years after* the City produced its last installment of records and closed Earl's PRA request, Earl filed a cause of action under Chapter 42.56 RCW, claiming the City should have produced the Command Post Log ("PRA Claim"). It is undisputed that Earl's PRA Claim was filed well after the one-year statute of limitations had expired. Although her PRA Claim was untimely, Earl argues that either the doctrine of equitable tolling or the discovery rule should have been applied, thereby allowing her PRA Claim to proceed.

Finding that Earl's PRA Claim was time-barred, and that neither the discovery rule nor the doctrine of equitable tolling applied, the superior court dismissed the matter on summary judgment. [1] In a unanimous opinion, the Washington State Court of Appeals Division II ("Division II") affirmed the trial court's dismissal. Division II confirmed that Earl's PRA Claim was time-barred because the common law discovery rule does not apply in PRA cases, and because Earl did not establish the requisite elements of the doctrine of equitable tolling, which, if applicable, would toll the statute of limitations set out in RCW 42.56.550(6). Earl v. City of Tacoma, No. 56160-3-II, 2022 Wash. App. LEXIS 1422 (Ct. App. July 12, 2022).

As outlined herein, Earl's Petition fails to demonstrate any of the requirements necessary for review as set forth in RAP 13.4(b), as such therefore there is no basis for review by this Court.

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[1] Earl sought direct review of the trial court's decision, which this Court denied. Earl v. Tacoma, SC No. 99368-8.

II. COUNTERSTATEMENT OF THE ISSUE

Did Division II correctly hold that: (1) the common law discovery rule does not apply to PRA claims; and, (2) in order to equitably toll the statute of limitations in PRA actions, all four Millay conditions must be present.

III. COUNTER STATEMENT OF THE CASE

Division II's analysis of the instant case includes a detailed and accurate description of Earl's PRA request, an accurate summary of the City's response, and an accurate timeline on which the statute of limitations issues in the matter below are based. In the interest of efficiency and judicial economy, that factual background is not repeated herein in full. Two points, however, warrant emphasis:

First, the City maintains its position that the document in question, the Command Post Log, is not responsive to Earl's PRA request. The lower courts did not resolved this issue, as it was not necessary to do so in light of each of the lower courts holding that the matter was time-barred. *See* App. 2.

Second, the facts surrounding all of Earl's claims of injustice related to her daughter's death and her conspiracy theories involving TPD were fully litigated before the U.S. District Court[2]. The U.S. District Court fully analyzed each of Earl's substantive claims. After a carful and thorough review, the U.S. District Court dismissed all of the claims related to the alleged injustice of the shooting and the claims related to the alleged conspiracy in their entirety. App. 3.

IV. REASONS WHY REVIEW SHOULD BE DENIED

A petition for discretionary review shall only be accepted if the petition meets specific criteria as identified in RAP 13.4(b). Earl fails to establish any of the criteria identified by RAP 13.4(b) necessary for discretionary review and, as such, her Petition should be denied.

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[2] As such, the City is not going to address any of the inaccurate allegations related to the shooting of Salyers or Earl's conspiracy theories – as those claims are wholly unrelated to the matter currently before this Court.

A. Division II's holding in Earl is consistent with this Court's previous decisions, therefore there is no basis for this Court to accept review under RAP 13.4(b)(1).

Earl claims Division II's decision below is in direct conflict with both of this Court's decisions in: (1) In re Pers. Restraint of Fowler, 197 Wn.2d 46, 479 P.3d 1164 (2021); and (2) U.S. Oil & Ref. Co. v. Department of Ecology, 96 Wn.2d 85, 633 P.2d 1329 (1981). Earl argues that this alleged inconsistency warrants this Court's review of this matter under RAP 13.4(b)(1). As outlined below, there is no conflict between this Court's earlier decisions and Division II's holding in Earl, therefore this Petition should be denied.

1. Subsequent to the filing of Earl's Petition for review in this matter, this Court issued its decision in Fowler v. Guerin that definitively confirmed there are four predicate conditions necessary for equitable tolling to apply in civil matters.

In the civil litigation context, this Court has clearly identified four conditions that must be present in order for a court to grant equitable relief by tolling the statute:

> [Washington law] allows equitable tolling (1) when justice requires. The predicates for equitable tolling are (2) bad faith, deception, or false assurances by the defendant and (3) the exercise of diligence by the plaintiff. In Washington equitable tolling is appropriate (4) when consistent with both the purpose of the statute providing the cause of action and the purpose of the statute of limitations.

Fowler v. Guerin, 200 Wn.2d 110, 119 (2022)(*citing* Millay v. Cam, 135 Wn.2d 193, 206, 955 P.2d 791 (1998)).

Critically, in the matter at bar, Division II found "Earl presents no evidence to suggest that the City made deliberately false, misleading assurances which caused the statute of limitations to lapse" and accordingly Division II refused to equitably toll the statute of limitations applicable to Earl's PRA Claim. Earl at *21. Earl argues that, in light of this Court's decision in In re Fowler, Division II erred below when it held that Earl was required to provide sufficient evidence establishing each of the conditions necessary for equitable tolling mandated by Millay. Earl asserts that this Court's decision in In re Fowler dispensed with the Millay criteria and, as such, her PRA Claim

should be eligible for equitable tolling and ultimately considered timely.

However, this Court made it abundantly clear in its very recent decision from Fowler v. Guerin, that:

> [t]he four-part standard set forth in Millay remains the standard for equitable tolling of statutes of limitations in civil actions under Washington law. Washington courts must evaluate each part of this standard in light of the particular facts of each case and should equitably toll the applicable statute of limitations only when *all four parts* of the Millay standard are satisfied.

Fowler v. Guerin, at 124-25 (Aug. 18, 2022)(emphasis added).

Accordingly, Division II's application of the Millay factors in its equitable tolling analysis below does not conflict with this Court's jurisprudence and, as such, Earl's argument here must fail.

2. Division II's decision in Earl does not conflict with this Court's holding in U.S. Oil.

Earl also contends that review is warranted because Division II's decision below is in direct conflict with this Court's

1981 decision in U.S. Oil as it pertains to application of the discovery rule.

U.S. Oil, however, is obviously distinguishable from the matter presently before this Court – both on the facts and on the law. First, U.S. Oil involved the regulation of the discharge of pollutants by the Washington State Department of Ecology ("DOE"). U.S. Oil, at 87. Under DOE regulations, businesses, like U.S. Oil, are required to self-report discharge of pollutants. Id. In that matter, U.S. Oil filed the required reports, but the reports were inaccurate in that they did not disclose that U.S. Oil had exceeded it effluent limits. Id. The DOE had no way to know that the required reports filed by U.S. Oil were inaccurate. Id. U.S. Oil did not dispute that they had submitted inaccurate reports and had illegally discharged pollutants. Id. U.S. Oil argued, however, that it should avoid penalty for the illegal discharge and false reports because the statute of limitations had run. Id. The facts in U.S. Oil are in no way akin to a PRA claim.

More importantly however, this Court expressly limited its adoption of the discovery rule in U.S. Oil to "***actions brought by DOE*** to collect penalties for unlawful waste discharges." U.S. Oil at 94 (emphasis added). Accordingly, based on this Court's clear and definitive holding in U.S. Oil, Division II did not err below when it refused to apply the discovery rule in Earl's ***PRA*** action.

Because Earl cannot demonstrate any conflict in Division II's holding below with In re Fowler or U.S. Oil, there is no basis for review pursuant to RAP 13.4(b)(1), as such, Earl's Petition should be denied.

B. Division II's holding in Earl is consistent with Division II's previous decisions, therefore there is no basis for this Court to accept review under RAP 13.4(b)(2).

Earl also argues Division II's decision below is in direct conflict with Division II's prior holding in Thompson v. Wilson, 142 Wn. App. 803, 175 P.3d 1149 (2008), thereby warranting review under RAP 13.4(b)(2). As outlined herein, there is no

conflict between Division II's decision below and Division II's holding in Thompson, therefore Earl cannot establish a basis for review under RAP 13.4(b)(2) and this Petition should be denied.

In Thompson, Thompson disputed the coroner's classification of her daughter's death. Id. at 809. She sought to have the death certificate modified. Id. She met with the coroner and provided an independent case review that disputed the manner of death. Id. The coroner assured Thompson that he would review the documents she provided and meet with her again. Id. Despite his agreement to do so, the coroner did not meet with Ms. Thompson again. Id. Only after the coroner refused further meetings did Thompson file a petition for a writ of certiorari asking for judicial review of the actions and determinations of the coroner. Id. The trial court dismissed the matter on summary judgment finding Thompson's cause of action time barred. Id. at 814. On appeal, Division II reversed, finding that the statute of limitation had been equitably tolled. Id.

In holding that equitable tolling applied in Thompson, Division II based its ruling on its finding that Thompson had "actively and continuously" sought an explanation of the coroner's findings *and* that the coroner had deliberately mislead her. Id. In sharp contrast to the facts in Thompson, there was no exercise of diligence by Earl, and Division II found "no evidence to suggest that the City made deliberate, false, or misleading assurances" to Earl. Earl at *21.

Earl contends that the City's search for records was inadequate – an argument based only on the City's alleged failure to produce a single document. With an inexplicable and unjustifiable leap, Earl then argues that such an inadequate search is tantamount to the showing of "bad faith" necessary to equitably toll the statute of limitations on her PRA Claim. This argument is contrary to well-settled PRA jurisprudence. "The adequacy of a search is judged by a standard of reasonableness, that is, the search must be reasonably calculated to uncover all relevant documents." Neighborhood Alliance of Spokane

County v. Spokane County, 172 Wn.2d 702, 720, 261 P.3d 119(2011). "A reasonable search need neither be exhaustive nor successful." Kozol v. Dep't of Corr., 192 Wn. App. 1, 9, 366 P.3d 933, review denied, 185 Wn.2d 1034 (2016). "The fact that the record eventually was found does not establish that the agency's search was not adequate." Kozol, at 8 (*citing* Neighborhood Alliance, at 719). To the extent that an agency simply misses responsive documents when responding to a request, the courts have held that the agency's "search need not be perfect, only adequate." Block v. City of Goldbar, 189 Wn. App. 262, 276, 355 P.3d 266 (2015) (*quoting* Neighborhood Alliance, 172 Wn.2d at 720). *See also*, Forbes v. City of Gold Bar, 171 Wn. App. 857, 288 P.3d 384 (2012), review denied, 177 Wn.2d 1002(2013). That a requester later obtains a responsive document either from the agency or from a third party does not create a genuine issue of material fact for trial. Block, at 276. Under Earl's theory, the statute of limitations would be tolled every time a requestor later obtains a single document that is even

arguably responsive. Earl's theory would both nullify the statute of limitations imposed by Chapter 42.56 RCW, and completely undermine the doctrine of equitable tolling. *See e.g.* Price v. Gonzalez, 4 Wn. App. 2d 67, 419 P.3d 858 (2018)("Courts typically permit equitable tolling to occur only sparingly, and should not extend it to a garden variety claim of excusable neglect.")

Earl also misstates the facts developed in this matter. Earl claims that: "Tacoma deliberately allows the SWAT team commander to decide where to keep SWAT team police records;" "Tacoma allows the commander to decide *not* to integrate SWAT records into the regular computerized electronic records database;" and, "Tacoma enables the commander to keep SWAT records where they are not likely to be found." Petition for Review, p. 16-17. Each of these claims are undeniably inaccurate and contrary to the record developed in this case.

The record on the storage of the Command Post Log at the heart of this case is clear. When Command Post Logs (including

this one) are received by the chain of command, the Logs (including the one in question here) are stored electronically in the SWAT team section on Cop Web. App. 7. Cop Web is a centralized electronic database maintained by TPD. App. 8.

At all times relevant, the City knew where this Command Post Log was located. The City did not search for the Command Post Log in question because it was not responsive to Earl's PRA request. In relevant part, Earl' PRA request sought:

> All documents related to the shooting death of Jacqueline Salyers on January 27-28, 2016, including but not limited to the complete investigative report, and any and all follow-up reports, investigation materials, witness statements and officer's notes, photographs, DXF/CAD files, measurements, physical evidence, video/audio, dash cams, and the involved vehicle including any data downloads from that vehicle.

Earl at *6.

The Command Post Log at issue here contains information relating *exclusively* to the manhunt for Wright[3]. App. 10. There is *no information whatsoever* contained in the Command Post Log related to the shooting of Salyers or the investigation that followed. Id. The Command Post Log does not so much as mention Salyers's name. Id. This record was never stored "in a place it could not be found" as Earl claims; it simply wasn't identified as responsive to Earl's PRA request, so no search for the Command Post Log was performed.

Because Earl fails to demonstrate any conflict between Division II's holding in Thompson and the matter below, there is no basis for review pursuant to RAP 13.4(b)(2), as such, Earl's Petition should be denied.

[3] Kenneth Wright was a violent felon, who was seen *after* the shooting of Salyers running through the neighborhood with a long gun. On the evening in questions, the SWAT team was dispatched for the sole purpose of locating Wright. App. 9.

C. Earl cannot demonstrate any issues of substantial public interest that should be determined by this Court, therefore there is no basis for this Court to accept review under RAP 13.4(b)(4).

Finally, Earl offers no compelling argument that the facts presented in her case amount to "an issue of substantial public interest" requiring review by this Court.

1. This Court should not impose a common law discovery rule in PRA actions – doing so would override the Legislature and eviscerate the statute of limitations.

Earl argues that this Court should implement a common law discovery rule in all PRA cases to promote the PRA's purpose, to hold governmental agencies accountable, and to prevent injustice. Under the theory advanced by Earl, there would be no finality in PRA requests. Instead, the discovery rule would apply in *every single* PRA case – effectively nullifying the statute of limitations created by Legislature in RCW 42.56.550(6).

That argument flies in the face of well-settled law. This Court has repeatedly recognized that "statutes of limitation

reflect the importance of finality and settled expectations in our civil justice system." Fowler v. Guerin, at 118 (*citing* Douchette v. Bethel Sch. Dist. No. 403, 117 Wn.2d 805, 818 P.2d 1362 (1991)). "Statutes of limitations protect defendants – and the courts – from the burdens of litigating stale claims by requiring prospective plaintiffs to assert their claims before relevant evidence is lost." Id. at 118-119; s*ee also* Belenski v. Jefferson Cty., 186 Wn.2d 452, 460-61, 378 P.3d 176 (2016) ("leaving no statute of limitations or imposing a different statute of limitations based on an agency's response" in PRA claims would lead to an "absurd result.").

If the Legislature had intended to implement a common law discovery rule for PRA claims under RCW 42.56.550(6), the Legislature could have done so, but it did not. Moreover, it is clear that the application of a common law discovery rule in PRA cases would erode legislative intent, and lead to the very "absurd result" this Court cautioned against in Belenski. This Court

should decline Earl's invitation that this Court impede upon the legislative process.

2. There is no evidence to support Earl's assertion that a one-year statute of limitations in anyway "improves their [i.e., a police department's] chances of - literally - getting away with murder."

Finally, Earl's assertions that "Tacoma has frequently been sued for the actions of its SWAT team which has killed and injured several people" is nothing more than hyperbole. Petition for Review, p. 27. To support that assertion, Earl cites to: Seaman v. Karr; Mancini v. Tacoma; and, Estate of Cunningham v. Tacoma. Id. First, this Court should note that none of these cases involve any claims related to PRA violations – making each wholly irrelevant to the issue presently before this Court. Moreover, in her representation, Earl appears to deliberately ignore the facts present in each of these cases. A careful review of these matters demonstrates that **not one** includes a fact pattern wherein the Tacoma SWAT team injured or killed *anyone*. *See* App. 4, 5, 6.

Earl fails to establish any of the criteria identified by RAP 13.4(b)(4) necessary for discretionary review and, as such, her Petition should be denied.

V. CONCLUSION

Division II issued a thorough, well-reasoned opinion, and correctly concluded that Earl's PRA Claim was untimely. Division II did not err in reaching this conclusion and review of its opinion is not warranted - on any grounds. Accordingly, Lisa Earl's petition for review must be denied.

This document contains 3199 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 6th day of October, 2022.

WILLIAM C. FOSBRE, City Attorney

By: */s/ Michelle N. Yotter*
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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on October 6, 2022, I filed with the Supreme Court of Washington and delivered through the Court's portal a copy of the foregoing City of Tacoma's Answer to Plaintiff's Petition for Review and this Certificate of Service by email pursuant to agreement to the following:

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Dated this 6th day of October, 2022, at Tacoma, Washington

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APPENDIX 1

Filed
Washington State
Court of Appeals
Division Two

July 12, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

LISA EARL, Appellant, v. CITY OF TACOMA, a political subdivision of Washington State, Respondent.	No. 56160-3-II UNPUBLISHED OPINION

VELJACIC, J. — A Tacoma police officer shot and killed Lisa Earl's daughter, Jacqueline Salyers, in January 2016. Earl made a request under the Public Records Act (PRA), chapter 42.56 RCW, to the City of Tacoma for records related to her daughter's death. The City disclosed records to Earl on an installment basis and, after providing Earl with the requested documents, issued a letter closing the request.

In the course of separate litigation, the City produced a record that was not disclosed in response to Earl's PRA request. Almost three years after the City's closing letter, Earl filed this action contending that the City violated the PRA by failing to conduct an adequate search and by failing to disclose responsive records. She also asked the court to enjoin the Tacoma Police Department (TPD) from keeping certain records separate and apart from other police records. Earl and the City filed cross-motions for summary judgment. The trial court ruled that Earl's action was untimely and granted the City's motion for summary judgment. Because the trial court

dismissed Earl's PRA claims on statute of limitations grounds, it did not address her motion for partial summary judgment.

Earl appeals the trial court's order granting the City's motion for summary judgment dismissal of her claims. Earl argues that the trial court erred by dismissing her PRA claims because the discovery rule and equitable tolling applied to make her complaint timely. She also asks us to order the trial court to grant her motion for partial summary judgment and hold that the City violated the PRA. She also requests attorney fees and costs on appeal.

Because the discovery rule does not apply to PRA cases, and because Earl fails to meet her burden of proof for equitable tolling, we affirm the trial court's order dismissing Earl's PRA claims as time barred under RCW 42.56.550(6). We also deny Earl's request for attorney fees and costs on appeal because she is not the prevailing party.

FACTS

I. BACKGROUND

On January 28, 2016, Tacoma police officers Scott Campbell and Aaron Joseph drove to the 3300 block of Sawyer Street in Tacoma because they received a tip concerning the location of Kenneth Wright. The informant also provided information on a vehicle that Wright was recently seen driving. The TPD was on a mission to locate Wright because he had a warrant out for his arrest for armed robbery, among other crimes.

The officers arrived at the Sawyer Street location at approximately 11:45 p.m. Once there, Campbell spotted a vehicle backed into a parking spot that matched the informant's tip. Campbell recognized Wright sitting inside the passenger side of the vehicle. Salyers was in the driver's seat.

Joseph stopped the patrol vehicle in front of the suspect vehicle. Both officers exited the patrol vehicle, drew their firearms, and moved towards the suspect vehicle. At some point, Salyers began to drive forward. Campbell stated that he was about 5-10 feet at a 45 degree angle from the front passenger side of the vehicle when it began to accelerate. Campbell then fired eight shots, killing Salyers.

After Campbell stopped shooting, the vehicle rolled to a stop. Wright exited the vehicle with a rifle and ran down an alley. The officers did not chase Wright because they were unsure if he took up a defensive position in the dark alley or if he continued fleeing the scene.

Shortly after midnight, the TPD called out its Special Weapons and Tactics (SWAT) team to search for Wright. Jack Nasworthy was one of the responding SWAT officers. Nasworthy's role that night was to serve on the Command Post Element, which provides intelligence to the other SWAT elements through radio and coordinates tactical operations.

Nasworthy learned that there was a pole camera installed at the 3300 block of Sawyer Street. He believed that the camera captured footage which could narrow down Wright's possible location. The Sawyer Street camera was installed on January 22 and appeared to be focused on the area where the shooting occurred. The camera is a motion activated device meaning that it will only record footage if some movement activates the recording function.

Nasworthy attempted to log into the View Commander system[1] to access the Sawyer Street pole camera. He was unable to log in with his Criminal Investigations Division (CID) password because the camera was a Special Investigations Division (SID) asset. He called Scott Shafner, who was also a responding SWAT officer that night, and obtained his login information. Because

[1] "View Commander" is the name of the software program that houses all camera footage, live or recorded, and controls access to any camera that was set up under its program.

Shafner was an administrator on the View Commander system, Nasworthy was able to gain access to the Sawyer Street camera. Only administrators have editing privileges for the View Commander system.

Once he had accessed View Commander, Nasworthy stated that he checked the live feed for the Sawyer Street camera. He stated that he was unable to see anything because of the darkness. Nasworthy then checked for a recording of the shooting, but stated that he could not find any recorded information.

Wright ended up escaping that night. He was arrested approximately two weeks later without incident.

II. EARL'S 2016 PRA REQUEST

The following morning, on January 29, Earl learned that a Tacoma police officer had shot and killed her daughter, Salyers. Earl wanted to know why the officer killed her daughter.

On June 30, Earl, through counsel, submitted a comprehensive, 16 item public records request to the City. Relevant here, Earl requested a copy of the following records:

> 1. All documents related to the shooting death of Jacqueline Salyers on January 27-28, 2016, including but not limited to the complete investigative report, and any and all follow-up reports, investigation materials, witness statements and officer's notes, photographs, DXF/CAD files, measurements, physical evidence, video/audio, dash cams, and the involved vehicle including any data downloads from that vehicle;
>
> 2. All documents (including photographs and video) related to the surveillance camera and the location of that surveillance camera identified as the Axis 214 camera installed in the covert box that was deployed at 3314 S. Sawyer.

Clerk's Papers (CP) at 255.

The City produced responsive records in two installments. The first installment was disclosed on October 7 and the second installment was disclosed on November 8. The records produced included reports written by Tacoma police officers and other reports that referred to the SWAT team's activities on the night Salyers was killed.

On November 23, the City closed Earl's request. The closing letter stated, "After searching further, it was determined there are no other records responsive to your request. As such, your request . . . is now considered closed. If you believe there are other records responsive, or this does not meet the scope of your request, please contact me at your earliest convenience." CP at 556. Earl did not respond to this letter.

III. THE COMMAND POST LOG

On April 28, 2017, Earl, Salyers' minor children, and the Estate of Jacqueline Salyers (hereinafter collectively referenced as "Earl") filed a complaint in the Western District of Washington against Campbell and the City based on the shooting death of Salyers. Specifically, Earl asserted claims of excessive force, a violation of substantive due process rights, and wrongful death.

In that case, Earl filed a motion to reopen discovery because she claimed that Nasworthy deleted a video recording of the shooting. On September 25, 2018, the City filed an affidavit from Nasworthy in response to Earl's motion. Nasworthy declared that he did not delete any video footage from the pole camera on Sawyer Street. As a member of the Command Post Element, Nasworthy stated that his responsibility on the night of the shooting was to prepare the "Command Post Log," which was attached to his affidavit. CP at 224.

The Command Post Log is a three-page document that compiles information pertaining to the SWAT team's movements. Relevant here, the first few lines of this document read,

> CASE # – 1602801965
> DATE – 1/29/2016
> LOCATION – 3300 Sawyer/3326 Sawyer susp address
> SUBJECT – Kenneth Wright
> SITUATION – Officer Involved Shooting

CP at 227. Sergeant Peter Habib, a responding SWAT officer on the night of the shooting, stated that the phrase "officer-involved shooting" means that "some officer discharged their firearm." CP at 659. The TPD case number that appears on the Command Post Log (No. 1602801965) is the same case number that appears on the police reports furnished to Earl in response to her 2016 PRA request. This was the only information in that three-page document that related to the shooting of Salyers.

However, the Command Post Log was not disclosed to Earl in her 2016 PRA request. Earl declared that "[she] believed the City when it said there were no other records responsive to my request." CP at 626. Earl also stated that "[t]he first time [she] ever knew that such a document existed was sometime after September 25, 2018." CP at 626. Earl further stated that "[i]f I had known that there was a SWAT Team Command Post Log that documented the activities of the SWAT Team on January 29, 2016, I would have objected to Tacoma's failure to give me a copy of it pursuant to my [PRA] request." CP at 626. Thus, the City's failure to disclose the Command Post Log in response to Earl's 2016 PRA request is at issue in this case.

IV. PROCEDURAL HISTORY

On August 29, 2019, Earl filed a complaint in Pierce County Superior Court alleging that the City violated the PRA. Earl filed a motion for partial summary judgment arguing that the City violated the PRA (1) by failing to disclose the Command Post Log and (2) by failing to perform an adequate search for responsive records. She also asked the court to enjoin the City from keeping SWAT team records separate and apart from other TPD records.

The City also filed a motion for summary judgment, arguing that Earl's complaint was barred by the PRA's one year statute of limitations. In response, Earl argued that the statute of limitations should be equitably tolled because the City falsely assured her that it possessed no other responsive records in its closing letter. Earl also contended that the discovery rule postponed the date that her PRA cause of action began to accrue to September 25, 2018, thus making her complaint timely.

The trial court agreed with the City and ruled that Earl's action was barred by the PRA's one year statute of limitations. It did not address the merits of Earl's motion for partial summary judgment. The court then issued an order granting the City's motion for summary judgment, denying Earl's motion for partial summary judgment, and dismissed Earl's PRA claims and request for injunctive relief.

Earl appeals the order granting the City's motion for summary judgment dismissal of her claims. She also argues that we should hold that the City violated the PRA, effectively asking us to make an initial ruling on her motion for partial summary judgment.

ANALYSIS[2]

Earl and the amici argue that the trial court erred by granting the City's motion for summary judgment because her action was timely filed. We disagree and hold that Earl's action was time barred.

[2] Amicus ACLU appears to advance policy arguments, based on studies demonstrating the historical and enduring systemic violence perpetrated against Native people by government officials, to support its contention that the discovery rule and equitable tolling should apply to PRA cases. While we recognize and are sensitive to this important social justice issue, such "[p]ublic policy arguments 'are more properly addressed to the Legislature, not to the courts.'" *McCaulley v. Dep't of Labor & Indus*., 5 Wn. App. 2d 304, 316, 424 P.3d 221 (2018) (quoting *Blomster v. Nordstrom, Inc*., 103 Wn. App. 252, 258, 11 P.3d 883 (2000)).

I. STANDARD OF REVIEW

"The PRA is a 'strongly worded mandate for broad disclosure of public records.'" *Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 431, 327 P.3d 600 (2013) (quoting *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978)). It requires governmental agencies to "'make available for public inspection and copying all public records, unless the record falls within the specific exemptions of [the PRA].'" *Rental Hous. Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 535, 199 P.3d 393 (2009) (quoting RCW 42.56.070(1)).

"The PRA's primary purpose is to foster governmental transparency and accountability by making public records available to Washington's citizens." *John Doe A v. Wash. State Patrol*, 185 Wn.2d 363, 371, 374 P.3d 63 (2016). The PRA mandates that its provisions "shall be liberally construed" to promote full access to public records. RCW 42.56.030; *John Doe A*, 185 Wn.2d at 371. We review challenges to agency actions under the PRA de novo. RCW 42.56.550(3).

"Grants of summary judgment are reviewed de novo, and we engage in the same inquiry as the trial court." *Neigh. All. of Spokane County v. Spokane County*, 172 Wn.2d 702, 715, 261 P.3d 119 (2011). Summary judgment is appropriate "if . . . there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." CR 56(c). "We review all evidence and reasonable inferences in the light most favorable to the nonmoving party and consider only the evidence that was brought to the trial court's attention." *O'Dea v. City of Tacoma*, 19 Wn. App. 2d 67, 79, 493 P.3d 1245 (2021).

II. STATUTE OF LIMITATIONS

Whether a claim is time barred is a legal question we review de novo. *Kelly v. Allainz Life Ins. Co. of N. Am.*, 178 Wn. App. 395, 399, 314 P.3d 755 (2013).

The PRA establishes a one year statute of limitations for judicial review of agency actions. RCW 42.56.550(6) provides that "[a]ctions under [the PRA] must be filed within one year of the agency's claim of exemption or the last production of a record on a partial or installment basis." "Our Supreme Court has held that this section reveals the legislature's intent to impose a one year statute of limitations 'beginning on an agency's final, definitive response to a public records request.'" *Dotson v. Pierce County*, 13 Wn. App. 2d 455, 470, 464 P.3d 563 (quoting *Belenski v. Jefferson County*, 186 Wn.2d 452, 460, 378 P.3d 176 (2016)), *review denied*, 196 Wn.2d 1018 (2020). This final response includes a letter sent to the requester notifying him or her that the request has been closed. *Dotson*, 13 Wn. App. 2d at 471.

Amicus ACLU argues that the trial court erred by concluding that the statute of limitations began to run on the date of the City's closing letter, rather than the date the City disclosed the Command Post Log in Earl's federal lawsuit. Specifically, the ALCU contends that the City's disclosure of that document "equates to the agency's last production of a record on a partial or installment basis," thus making Earl's complaint timely. Br. of Amicus Curiae (ACLU et al) at 16. However, we rejected a similar argument in *Dotson*, 13 Wn. App. 2d at 470-72. So too here, this argument fails.

Here, the City sent a letter closing Earl's request on November 23, 2016. This action comprised a final, definitive response to Earl's request, and started the PRA's one year statute of limitations. Earl did not file her PRA complaint until August 29, 2019. Therefore, unless Earl can

show that the discovery rule applies to PRA actions or that equitable tolling applies to her case, her complaint was untimely.

III. DISCOVERY RULE

Earl and the amici argue that the statute of limitations began to run on September 25, 2018, when Earl discovered that the City had not disclosed the Command Post Log, which they contend was a responsive record to her PRA request. We reject Earl's attempt to apply the discovery rule to her PRA action.

A. Legal principles

"Under the discovery rule, a cause of action accrues when the plaintiff knew or should have known the essential elements of the cause of action." *Allen v. State*, 118 Wn.2d 753, 757-58, 826 P.2d 200 (1992) (footnote omitted). "[T]he discovery rule will postpone the running of a statute of limitations only until the time when a plaintiff, through the exercise of due diligence, should have discovered the basis for the cause of action. A cause of action will accrue on that date even if *actual* discovery did not occur until later." *Id.* at 758.

"The discovery rule does not alter the statute of limitations. It is . . . a rule for determining when a cause of action accrues and [when] the statute of limitations commences to run." *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 587, 146 P.3d 423 (2006). "[T]he discovery rule is not available where the legislature has clearly delineated the event that starts the running of the limitations period, for there is then no 'accrual' to interpret." *In re Parentage of C.S.*, 134 Wn. App. 141, 147, 139 P.3d 366 (2006); *see Douchette v. Bethel Sch. Dist. No. 403*, 117 Wn.2d 805, 813, 818 P.2d 1362 (1991) ("Where the statute does not specify a time at which the cause of action accrues, the general rule of law is that an action accrues when the plaintiff discovers or reasonably should discover all the essential elements of a cause of action.").

Recently, we have rejected the application of the discovery rule in PRA actions reasoning in part that, "the PRA statute of limitations contains triggering events that enable a requester to know that a cause of action has accrued, and the legislature enacted no discovery rule exception." *Dotson*, 13 Wn. App. 2d at 472.

B. The Discovery Rule Does Not Apply to PRA Actions

Following *Dotson*, we hold that the discovery rule does not apply to PRA actions because the legislature has clearly specified the event that starts the running of the limitations period in RCW 42.56.550(6), which is the agency's final, definitive response to a public records request. *Belenski*, 186 Wn.2d at 460; *C.S.*, 134 Wn. App. at 147. Therefore, the trial court did not err by declining to apply the discovery rule to Earl's cause of action.

Earl advances several arguments contending that *Dotson* incorrectly held that the discovery rule does not apply to PRA actions and that it should be overruled. We disagree with each contention.

First, Earl contends that *Dotson* incorrectly interpreted the Supreme Court's decision in *Douchette* to stand for the proposition that the discovery rule only applied to negligence actions. But *Dotson* stated no such thing. Rather, *Dotson* held in part that the discovery rule did not apply to PRA actions because RCW 42.56.550(6) specifies the time at which a requestor's cause of action accrues, which is a correct statement of the law. 13 Wn. App. 2d at 472. Accordingly, this argument fails.

Second, Earl argues that *Dotson* confuses knowledge of the law (the accrual date for a PRA cause of action) and knowledge of the facts (the fact that the government failed to disclose responsive records). Because knowledge of the law is irrelevant to the application of the discovery

rule, Earl contends that *Dotson* impermissibly conflicts with *Douchette*, and therefore, should be overruled. We disagree.

Earl points to the following language in the *Dotson* opinion:

> The discovery rule generally applies in cases where "the statute does not specify a time at which the cause of action accrues." [*Douchette*, 117 Wn.2d at 813]. However, the PRA statute of limitations contains triggering events that enable a requester to know that a cause of action has accrued, and the legislature enacted no discovery rule exception. And Dotson cites no authority for applying the discovery rule to PRA actions that, as interpreted in *Belenski*, arise under a statute that specifies the statute of limitations begins to run at the time of the agency's "final, definitive response." 186 Wn.2d at 461 []. We hold that the statute of limitations began to run in June 2016.

13 Wn. App. 2d at 472 (footnote omitted).

The language in *Douchette* that Earl alleges is conflicting states, "[t]he discovery rule does not require knowledge of the existence of a legal cause of action itself, but merely knowledge of the facts necessary to establish the elements of the claim." 117 Wn.2d at 814. There, the Supreme Court explained this to convey the well-established principle that the limitations period will begin to run under the discovery rule when a plaintiff should have discovered the salient facts of their cause of action; not when the plaintiff has actual knowledge of a legal claim. *Id*. at 814-15. Earl's reliance on this proposition fails because, while true, it has no bearing on the applicability of the discovery rule to a *statute* that specifies an accrual date for a plaintiff's cause of action.

Contrary to Earl's assertion, both *Dotson* and *Douchette* harmoniously recognize that the discovery rule generally applies in cases where the applicable statute does not specify a time at which the cause of action accrues. 117 Wn.2d at 813; 13 Wn. App. 2d at 472. Again, this is a correct statement of the law. Because these decisions are consistent with each other, we decline to overrule *Dotson* on this ground.

Third, Earl contends that *Dotson* declined to apply the discovery rule only because the appellant in that case failed to cite legal authority to support her contention that the rule applied to PRA cases. We disagree.

Contrary to Earl's contention, *Dotson* did not rest its holding on RAP 10.3. The *Dotson* court declined to apply the discovery rule to PRA cases (1) because RCW 42.56.550(6) contained triggering events that enable a requester to know that a cause of action has accrued and (2) because the appellant cited no authority for applying the discovery rule to PRA cases. 13 Wn. App. 2d at 472. Because *Dotson* did not decline to apply the discovery rule to PRA cases solely based on the appellant's failure to cite legal authority, we reject Earl's argument.

Next, Earl relies on four cases to support her contention that the discovery rule applies to PRA cases. Specifically, Earl cites to *Reed v. City of Asotin*, 917 F. Supp. 2d 1156 (E.D. Wash. 2013); *Anthony v. Mason County*, 2014 WL 1413421 (W.D. Wash. 2014); *Mahmoud v. Snohomish County*, No. 70757-4-I (Wash. Ct. App. Oct. 27. 2014) (unpublished), https://www.courts.wa.gov/opinions/pdf/707574.pdf; and *Canha v. Dep't of Corr*., No. 73965-4-I (Wash. Ct. App. Apr. 25, 2016) (unpublished), https://www.courts.wa.gov/opinions/pdf/739654.pdf. However, these cases are inapposite because none of them recognize that the discovery rule is inapplicable to a limitations statute where the legislature specifies an accrual event for a cause of action. *C.S.*, 134 Wn. App. at 147. Accordingly, Earl's reliance on these cases fails.

We recognize that our refusal to apply the discovery rule in the context of the PRA actions will preclude claims where, as here, the requestor did not know certain records existed until years after the agency's final closing letter. However, there has been a trend toward making violations and penalties less onerous on agencies. *See* Wash. State Bar Ass'n, PUBLIC RECORDS ACT

DESKBOOK: WASHINGTON'S PUBLIC DISCLOSURE AND OPEN PUBLIC MEETINGS LAWS § 18-4. For example, the legislature has amended the PRA to eliminate the $5.00 minimum per day penalty, allowing courts to conclude no penalty, or a small penalty of less than $5.00 per day is warranted, depending on the facts. LAWS OF 2011, ch. 273 § 1(4). And the legislature has made the specific policy decision to decrease the applicable limitations period for PRA claims. LAWS OF 1973, ch. 1 § 41 (original initiative establishing six year statute of limitations); LAWS OF 2005, ch. 483 § 5 (establishing current one year statute of limitations). We are not in a position to override the legislature's stated intent.[3]

Therefore, we follow *Dotson*'s holding that the discovery rule does not apply to PRA actions because the legislature has clearly specified the event that triggers the running of the limitations period: the agency's final, definitive response to a public records request. *Belenski*, 186 Wn.2d at 460; *C.S.*, 134 Wn. App. at 147. The statute of limitations for Earl's PRA claims began to run on November 23, 2016, which was date the City closed Earl's request. Earl filed her complaint on August 29, 2019. Accordingly, Earl's complaint is barred by the PRA's one year statute of limitations unless she can show that equitable tolling applies.

[3] If the legislature disagrees and instead believes that the discovery rule should apply, it is free to legislate accordingly.

IV. EQUITABLE TOLLING

Earl and the amici argue that the statute of limitations for her PRA claims should be equitably tolled.[4] We disagree.

A. Legal Principles

"Although we give deference to the trial court's factual determinations, we review a decision of whether to grant equitable relief de novo." *Trotzer v. Vig*, 149 Wn. App. 594, 607, 203 P.3d 1056 (2009).

"Equitable tolling permits a court to allow an action to proceed when justice requires it, even though a statutory time period has nominally elapsed." *Price v. Gonzalez*, 4 Wn. App. 2d 67, 75, 419 P.3d 858 (2018). "The predicates for equitable tolling are bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff." *Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791 (1998). Washington courts have applied the false assurances prong in narrow circumstances and have appeared to require a showing that the defendant "made a deliberate attempt to mislead." *Price*, 4 Wn. App. 2d at 76. Furthermore, "[i]n Washington equitable tolling is appropriate when consistent with both the purpose of the statute providing the cause of action and the purpose of the statute of limitations." *Millay*, 135 Wn.2d at 206.

"Courts typically permit equitable tolling to occur only sparingly, and should not extend it to a garden variety claim of excusable neglect." *Price*, 4 Wn. App. 2d at 76. "The party asserting

[4] The ACLU also argues that the doctrine of equitable estoppel applies to toll Earl's PRA claims. But equitable estoppel is not the appropriate test for tolling the statute of limitations. Rather, equitable estoppel works to prohibit a defendant from raising a statute of limitations defense when they made representations or promises to perform which lulled the plaintiff into delaying timely action. *Peterson v. Groves*, 111 Wn. App. 306, 310-11, 44 P.3d 894 (2002). Here, Earl does not dispute that the City can raise the defense; rather, she contends the limitations period was tolled. Thus, this argument fails.

that equitable tolling should apply bears the burden of proof." *Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 379, 223 P.3d 1172 (2009).

B. Equitable Tolling Does Not Apply Here

Earl does not allege bad faith or deception. Instead, Earl and the amici argue that the first element of equitable tolling is met because the City made a false assurance that it possessed no other responsive records to her request in its closing letter. We disagree with the application of equitable tolling here because Earl fails to meet her burden of proof.

Here, the City closed Earl's PRA request on November 23, 2016, stating "[a]fter searching further, it was determined there are no other records responsive to your request. As such, your request . . . is now considered closed. If you believe there are other records responsive, or this does not meet the scope of your request, please contact me at your earliest convenience." CP at 556. But on September 25, 2018, the City disclosed the Command Post Log in the course of separate litigation.

Even assuming, without deciding, that the Command Post Log was responsive to her request, Earl presents no evidence to suggest that the City made deliberately false, misleading assurances which caused the one year limitations period to lapse. In her reply brief, Earl appears to argue that it is irrelevant as to whether the City's closing letter was "*deliberately* false." Reply Br. of Appellant at 13. But, as explained above, Washington courts have applied the false assurances prong in narrow circumstances and have appeared to require a showing of the defendant's deliberate attempt to mislead the plaintiff. *Price*, 4 Wn. App. 2d at 76. Therefore, the response *may* have turned out to be objectively false, but given that there is no evidence the City knew it was false and deliberately mislead Earl when it made the statement, the closing letter was not on its own a "false assurance" for the purposes of equitable tolling.

Such a showing was made by the requestor in *Belenski*. In that case, Belenski sent the County a PRA request asking to inspect the Internet Access Logs (IALs) from February 1, 2010 to September 27, 2010. *Belenski*, 186 Wn.2d at 455. On October 5, 2010, Belenski received a response stating that "the County has no responsive records." *Id*. Belenski explained that he was confused by the County's response because he had requested and received IAL data from the County in the past. *Id*. Eventually, Belenski discovered (through a separate public records response) e-mails between county employees sent shortly after his request admitting that the IALs existed during the relevant time period of Belenski's PRA request, but suggesting the County need not provide them because they are not "natively viewable" and would need to be "pulled out of a database and generated in a human readable format." *Id*. at 455-56. Belenski then filed a PRA complaint on November 19, 2012, which was well past the one year statute of limitations. *Id*. at 456. Because there were remaining factual issues concerning Belenski's diligence in pursuing his PRA claims, the Supreme Court remanded to the trial court to determine whether the doctrine of equitable tolling applied to toll the statute of limitations in that case. *Id*. at 461-62.

Requiring a PRA requestor to present evidence of an agency's deliberately false, misleading assurances will guarantee that the equitable tolling doctrine would be used "sparingly." *Price*, 4 Wn. App. 2d at 76. To hold otherwise would mean the statute of limitations would be tolled in every case where a requestor later obtains copies of records the agency claimed it did not

possess. That would not be sparing use of the doctrine. Therefore, the fact that Earl later received an alleged responsive record is not, by itself, sufficient to toll the one year statute of limitations.[5]

Earl contends that her case is akin to *Thompson v. Wilson*, 142 Wn. App. 803, 175 P.3d 1149 (2008), to support her argument that equitable tolling should apply here. We disagree.

In *Thompson*, the plaintiff repeatedly tried to meet with the defendant (the county coroner) to discuss the cause of her daughter's death, but when he finally agreed to meet with her, he misled her and only then did she seek judicial review. *Id*. at 814. The plaintiff asserted that defendant's actions caused the limitation period to lapse and the defendant "[did] not dispute these assertions of deception and misleading assurances." *Id*. Accordingly, we held that the limitations period was equitably tolled and commenced upon the defendant's good faith compliance with the statute at issue, which required the coroner to meet with the deceased's family upon request. *Id*. at 814-15.

Here, unlike *Thompson*, Earl presents no evidence which, when viewed in the light most favorable to her, would lead a reasonable trier of fact to conclude that the City deliberately made false, misleading assurances to her, thereby causing the limitations period to lapse. Therefore, Earl's reliance on *Thompson* fails.

Courts should apply the equitable tolling doctrine sparingly. Earl has the burden to show that equitable tolling applies. Earl fails to meet her burden of proof because, even considering the evidence in the light most favorable to her, she fails to show any evidence that the City made deliberately false, misleading assurances when it closed her PRA request without providing the

[5] This reasoning is consistent with Division One's unpublished decision in *Strickland v. Pierce County*, No. 75203-1-I (Wash. Ct. App. Jan. 29, 2018) (unpublished), http://www.courts.wa.gov/opinions/pdf/752031.pdf. There, Division One also held that "[w]hen a requester obtains copies of records that the agency previously claimed it did not possess, that circumstance, without more, is not sufficient to toll the running of the statute of limitations." *Strickland*, slip op. at 12.

one omitted record. Accordingly, we conclude that the trial court did not err by granting summary judgment in this case.

V. ATTORNEY FEES

Earl requests attorney fees and costs on appeal under RCW 42.56.550(4). We deny her request because Earl is not the prevailing party on appeal. RCW 42.56.550(4).

CONCLUSION

We affirm the trial court's order which granted the City's motion for summary judgment, denied Earl's motion for partial summary judgment, and dismissed Earl's PRA claims. We deny Earl's request for attorney fees on appeal.

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.

Veljacic, J.

We concur:

Maxa, J.

Glasgow, C.J.

APPENDIX 2

IN THE COURT OF APPEALS OF WASHINGTON

DIVISION II

LISA EARL, Appellant,	)	
v.	)	COA Appeal No. 561603
CITY OF TACOMA, Respondent.	)	

ORAL ARGUMENT

Before The Honorable Rebecca Glasgow,

The Honorable Bradley Maxa,

The Honorable Bernard Veljacic

May 10, 2022

TRANSCRIBED BY: Reed Jackson Watkins
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I N D E X O F P R O C E E D I N G S

-o0o-

May 10, 2022

THE BAILIFF: All rise.

JUDGE GLASGOW: Please be seated.

THE BAILIFF: Court is reconvened.

JUDGE GLASGOW: Please be seated. Thank you.

Good morning, Counsel.

MR. LOBSENZ: Good morning, Judge.

JUDGE GLASGOW: We are here today for our second case, which is Earl v. City of Tacoma.

Mr. Lobsenz, I understand you've reserved five minutes for rebuttal?

MR. LOBSENZ: Yes.

JUDGE GLASGOW: Okay. Thank you. You may begin.

MR. LOBSENZ: Thank you, Your Honors. May it please the Court, I am Jim Lobsenz. I represent Lisa Earl. To give you an outline of what I maybe will hope to cover today are the following:

We submit that there are two independent reasons why the superior court erred in dismissing the case on statute of limitations grounds. We meet the requirements for equitable tolling, and we also think the discovery rule applies to Public Records Act cases and that this panel should not follow Dotson, which is incorrect, and that we should also

not have been dismissed because of the discovery rule.

We meet the equitable tolling rule for various reasons, including, among others, false assurances. We meet the discovery rule, and in the U.S. Oil case the Washington Supreme Court ruled that the discovery rule is dictated where the plaintiff lacks the means to know that a wrong has been committed against her. It's not a Public Records Act case, but I think it's -- I don't really think that's dicta. I mean, I think that's the rule, and it governs.

This is a case where it is impossible for a plaintiff to know whether or not a public agency has records that they haven't searched or given you; therefore, it is dictated, I think, that the discovery rule applied.

JUDGE MAXA: So there's also cases that suggest that the discovery rule only applies when accrual is uncertain. And here the legislature has specifically said it accrues when that last letter goes out.

MR. LOBSENZ: You -- the way you phrase it, I sort of have to agree. You say suggested, but I note that the City consistently leaves out the word "usually" from that sentence of Douchette. It says "usually" when the legislature has specified the accrual that that's it, and the discovery rule doesn't apply.

But the Supreme Court of Washington has also said that these rules apply when justice requires it. And they've

also said in U.S. Oil that it dictates it in these situations. So this isn't usual.

In the situations where the plaintiff can't know, it's nuts to say that, well, sorry, you had no way of knowing that you had a lawsuit. You had no way of knowing there was a Public Records Act violation. You couldn't go and search the records themselves. Sorry. If that becomes the rule, police agencies can just -- I want to distinguish here between intentional misconduct and just sort of bad searching. But they can do both. They can be lazy in their searching and do adequate [sic] searches and get away with it because nobody will find out for a long time, or they can be intentionally deceptive, or they can do what they do here, which is they park their SWAT records in a different place, and they leave it up to the SWAT team commander whether to even integrate them into their records system, which I submit is a form of bad faith.

But I don't think that --

JUDGE GLASGOW: So, Counsel, why isn't the legislature entitled to make that choice and say, well, we have a trigger for accrual. They did reduce the statute of limitations down to one year, so we know that they're making some judgments, and then leaving the safety valve to be equitable tolling, where you have pretty -- some pretty extreme circumstances that can leave you to -- to tolling

the statute of limitations.

Like, why -- why is that not a balancing that the legislature has established?

MR. LOBSENZ: Well, the legislature can do that.

JUDGE GLASGOW: Right.

MR. LOBSENZ: But I think the Washington Supreme Court and this court have both said that that doesn't relieve the judiciary of deciding whether justice requires that you not run the rule; that you not dismiss for expiration of the statute of limitations.

I think the sentences that I would return to -- equitable tolling, of course, is not in any way inconsistent with that really, is it? Because if there's equitable tolling --

JUDGE GLASGOW: Right.

MR. LOBSENZ: -- there's equitable tolling.

JUDGE GLASGOW: Right.

MR. LOBSENZ: It's only the discovery rule that runs into that issue. And the U.S. Oil case says they're doing -- in determining whether to apply the discovery rule, the possibility of stale claims must be balanced against the unfairness of precluding justified causes of action. That balancing test has dictated -- that means required, doesn't it? -- has dictated the application of "the" rule, the discovery rule, where the plaintiff lacks the means or ability to ascertain that a wrong has been committed.

Justice requires this court to decide whether the usual rule that the legislature has specified an accrual period, time, trigger, should apply or not. And I think the U.S. Oil case says not.

JUDGE MAXA: So we obviously have the Dotson case. We are not bound by the Dotson case. That's one of the quirks of our appellate system. But, you know, we like our colleagues. We try not to overrule them or disregard them without reason.

So what's the reason that we should disregard Dotson?

MR. LOBSENZ: Well, really the Dotson case, Your Honor -- I know it's not like the Ninth Circuit where I get to say the rule of interpanel accord binds one panel to another, and I think that's sort of a good thing about our system. It allows different panels to take different views, and then we leave it to the Supreme Court of Washington to figure out which panel is right.

Dotson is so clearly wrong. It relies in a sentence or two on Douchette, and Douchette says, flat out in a sentence on -- I forget which page -- "This is not a case where we need to decide whether the discovery rule applies." That's what Douchette says. If Douchette says that, how can Dotson look to it and say, well, we -- we have to say that the discovery rule doesn't apply because that's what Douchette says? That is not what Douchette says.

Second, Douchette has a long quote in it from U.S. Oil v. Department of Energy [sic]. It goes through all the -- it goes through the same analysis I basically just argued to you. Douchette lost because she knew the facts. She didn't fit within this U.S. Oil rule of lacks the ability to ascertain whether she had a case. She knew her own age, and she knew she was fired because they said you're too old. She knew the facts. That's why the court said in Douchette we don't have any occasion here to decide whether the discovery rule applies to this case.

But the Washington Supreme Court has said it's a judicial task to decide whether justice requires these things. It does. If you decide that Dotson is right and you're going to follow it, and you also say no to the equitable tolling, then police departments across this -- not just police departments, but police departments can just hide stuff. And maybe that gives me an opportunity to segue back to equitable tolling for a moment.

The City has said, I think, this isn't a case of intentional hiding of a document. How are we supposed to know? I don't know whether it's intentional or not. I do know that when you talk about the state of mind of a city, you have lots of different actors. There's Mr. -- I forget his name -- the civil attorney who delegated to other people to go searching. There's -- they don't even know who did

the searching. There's a list of people who likely did the searching. There's their states of mind. But I know one thing. Somebody made up this policy that Detective Nasworthy testified to, that they leave it to the commander of the SWAT team unit to decide whether to integrate SWAT team documents into the electronic files. Big surprise. They don't get there.

This document had the same incident number as every other police report that had anything to do with Jackie Salyers' death. It's got the same incident number. And, yet, they don't put these documents in the electronic file, so of course they don't get found.

There's language in -- in their briefing about -- I've lost my train of thought here for a minute -- oh, about target words, they said. I don't know where they come up with these target words. But they said if you use these four target words, this SWAT document doesn't come up. What about the word "shooting"? That was the first word in my request that I framed. We want all documents related to the shooting of Jackie Salyers on this date.

It says "officer involved shooting" on every single page of this document. Every single page. You can't leave it up to police departments to be able to sort of offshore. It's like keeping your income in Bermuda so it can't be taxed. If you keep it in the SWAT office where it can't be found

because you're not integrating, it's not going to be found. That's not right. And I would urge you to get to the injunctive issue, which I -- I'm not going to have really time to talk about here.

But I think in addition to reversing and ordering them to enter partial summary judgment and liability in Ms. Earl's favor, just figuring out penalties later. Penalties, we could -- it matters whether or not the violation was intentional or unintentional. I don't think it matters to the equitable tolling rule particularly whether it's intentional or not. If it's intentional, it's deception. And then, of course, it fits one of the three -- they're not limited to three categories, but one of the three named categories.

They also ignore the Fowler case decided six months before they wrote their brief that said it is not limited to these three categories. We see no reason to limit it. We will apply it where justice requires.

JUDGE MAXA: Fowler's a criminal case. Does that make a difference?

MR. LOBSENZ: No, absolutely not. I mean, I -- if it was going to make a difference, it would have made a different the other way and they would have said we'll be tighter about equitable tolling in criminal cases because finality is more important. But I think it weighs against them, not

for them.

Well, perhaps in jumping around, I've covered most everything. And I see I've used my ten minutes, so I will sit down.

JUDGE GLASGOW: Thank you, Counsel.

MS. YOTTER: Good morning. May it please the Court, Michelle Yotter on behalf of the City of Tacoma this morning.

The City is asking that this court dismiss the matter at bar, and there are two distinct reasons for that request.

First, the City asks that this court find the document in question -- and I want to be clear that there were thousands of documents produced, or at least a thousand documents produced in this matter, and we are here today talking about a single three-page document. It's the City's position that that document was never responsive to this PRA request, and that there was no PRA violation to begin with.

And to make that point I want to give you just a very brief background. The record in question is called a Command Post Log. That is a three-page document created by the SWAT team. And the only information contained in that log are the SWAT team's efforts to track a known violent felon by the name of Kenneth Wright.

The SWAT team ended up responding to the scene of this shooting not because there was a shooting, not because there

was a death. These aren't things the SWAT team would normally respond to. The SWAT team doesn't respond to investigate deaths, and they don't respond, typically, to officer-involved shootings. They respond to dangerous situations where special weapons and tactics are necessary.

JUDGE MAXA: So was the movement of Mr. Wright related to the shooting; right? "Related" is a very broad word.

MS. YOTTER: It is a very broad term. I agree with that. And so I want to give -- and that's where the background here becomes important. The Tacoma Police Department's violence reduction team had been conducting a manhunt for Kenneth Wright for several weeks prior to the shooting taking place.

On the night of the shooting, with two patrol officers in the area because they believed that there was a possibility Mr. Wright could be in the area, and, in fact, they spotted Mr. Wright. He was a passenger in the vehicle of Ms. Salyers. The officers on foot attempted to apprehend Mr. Wright. And in that attempt, Ms. Salyers, the driver, drove the car directly at one of the officers. He fired and killed her. After that occurred, Mr. Wright climbed across her body, had a long gun in his hand, and took off on foot.

The only reason the SWAT team responded was because the officers didn't know where Kenneth Wright had gone. And so the SWAT team response was to look for Mr. Wright, to see if

he was laying in wait and planning to shoot the officers. If he -- this is a residential neighborhood. If he'd gone into a residence and had taken people hostage. There was -- the officers on the scene had no idea.

The SWAT team did not respond, though, simply because there was an officer-involved shooting or because there was a fatality, and they had no role in that investigation. That's important because when we look to the specific language of the public records request, and the appellant points -- they did make a very extensive request. I believe it had 16 paragraphs. But the appellant points to paragraph number 1 as where the City should have responded with this SWAT document.

And what that paragraph requests is all documents related to the shooting death of Jacqueline Salyers on January 27 through 28, 2016, including, but not limited to, the complete investigative report, any and all follow-up reports, investigation materials, witness statements, and officers' notes, photographs, DXF CAD files, measurements, physical evidence, video, audio, dash cams, and the involved vehicle, including any downloads from the vehicle.

So based on that paragraph, the City did not interpret that to mean we want this log tracking Kenneth Wright. And in her reply brief --

JUDGE GLASGOW: So why wouldn't that be officer notes?

MS. YOTTER: So in -- well, in her reply brief -- it wasn't officer notes related to the shooting death or the investigation. That's, I think, where we make the distinction. All of the notes related to the investigation of the shooting and the officers that were there in response to the fatality, that information was all provided.

What we didn't provide was just this log that showed the tracking of Kenneth Wright. The City did not interpret that to be related to the shooting death.

And just to give a hypothetical example, had the shooting occurred, had the facts been the same except Kenneth Wright wasn't there, the SWAT team would never have been called. They would never have been a part of the investigation into that shooting.

And so in her reply brief, on page 4, Ms. Earl now contends what that request meant was she wanted documents about Wright was doing the day of the shooting, and the City didn't interpret that request to mean they should look for documents related to what eyewitnesses were doing throughout the day.

So for those reasons, the City didn't deem this single record to be responsive. They didn't search for it, and it was not produced. It was subsequently produced in the course of the civil case by the City voluntary.

So for those reasons we would ask that the Court find the

document not responsive, but --

JUDGE GLASGOW: But, Counsel, moving into the question of equitable tolling.

MS. YOTTER: Yes.

JUDGE GLASGOW: So it looks like what the response -- the final response email said was "After searching further, it was determined that there are no other records responsive to your request."

So assuming for a moment that we -- we don't agree, and we think that the records in question were responsive, so help me understand how that sentence -- how we apply equitable tolling with that sentence in mind.

MS. YOTTER: Absolutely. Thank you, Your Honor.

So that would be the second argument the City would have. So even if you were to find -- either not engage in the analysis as to whether the document was responsive or if you were to find that it was, the single document was responsive, this court should dismiss on the basis of statute of limitations. And there's no dispute as to the timeline here. And I'm happy to go through that if the court would like.

But the -- the lawsuit was filed almost three full years after the final definitive response by the City. We know from this Court's earlier decision in Dotson, in Zellmer, and in Wolf that missing a single document, even if

responsive, is not, in and of itself, enough to trigger the equitable tolling rule. In fact, Belenski is the only public records case that the City is aware of where equitable tolling is even considered. And you had a very distinct fact pattern there that isn't present here.

JUDGE MAXA: So why -- why isn't it equitable? So equitable tolling, obviously, is an equitable doctrine.

MS. YOTTER: Yes.

JUDGE MAXA: The City or any agency basically says, "Trust us. We've given you all the records." There's nothing that the requester can do to check that. And so if -- if they say "trust us," and they're wrong, it seems like you're saying, "Hey, you screwed up; you trusted us."

MS. YOTTER: So trust us we're wrong, if the requester comes back and says, "I asked for these specific documents and you didn't give them to me," I think that's a different fact pattern than what we have here where Ms. Earl is saying "anything related to." That's open to the interpretation of the City as to what's related to. And if the governmental entity makes a good faith, we truly believed that we had encapsulated everything she wanted and gave it to her, if there's a single document that later she says, "Oh, I also meant this. I didn't know," and the City also didn't know, there really shouldn't be equitable tolling because there isn't bad faith, there isn't deception, and there aren't

false assurances.

To hold that equitable tolling applies any time a governmental entity says "we've given you everything we believe to be responsive," then you --

JUDGE GLASGOW: But that's not what you said. You said "after searching further, it was determined that there are no other records responsive to your request." That's different than saying "We've searched. We've done a good-faith search and we believe we found everything responsive to your request." I know it's splitting hairs, but it's not the same.

MS. YOTTER: And I do agree. And I think --

JUDGE GLASGOW: Yeah.

MS. YOTTER: -- maybe I would say that our language was inartful.

JUDGE GLASGOW: Okay.

MS. YOTTER: I don't think that there was any bad faith, any deception, or any false assurances. I think the City truly believed that we had captured everything that this requester was seeking and we were providing it to her.

JUDGE MAXA: So let's move to the discovery rule, then. So, again, in every single opinion, including Dotson and including, I'm sure, a bunch that I've written, it says "the PRA is a broad mandate for the full disclosure of records." And, yet, if the discovery rule doesn't apply, we could have

a situation where -- and let's say it's not intentional. The City has a folder of a thousand pages. It's -- somehow it got misplaced. It wasn't produced. A year passes. The requester's out of luck, without a discovery rule.

How is that furthering the broad purposes of a PRA?

MS. YOTTER: So I don't have a specific answer to that question, other than my response would be should -- should we say a discovery rule applies to all PRA cases, and that, at any time in the future, a single document which could arguably have been responsive extends the statute of limitations because there's now a discovery rule? What you're essentially doing is nullifying RCW 42.56.550 and the legislature's enactment of the one-year statute.

Certainly this has been an ongoing issue in these types of cases, and the legislature could enact a discovery rule or they could modify their rule in 42.56.550, sub (6), saying there's a one-year statute of limitations.

And then the other thing I would point out, as the appellant relied on U.S. Oil and also In re Fowler, I'd be happy to comment on that, but in those cases -- well, particularly U.S. Oil and Douchette, those are tort cases. And you're talking about, in those situations, where an individual has been harmed. They've suffered harm, and the purpose of tort law is to make that individual whole for the harm that they have suffered. And PRA is distinguishable in

that.

A PRA claim is not a tort claim. The purpose of the penalty is not to assess harm to a requester and make them whole for a document or documents that were missed. It's actually quite contrary to that. It's a penalty against an agency for not complying with a statute.

JUDGE GLASGOW: So, Counsel, why doesn't the PRA sort of -- why wouldn't we say that it's designed to sort of take care of this good faith missing of a record on the back end? So instead of saying that the discovery rule is completely unavailable, in -- where a -- where an agency has made a good-faith search and they missed something, then, at the back end, the PRA accounts for that by saying, well, you don't necessarily get penalties if there was a good-faith search.

So why shouldn't we let it through the door and sort of have an expansive reading of the -- or a limited reading of the statute of limitations and let the -- that good faith situation be addressed on the back end, where there's actual proof from the agency that they did do a good-faith search?

MS. YOTTER: So I guess I'm a little bit confused about your question. I would want to distinguish, are you saying that would fall under more of a common law discovery rule or that that would be assessed more in terms of an equitable tolling rule --

JUDGE GLASGOW: Well --

MS. YOTTER: -- where there was something missed?

JUDGE GLASGOW: Yeah. I mean, I'm just sort of echoing what Judge Maxa said, which is we're supposed to take this expansive view of the Public Records Act; right? But we recognize that the legislature has pulled back on that some, by shortening the statute of limitations, by allowing zero penalties in some cases; right? So it's not as draconian as it used to be with the agencies; right?

So given that that's the case, if we have to apply this broad -- or this principle that we want to promote transparency and access to public records, why would we bar the door at the beginning as opposed to letting those solutions at the back end work when the agency puts actual facts on the table to show their good faith?

MS. YOTTER: Yeah. So I think I would point the Court to Neighborhood Alliance, which isn't quite on point. But I think there, when we're talking about adequate searches, I think this would run along the same lines. The test isn't perfection; the test is reasonableness.

When you're talking about governments who create, in the course of their business every day, thousands, if not hundreds of thousands of documents, and they're asked to sometimes interpret requests and to figure out what citizens mean, I don't think a level of perfection is possible.

So I think the analysis should be in line with adequate search, and that's a reasonableness. Was the government reasonable in their actions and in their production?

JUDGE MAXA: Although, that seems to suggest that we don't apply the statute strictly, because as Judge Glasgow suggested, the trial court can then assess reasonableness. We're -- right now, if we -- if we slam the door, it could be intentional, it could be deliberate, it could be fraudulent. And it's like, too bad. You -- you didn't know soon enough.

MS. YOTTER: And I agree with your comment, and I should probably have started my answer by saying I do think a hard line following of the RCW is the first appropriate step and the step that clearly legislature has outlined for us. But if the Court wanted to go in another direction and ignore the statute, then I think it would turn to a reasonableness standard.

I don't have a -- a better answer on how that could be evaluated, although I would, again, say it would be -- you're holding governments to an impossible level, if what you're saying is you must be perfect in every single search and provide every single document that the requester had in mind.

JUDGE MAXA: Do we need to consider the universe of cases or can we focus on this case?

So I -- this seems like a very valid public records request. I mean, this isn't, you know, a wacko going "give me every document you ever produced in the last 20 years" just because they want to try to get penalties.

I understand we -- you know, the wackos we want to keep out. But this is a very legitimate request on a very serious issue, so why should we slam the door on this one?

MS. YOTTER: I don't disagree. But I think when we look to Belenski, that's the first one that would guide us, we know that there is no discovery rule, but there's a possibility for equitable tolling. But this Court has been very consistent in its rulings in Dotson and Zellmer and in Wolf; that missing a document or a couple of documents in a good-faith search does not rise to the level to defeat the statute of the one-year statute of limitations.

So I would say this Court should stay consistent with its previous rulings. And then I would also just point out a couple of unpublished cases that are very recent out of Division I, which would be Gibson v. Snohomish and Strickland v. Pierce County where Division I's opinions have been right in line with this Court.

So my time is up, I believe. So, with that, I thank you for your time today and happy to answer any other questions or provide any supplemental briefing that would be of assistance for the court.

JUDGE GLASGOW: Thank you, Counsel.

Bailiff, will you add one minute to the rebuttal time, please.

Thank you.

MR. LOBSENZ: A couple points about precedent first. Counsel mentioned the Belenski case and suggested that it ruled that there was no such thing as a discovery rule in this context. Belenski is silent about the discovery rule. Says nothing about it whatsoever. It addresses solely equitable tolling. And I can't believe that Belenski silently overruled U.S. Oil.

As far as U.S. Oil is concerned, counsel said something about, well, this is a PRA case. It's not a tort case. So what? Among other things, they said that for a while and that was the reason for saying, oh, the -- none of this applies to a contracts case. The Western Supreme Court said, yes, it does. We didn't limit it to tort cases. And in the Vertecs case, they said it applies to contracts cases.

U.S. Oil is not a tort case or a contracts case. It's not a case where the Department of Energy [sic] is seeking damages for either one. It's a statutory cause of action for a penalty. Exactly the same as what this is. A statutory cause of action for penalties and for injunctive relief.

Counsel said that -- repeated this argument that the SWAT team was called out has absolutely nothing to do with investigating the shooting of Jackie Salyers, just looking for Kenneth Wright. I just want to go back and point out that the record is clear, you'll find at clerk's papers 324, one member of the SWAT team that was called out was Mr. Gary Roberts, who is an investigator for the Internal Affairs Division of the Tacoma Police Department. The Internal Affairs Division investigates misconduct by police. It investigates situations whether -- where there's a -- going to be anticipated, in this case there was, an allegation that he shouldn't have shot Jackie. Why is he going along? He's not going along to look for Kenneth Wright. He's with Internal Affairs.

A small point about false assurances, again, and the Thompson case. An intent. False assurances, I think, doesn't require an intent to deceive. If it did, this language would be awfully duplicative, to be talking about false assurances or deception. But in Thompson v. Wilson, which is, I think, a Division II decision, you have a similar situation. You have a mother trying to get information about why her daughter is dead. And in one case the assurances she was given for Ms. Thompson was, we will meet -- the coroner will meet with you, the coroner will meet with you, the coroner will meet with you. And the

coroner never met with her, and the statute of limitations expired. And in this case it's we were given --

JUDGE GLASGOW: So, Counsel, would that false assurances analysis be different if the language in the response letter were different? If they were -- if it were less absolute about there are no other records responsive to your request?

MR. LOBSENZ: Well, I think the best way I can answer that is to say I agree with you; that the language that was used was pretty over-the-top emphatic. If it hadn't been, my argument would be not as strong. But I would still be arguing because these are still false assurances. You're still saying it doesn't exist. Trust us.

I did want to say there is a consistent ignoring by the City of the independence of PRA violations for not producing responsive document and PRA violations for not doing an adequate search. Certainly I think you should rule -- I think you should rule this was responsive and there was a violation. But even if you didn't, there's still the separate and independent question of whether or not there was an adequate several, which itself is a violation, even if they don't -- if they -- if they've done an adequate search, if they searched all the SWAT documents and there didn't exist any and there was nothing missed, there would still be a violation.

JUDGE VELJACIC: Did U.S. Oil have a -- I apologize, Judge

Maxa.

Is U.S. Oil, is that a situation where the legislature specifically articulated an accrual date, statutory accrual date?

MR. LOBSENZ: I can't really answer your question, Your Honor. I wish I could, but I don't think the opinion really clearly identifies that. The best I can say is it sort of seems to read like -- like the law makes the accrual date the discharge of the pollutants into the water, but I don't know that. I can't -- I can't tell you that the opinion really says that. It just sort of seems to me to apply that.

JUDGE VELJACIC: Thanks.

MR. LOBSENZ: I did want to say --

JUDGE MAXA: So -- excuse me. So let me ask you kind of the policy question that I asked counsel. So, I mean, we do have this broad mandate. But, on the other hand, we all know, and certainly it's not the case in this specific case, the PRA can be abused; right? And the legislature has struggled with that, particularly with prisoners and whatnot.

It seems like an argument could be made that the legislature intentionally wanted to tighten up this statute of limitations, no discovery rule, one year, just because so many cases are abused.

What are your thoughts about that?

MR. LOBSENZ: Well, if the legislature had wanted to say no discovery rule, they could have said so. If the legislature had wanted to say no equitable tolling, they could have said so. They didn't say that.

It would produce all kinds of other issues about separation of powers, I would think. If the legislature actually wrote "the courts are forbidden to apply equitable tolling or the discovery rule," I would argue that that's another case; that that violates separation of powers.

And I guess I would close and point you back to some language, again, in U.S. Oil. It's similar to language in the very first case. The very first case about the discovery rule was the sponge -- the surgery sponge case. A woman can't look inside her own body and see that there's a sponge in there. She brought suit 19 years after that sponge was left in her, and the court said she could do that. The legislature has not forbidden that. They've left the courts free to decide what justice requires.

And in U.S. Oil, the court said "neither the purpose for statute of limitations nor justice is served when the statute -- by this statute when the information concerning the injury is in the defendant's hands."

JUDGE GLASGOW: Thank you, Counsel. Your time has expired.

MR. LOBSENZ: Thank you.

JUDGE GLASGOW: Thank you, Counsel, for your helpful arguments this morning.

Bailiff, has Counsel checked in for the third case?

Yes. Okay. So we will take a moment to switch out counsel and -- for the third case.

(May 10, 2022, proceedings concluded)

C E R T I F I C A T E

STATE OF WASHINGTON)
)
COUNTY OF KING)

I, the undersigned, do hereby certify under penalty of perjury that the foregoing court proceedings or legal recordings were transcribed under my direction as a certified court reporter; and that the transcript is true and accurate to the best of my knowledge and ability, including changes, if any, made by the trial judge reviewing the transcript; that I received the electronic recording in the proprietary court format; that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially interested in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand this 2nd day of August, 2022.

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APPENDIX 3

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LISA EARL, et al., Plaintiffs, v. SCOTT CAMPBELL, et al., Defendants.	CASE NO. C17-5315 BHS ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' MOTION TO EXCLUDE, DEFENDANTS' MOTIONS IN LIMINE, AND PLAINTIFFS' MOTIONS IN LIMINE AS MOOT

This matter comes before the Court on Defendants Scott Campbell ("Campbell") and the City of Tacoma's ("City") (collectively "Defendants") motion to exclude plaintiffs' expert witness Thomas Streed, Dkt. 25, motion for summary judgment, Dkt. 27, and motions in limine, Dkts. 63, and Plaintiffs Lisa Earl, I.B., K.S., K.W., O.B., and the Estate of Jacqueline Salyers's ("Estate") (collectively "Plaintiffs") motions in limine, Dkt. 61. The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby rules as follows:

I. PROCEDURAL HISTORY

On April 28, 2017, Plaintiffs filed a complaint against Defendants asserting claims based on the shooting death of Jacqueline Salyers ("Salyers"). Dkt. 1. Specifically, the

Estate asserts an excessive force claim against Campbell, the individual plaintiffs assert substantive due process claims against Campbell, and all Plaintiffs assert wrongful death claims against Defendants. *Id.*, ¶¶ 58–84.

On July 5, 2018, Defendants filed a motion to exclude Plaintiffs' expert Thomas Streed and a motion for summary judgment. Dkts. 25, 27.[1] On July 23, 2018, Plaintiffs responded to the motion for summary judgment. Dkt. 40. On July 27, 2018, Defendants replied. Dkt. 45.

On September 13, 2018, Plaintiffs filed a motion to reopen discovery based on newly discovered evidence that supported an allegation that officers other than Campbell engaged in the spoliation of video evidence. Dkt. 48.

On September 24, 2018, the parties filed motions in limine in preparation for trial. Dkts. 61, 63.[2] On September 26. 2018, the Court struck the trial date and remaining deadlines. Dkt. 67. On October 4, 2018, the Court granted Plaintiffs' motion, reopened discovery, and set a supplemental briefing schedule for Defendants' motion for summary judgment. Dkt. 71.

[1] The Court denies the motion to exclude as moot because none of Mr. Streed's opinions are relevant to the issues on summary judgment. Moreover, the Court agrees with Defendants that the majority of his opinions are improper because they are irrelevant and intrude on the ultimate questions of law. For example, the issue of whether the officers should have waited for backup has no bearing on whether Campbell used excessive force.

[2] The Court denies these motions as moot because there will not be a trial on Plaintiffs' current claims.

On October 10, 2018, Plaintiffs filed a motion to clarify and/or expand the scope of reopened discovery. Dkt. 72. On October 22, 2018, Defendants responded. Dkt. 75. On October 26, 2018, Plaintiffs replied. Dkt. 78.

On November 21, 2018, Plaintiffs filed a supplemental response to Defendants' motion for summary judgment. Dkt. 84.

On November 28, 2018, Plaintiffs filed a motion for leave to amend the complaint. Dkt. 88.

On November 30, 2018, Defendants filed a supplemental reply in support of summary judgment. Dkt. 89.

On December 10, 2018, Defendants responded to Plaintiffs' motion for leave to amend. Dkt. 91. On December 14, 2018, Plaintiffs replied. Dkt. 92.

II. FACTUAL BACKGROUND

On January 28, 2016, Campbell and his partner, Tacoma Police Officer Aaron Joseph ("Joseph") drove to the 3300 block of Sawyer Street in Tacoma, Washington because they received a tip on the location of Salyers and her boyfriend Kenneth Wright ("Wright"). Dkt. 29, Declaration of Scott Campbell ("Campbell Dec."), ¶¶ 5, 7, 8. The informant also provided information on a vehicle that Wright was recently seen driving and that Wright had numerous outstanding warrants for his arrest, including one for robbery and one for unlawful possession of a firearm. *Id.* ¶ 5. The officers arrived at the location at approximately 11:45 p.m. *Id.* ¶ 8. Once there, Campbell spotted a vehicle that matched the informant's tip and, inside the vehicle, he recognized Wright from booking photos he had previously viewed. *Id.* ¶ 8. Based on the submitted exhibits, the

suspect vehicle was backed into a parking spot on the opposite side of the street. Dkt. 27 at 4. Campbell confirmed with Joseph that Wright was in the vehicle. *Id*.

Joseph declares that he immediately reacted when he saw the suspect vehicle with Wright inside. Dkt. 30, Declaration of Aaron Joseph ("Joseph Dec."), ¶ 6. After this recognition, he "stopped [the] patrol car, jumped out, pulled [his] weapon and ran toward the suspect vehicle." *Id*. Joseph stopped the patrol car in front of Wright's vehicle such that the front of Wright's vehicle was pointed at the rear portion of the patrol car. Dkt. 27 at 4. Joseph "took up a position by the A-post of the vehicle, right next the vehicle, looking through the windshield and pointing my weapon at the occupants." *Id*. (the A-post of the vehicle is the driver's side front corner). Joseph declares that he was yelling at the occupants to show their hands, but they failed to comply. *Id*.

Meanwhile, Campbell exited the passenger side of the patrol car, which was the side furthest from the suspect vehicle, and moved toward the back of the patrol car. Campbell Dec., ¶ 9. Campbell noticed that Joseph was close to Wright's vehicle and that Wright was sitting in the passenger seat leaning over as if he was reaching under the seat. *Id*. Campbell drew his weapon as he moved across the street towards the passenger side of the vehicle. *Id*. Campbell's attention was on Wright in the passenger seat, and he was not focused on Salyers in the driver's seat. *Id*. ¶ 10.

At some point, Salyers began driving the vehicle forward. As the vehicle began to "creep" forward, Joseph struck the driver side window with the butt of his weapon in an effort to break the window. Joseph Dec., ¶ 9. Joseph remembers the next few seconds as follows:

> As I was still striking the window, the car suddenly accelerated, turning southbound, away from me. The suspect vehicle accelerated rapidly enough that I heard the wheels spinning. Within a few seconds of the car accelerating, I heard gunshots and saw the muzzle flash from the gun. At that same moment, I saw Officer Campbell's silhouette, in front of the suspect vehicle near the passenger side.

Id.

Campbell recalls the events as follows:

> When I was approximately 5-10 feet from the vehicle, at an approximately 45 degree angle off the front passenger corner of the car (and while I was still moving towards the car), the front end of the car lurched up and forward, as the car was accelerating, and the wheels turned directly towards me.
>
> As soon as I recognized that the car was turning towards me, I immediately jumped back and started backpedaling (for the first couple of steps) as I made the decision to move towards the shoulder of the roadway. I shifted my feet and hips in the direction I was running, while keeping my upper body facing (as much as possible) towards the vehicle, and I began firing my weapon. I fired a volley of shots at the driver, without interruption, as quickly as I could while I moved towards the shoulder of the road. I shot at the driver in order to stop the driver from running me over; in response to my shots, the Lincoln started to slow. As soon as I realized I was out of the path of the Lincoln, I stopped shooting. I did not realize it at the time, but I had moved around the back end of a pickup truck that was also parked on the shoulder and had ended up on the shoulder of the road on the south side of the pickup. As the Lincoln rolled to a stop on the shoulder south of the pickup, I moved to the north side of the pickup to take cover.

Campbell Dec., ¶¶ 10–11.

Plaintiffs have retained multiple experts contesting whether Campbell was in the path of the vehicle and whether he was in a situation that justified shooting. For the

purposes of this order, the Court need only address the opinion of Ronald Scott ("Scott"). Dkt. 41 at 75–108.[3] Scott opines as follows:

> **The scientific evidence does not support the version of events claimed by Officer Campbell.**
> Not a single one of the eight /8/ gunshots were fired from a location that would have been in front of the Lincoln.
> All the gunshots were fired from locations that place Officer Campbell off to the passenger side of the vehicle and this shows that the vehicle was not in imminent danger of striking him.
> Officer Campbell's claim that he stopped firing when the danger had ceased is inaccurate; **he was never in a position where his life was in danger** and certainly was not justified in using lethal force merely because the driver was passing him when he was off to the side of the passenger side of the Lincoln.

Id. at 96 (emphasis added).

During his deposition, Defendants attempted to undermine this opinion by offering a hypothetical in which Campbell was standing stationary in front of the vehicle. The exchange proceeded as follows:

> Q. My question was, if Officer Campbell is standing somewhere in that rectangle as depicted in Mr. Newbery's supplemental report and that vehicle starts pulling forward on the arc depicted in Exhibit 9, is he or is he not in the path of that vehicle if he doesnt move?
> A. If he does not move?
> Q. Yes.
> A. He wouldn't be struck by the front of the vehicle, but I would say he would be very close to the side of the vehicle.
> Q. He would be hit by the vehicle, wouldn't he, Mr. Scott?
> A. I don't think he would because he was backpedaling at the same time the vehicle was moving forward. Your question is if he stayed there and didn't move, would he be struck by the vehicle? I think it's possible.

Dkt. 28-1 at 68–69.

[3] Unless otherwise noted, the Court refers to the electronic case file pagination, which is a header added to all documents electronically filed with the Court.

In response to another expert opinion, Campbell submitted an additional declaration. In there, Campbell declares as follows:

> Also, the animations show me running around the back end of the patrol car and up to the Lincoln and then stopping, as if I was taking up a position. This is not accurate. **As I testified in my deposition, I never stopped moving, from the time I exited the patrol car until after I stopped shooting.** Unlike the animations, I did not approach the Lincoln and then stop, as if waiting for the Lincoln to move. I was moving forward (towards the Lincoln) when the Lincoln started to pull forward.

Dkt. 47, ¶ 5 (emphasis added).

After Campbell stopped shooting, the car rolled to a stop a short distance from the officers. Wright crawled over Salyers, exited the vehicle with a rifle, and ran down an alley. The officers did not chase Wright because they were unsure whether he took up a defensive position in the dark alley to shoot the officers or if he continued fleeing the scene. When additional officers arrived, they were able to safely reach Salyers in the vehicle and performed CPR until medical personnel arrived. Campbell hit Salyers with four bullets, including a fatal wound to the right side of her head.

Regarding the alleged spoliation of video evidence, Plaintiffs have moved to add a claim for the deprivation of effective access to the courts against City police officers Scott Shafner, Jack Nasworthy, and Charles Taylor. Dkt. 88-1, ¶¶ 146–48. Plaintiffs allege that days before the shooting a City detective "placed a police surveillance camera up on a pole in the area of 3400 South Sawyer Street in Tacoma." *Id.* ¶ 66. It is undisputed that the camera was oriented in a direction that would have captured the events in questions. The parties, however, dispute whether the camera was able to capture video at night, whether it recorded any of the events in question, and whether any

officer deleted any video that was recorded by the camera. Plaintiffs have submitted three declarations of Dr. Gordon Mitchell, an expert in the field of information security systems. Dkts. 50, 70, 87. In the third declaration, Dr. Mitchell opines that it would have been possible for an individual to delete video from the camera without leaving any traces of the existence of the video or of the deletion. Dkt. 87, ¶¶ 4–9. Plaintiffs have also submitted circumstantial evidence to establish that an officer was improperly given administrative access to the camera and accessed the camera after the shooting.

III. DISCUSSION

Defendants move for summary judgment on all of Plaintiffs' current claims. The Court concludes that Campbell is entitled to qualified immunity on the Estate's excessive force claim, Plaintiffs fail to submit sufficient evidence to establish any substantive due process claim, and Plaintiffs have failed to establish their negligence claims as asserted in the complaint.

A. Summary Judgment Standard

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec.*

Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986) (nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt"). *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The Court must consider the substantive evidentiary burden that the nonmoving party must meet at trial—e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W. Elec. Serv., Inc*., 809 F.2d at 630. The Court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec. Serv., Inc*., 809 F.2d at 630 (relying on *Anderson*, 477 U.S. at 255). Conclusory, nonspecific statements in affidavits are not sufficient, and missing facts will not be presumed. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990).

B. Excessive Force

Defendants argue that Campbell is entitled to qualified immunity from the Estate's Fourth Amendment excessive force claim. When confronting a claim of qualified immunity, the Court must consider two questions. The first question is whether the

officer in fact violated a constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). The second question is whether the contours of the right were "sufficiently clear that a reasonable official would [have understood] that what he is doing violates that right." *Id.* at 202 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). The Court may consider these questions in any order. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

In this case, the Court will address the second question because it is likely that a question of fact exists on the first question. Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). When considering whether a right was clearly established, the Court does "not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al–Kidd*, 563 U.S. 731, 741 (2011). The Supreme Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality," and instructed that the dispositive question is "whether the violative nature of particular conduct is clearly established." *Id.* at 742. The inquiry "'must be undertaken in light of the specific context of the case, not as a broad general proposition.'" *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam) (quoting *Saucier*, 533 U.S. at 201). "Such specificity is especially important in the Fourth Amendment context, where the Supreme Court has recognized that '[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.'" *Mullenix v. Luna*, 136 S. Ct. 305, 313–14 (2015) (quoting *Saucier*, 533 U.S. at 201). In other words, qualified immunity protects officers when their conduct falls into the "'hazy border

between excessive and acceptable force.'" *Brosseau*, 543 U.S. at 201 (quoting *Saucier*, 533 U.S. at 206).

In this case, the Court concludes that the facts taken in the light most favorable to Plaintiffs establish that Campbell's actions at most fall into the hazy border between excessive and acceptable force, entitling Campbell to qualified immunity. While Plaintiffs extensively brief the issue of Salyers's constitutional right, they spend a mere three paragraphs and a footnote on the issue of whether that right was clearly established. *See* Dkt. 40 at 25 & n.30. In that brief response, Plaintiffs advance an argument that has been explicitly rejected. They argue that the "the Fourth Amendment right at issue in this case has been clearly established since [*Tennessee v. Garner*, 471 U.S. 1 (1985)] was decided in 1986." *Id*. In *Brosseau*, the Ninth Circuit denied qualified immunity because the circuit found "fair warning in the general tests set out in [*Graham v. Connor*, 490 U.S. 386 (1989)] and *Garner*." *Brosseau*, 543 U.S. at 199. The Supreme Court held that the circuit was mistaken because *Graham* and *Garner* "are cast at a high level of generality." *Id*. Similarly, the Court rejects Plaintiffs' arguments that *Garner* provided fair warning to Campbell.

Plaintiffs also rely on *Zion v. Cty. of Orange*, 874 F.3d 1072, 1076 (9th Cir. 2017), *cert. denied sub nom. Higgins v. Zion*, 138 S. Ct. 1548 (2018), for the proposition that "the use of deadly force against a non-threatening suspect is unreasonable." Dkt. 40 at 25. As with *Garner*, Plaintiffs cite a principle cast at a high level of generality and unpersuasive in the context of these facts. More importantly, the facts of *Zion* would not put Campbell on notice that using deadly force in the situation he encountered was

improper. In *Zion*, the officer shot the plaintiff as the plaintiff was running away from a knife attack on another officer. *Id.* at 1075. The officer who shot the plaintiff then ran toward the plaintiff as the plaintiff lay on the ground following the first volley of bullets. *Id*. The officer stood over the plaintiff and shot the plaintiff nine more times at close range followed by stomping on the plaintiff's head multiple times. *Id*. As applied to this case, Plaintiffs fail to show how a delayed second shooting and stomping of an individual laying on the ground would put Campbell on notice that shooting at an approaching vehicle would be an unauthorized use of force. Therefore, the Court rejects this argument as well.

Rejecting Plaintiffs' arguments does not end the analysis because it is Campbell's burden to establish that he is entitled to qualified immunity. *Moreno v. Baca*, 431 F.3d 633, 638 (9th Cir. 2005) ("the moving defendant bears the burden of proof on the issue of qualified immunity").[4] Upon review of the relevant authorities, the courts have addressed a spectrum of facts between an approaching vehicle that presents an immediate threat to an officer or others and a situation in which the vehicle is moving in a manner that does not present such a threat. For example, in *Sigley v. City of Parma Heights*, 437 F.3d 527 (6th Cir. 2006), the facts taken in the light most favorable to the plaintiff established that the officer in question was running either beside or slightly behind the driver's side window. *Id*. at 531. Although the officer was approximately two feet from

[4] Defendants assert that "Plaintiffs bear the burden of rebutting Officer Campbell's presumption of immunity." Dkt. 27 at 19. Defendants' fail to cite any authority for this "presumption," and the Court rejects the argument in light of the binding precedent.

the vehicle, the vehicle swerved away from the officer, and the plaintiff was shot in the back. *Id*. The court concluded that the officer was not entitled to qualified immunity reasoning as follows:

> viewing the facts in a light most favorable to the Plaintiff, [the officer] was running behind [the suspect's] car, out of danger, and [the suspect] drove in a manner to avoid others on the scene in an attempt to flee. Accepting these facts as true, [the officer] would have fair notice that shooting [the suspect] in the back when he did not pose an immediate threat to other officers was unlawful.

Id. at 537; *see also Cowan ex rel. Estate of Cooper v. Breen*, 352 F.3d 756 (2d Cir. 2003) (denying qualified immunity when submitted facts established officer was off to side of slow moving car and fired a second shot because he was trained to fire twice, not because he felt that he was in immediate danger).

On the other hand, "courts have held that the use of deadly force by an officer is reasonable in cases where the officer is standing in the path of an oncoming vehicle driven by a noncompliant suspect." *Rico v. Cty. of San Diego*, 09-CV-2684 BTM-WVG, 2013 WL 3149480, at *7 (S.D. Cal. June 18, 2013) (collecting cases). When presented with these factual situations, most courts have found in favor of the officer because the plaintiff failed to establish the violation of a constitutional right. In other words, the contours of the constitutional right have been clearly established such that the right does not encompass the freedom to drive a vehicle towards an officer threatening his safety.

Courts have also held that a plaintiff's right was not violated when the path of the vehicle and prospect of immediate harm are unclear. For example, in *Wilkinson v. Torres*, 610 F.3d 546 (9th Cir. 2010), the majority rejected evidence favorable to the

plaintiff to establish a factual scenario wherein an officer encountered a "'tense, uncertain, and rapidly evolving' situation . . . ." *Id*. at 551 (quoting officer's testimony). More importantly, the court stated that "the critical inquiry is what [the officer] perceived" when he used lethal force. *Id*. The court found that the officer perceived that his partner was either lying or standing in the path of an accelerating vehicle driven by a suspect that had repeatedly failed to follow commands. *Id*. at 551–53. Accordingly, the court held that the officer had cause to believe that his partner was in immediate danger and the use of lethal force did not violate the suspect's right. *Id*. at 553.

In between authorities addressing situations similar to *Wilkinson* and those addressing situations similar to *Sigley* is the "'hazy border between excessive and acceptable force.'" *Brosseau*, 543 U.S. at 201 (quoting *Saucier*, 533 U.S. at 206). Taking the facts in the light most favorable to Plaintiffs, the Court concludes that Campbell faced a scenario within this hazy borderland. It is undisputed that Campbell crossed in front of the suspect vehicle on his way to the passenger side of the vehicle. *See, e.g.*, Dkt. 40 at 6–7 (Plaintiffs conceding that Campbell "would inevitably have been in the path of the Salyers' vehicle for a second or two"). At this moment, Campbell declares as follows:

> When I was approximately 5-10 feet from the vehicle, at an approximately 45 degree angle off the front passenger corner of the car (and while I was still moving towards the car), the front end of the car lurched up and forward, as the car was accelerating, and the wheels turned directly towards me.

Campbell Dec., ¶ 10. Plaintiffs submit no evidence to contest Campbell's assertion that the vehicle accelerated and the wheels turned toward him while he was in the path of the

vehicle. Instead, Plaintiffs rely on expert testimony to establish that Campbell was outside the path of and beside the vehicle when he fired. This, however, is an improper analysis based on 20/20 hindsight.

For example, Scott opines that Campbell was "never in a position where his life was in danger . . . ." Dkt. 41 at 96. Although Scott fails to explain how being in the path of a moving vehicle driven by a person that is not following police commands is not dangerous, he apparently bases this opinion on the fact that Campbell was in a position "with at least 2 feet or more clearance between him and the passenger side of the vehicle . . . ." *Id*. at 83, ¶ 7(D). Even if there was two feet of clearance between Campbell and the vehicle, Plaintiffs fail to consider the gravity of a situation in which an officer is exiting the path of a vehicle that has turned toward him. Moreover, Scott's analysis relies on Campbell making the split-second calculation that he has technically exited the turning arc of the vehicle, removing himself from an actual threat of immediate danger. Contrary to Plaintiffs' position, this is the type of rapidly evolving, tense situation in which officers are afforded qualified immunity. From Campbell's perspective, which is the proper perspective, he was in immediate danger even if he had technically just escaped danger. Two feet is approximately one step. Thus, Campbell was one step away from a vehicle that was not only moving but had also turned directly toward him. In this scenario, Defendants have successfully shown that there was no clearly established law putting Campbell on notice that his use of lethal force was unconstitutional.

Similarly, the Court finds that Plaintiffs own experts support the split-second nature of the encounter and Campbell's decision to use deadly force. Trevor Newberry

declares that the vehicle "started to move approximately 3 seconds before the fatal shot." Dkt. 28-1 at 33. Ronald Scott, Plaintiffs' ballistics expert, opines that "it takes an officer at least .83 seconds to recognize the threat and actually pull the trigger." Dkt. 45 at 8 (Defendants' reply referring to expert report). Based on these facts, Campbell had approximately two seconds to determine whether he was in immediate danger or whether the arc of the vehicle's path was such that he was safely out of the path of the vehicle. The Court finds that this evidence supports the conclusion that Campbell encountered an uncertain and rapidly evolving situation in which the recognition of clearly defined constitutional rights is difficult to assess. Therefore, Campbell is entitled to qualified immunity.

Plaintiffs raise three other issues that the Court must address. First, Plaintiffs take issue with the number of times Campbell shot at the vehicle. *See*, *e.g.*, Dkt. 40 at 20 ("When Campbell fired his last four shots the 'suspect' – Jackie Salyers – had driven past Campbell and thus she 'no longer pose[d] a threat' to him."). The evidence, however, establishes a continual shooting as opposed to two or more separate incidents of shooting. Plaintiffs fail to submit any authority for the proposition that the number of shots an officer uses in response to a threat is clearly established. In fact, the Ninth Circuit has ruled to the contrary. *Wilkinson*, 610 F.3d at 552–53 ("Because we conclude as a matter of law that deadly force was authorized to protect a fellow officer from harm, it makes no difference in this case whether Torres fired seven rounds or eleven."). Thus, the Court rejects Plaintiffs' argument.

Second, Plaintiffs contend that Campbell could have resorted to less intrusive alternatives. Dkt. 40 at 22–23. Again, Plaintiffs fail to submit any authority for the proposition that officers should not draw their weapons when confronting a violent criminal with outstanding warrants in the middle of the night. Moreover, the entire incident unfolded in a matter of seconds, and Plaintiffs have failed to establish that Campbell had sufficient time to consider a less intrusive alternative when the vehicle began moving and turned toward him. Thus, the Court rejects Plaintiffs' argument.

Third, Plaintiffs argue that the police officers' alleged destruction or spoliation of video evidence undermines "Campbell's credibility." Dkt. 84 at 15–16. The problem with Plaintiffs' argument is that they fail to establish that Campbell participated in or even knew of the alleged spoliation of the video evidence. In fact, Plaintiffs' claim based on this alleged spoliation is against officers Shafner, Nasworthy, and Taylor. Dkt. 88-1, ¶ 147. Thus, Plaintiffs fail to establish that the circumstantial or direct evidence of another officer deleting a video "would tend to discredit the police officer's story." *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994). Moreover, even if Plaintiffs establish that an officer deleted the video, it would remain unknown what the deleted video captured. In order to overcome summary judgment on qualified immunity, the video or circumstantial evidence would have to show that Campbell was so obviously clear of Sayler's vehicle that he should have known that deadly force was not authorized. To reach this conclusion, a reasonable fact finder would have to ignore the other circumstantial evidence, including Sayler's own expert. The Court finds that there is no authority for such a proposition. Circumstantial evidence that undermines an officer's credibility is

one circumstance that courts must address, but hypothetical and non-existent circumstantial evidence falls into the realm of speculation, which is insufficient to overcome summary judgment. While evidence of spoliation may support other claims, the Court rejects Plaintiffs' attempt to convert the alleged deletion of a video into a factual premise that creates a genuine issue of material fact precluding judgment on qualified immunity.[5] Therefore, the Court grants Defendants' motion on Plaintiffs' excessive force claims.

C. Substantive Due Process

"The Supreme Court has made it clear . . . that only official conduct that 'shocks the conscience' is cognizable as a due process violation." *Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir. 2008) (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998)). "In determining whether excessive force shocks the conscience, the court must first ask 'whether the circumstances are such that actual deliberation [by the officer] is practical.'" *Wilkinson*, 610 F.3d at 554 (quoting *Porter*, 546 F.3d at 1137). "Where actual deliberation is practical, then an officer's 'deliberate indifference' may suffice to shock the conscience." *Id.* "On the other hand, where a law enforcement officer makes a snap judgment because of an escalating situation, his conduct may only be found to shock the conscience if he acts with a purpose to harm unrelated to legitimate law enforcement objectives." *Id.*

[5] If the matter proceeds on Plaintiffs' access to the courts claim and Plaintiffs submit evidence to establish that an officer deleted the video because it clearly showed that Campbell was not in danger when he used deadly force, then the Court may reconsider the qualified immunity issue. Plaintiffs, however, failed to request a Rule 56(d) continuance or deferral while they pursued such evidence.

In this case, Defendants move for summary judgment on Plaintiffs' substantive due process claim. Defendants argue that Plaintiffs have failed to submit any evidence establishing that Campbell acted with deliberation or deliberate indifference. Dkt. 27 at 19–23. Plaintiffs counter that "[i]f the jury finds that the Plaintiffs' experts are correct that Campbell was never in any danger of being run over, then the jury will conclude that Campbell *never had a legitimate law enforcement objective*." Dkt. 40 at 34. This argument, however, relies heavily on the 20/20 hindsight opinion that Campbell was at least two feet out of the path of the vehicle when he began to fire his weapon. Contrary to Plaintiffs' position, the Court finds that Campbell made a split-second decision in an escalating situation with the legitimate objective of protecting himself from what he perceived was immediate, life-threatening danger. As in *Wilkinson*, the situation here escalated from identifying a suspect with multiple felony warrants to a moving car with two officers on foot in a matter of seconds. In these situations, the Ninth Circuit will "not scrutinize as closely as the district court did [the officer's] decision about how best to minimize the risk to his own safety and the safety of others." *Wilkinson*, 610 F.3d at 554–55. Therefore, the Court grants Defendants' motion on Plaintiffs' substantive due process claims.

D. Negligence

Plaintiffs assert state law negligence claims against Defendants. Dkt. 1, ¶¶ 70–84. Defendants move for summary judgment arguing that a negligence claim may not be based on an intentional act such as Campbell's act of shooting Salyers. Dkt. 27 at 23–27. Plaintiffs counter that Defendants "ignore the fact that there are a plethora of other acts

upon which the negligence action in this case is based." Dkt. 40 at 26. Plaintiffs then cite Campbell's failure to pass the tip from the informant to other law enforcement or Campbell's failure to not harm an innocent bystander, Salyers, when taking a violent criminal, Wright, into custody. Dkt. 40 at 26–31. Plaintiffs' complaint, however, is limited to Campbell's negligent act of "shooting and killing Jacqueline Salyers . . . ." Dkt. 1, ¶¶ 71, 74, 77, 80, 83. Thus, the Court agrees with Defendants that the explicit language of the complaint limits the claims to Campbell's act of shooting Salyers. Under this interpretation of the complaint, the majority of Plaintiffs' speculative arguments go beyond the bounds of their claims and will not be addressed.

Within the claims, Plaintiffs argue that a jury could reasonably believe that Campbell was shooting at Wright and negligently hit Salyers. The Court agrees with Defendants that, to believe this story, a juror would have to reject Campbell's testimony and construct an inference based on other evidence in the record. The Court finds that no rational juror could reach this factual conclusion. Even if a court found this inference rational, Plaintiffs concede that there are no "Washington cases involving liability for making an arrest in a negligent manner which causes injury to a third party . . . ." Dkt. 40 at 29. Thus, Plaintiffs submit a few authorities from other jurisdictions that they contend are persuasive. The Court disagrees with Plaintiffs because the authorities are easily distinguishable in that they are based on *innocent bystanders*. Salyers was not an innocent bystander and no reasonable juror could reach this conclusion. Salyers began to drive a vehicle toward an officer against the commands of the officers. Plaintiffs have provided no authority for the proposition that officers owe a duty to the driver of a

vehicle that places their lives in immediate danger. Therefore, the Court grants Defendants' motion on these claims as well.

E. Other motions

There are two other pending motions, which are Plaintiffs' motion to expand discovery, Dkt. 72, and Plaintiffs' motion for leave to amend, Dkt. 88. The Court will address these issues in a separate order.

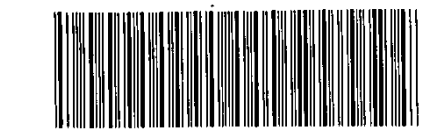
IV. ORDER

Therefore, it is hereby **ORDERED** that Defendants' motion for summary judgment, Dkt. 27, is **GRANTED** and Defendants' motion to exclude, Dkt. 25, and the parties' motions in limine, Dkts. 61, 63, are **DENIED as moot**.

Dated this 28th day of March, 2019.

BENJAMIN H. SETTLE
United States District Judge

APPENDIX 4



IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

LOUIS D. SEAMAN and SOCORRO RIZALINA SEAMAN, husband and wife, and the marital community composed thereof,
Appellants,

v.

DEPUTIES TODD KARR, BADGE # 98, TIM KOBEL, BADGE # 92, T. BERGER, BADGE # 104, D. SMITH, BADGE #372, and J. MCCARTHY, of the Pierce County Sheriff's Department and/or Lakewood Police Department in their individual capacities; and OFFICERS REOPELLE, BADGE # 472, TSCHEUCHNER, T. WHITE, BADGE # 407, G. T. ROBERTS, VANZUYT, BADGE # 393, A. CALITIS, BADGE # 018, S. KELSTRUP, BADGE # 459, D. WALKINSHAW, BADGE # 496, R. TENNYSON, BADGE # 434, B. HAYES, BADGE # 438, J. NASWORTHY, BADGE # 488, and E. D. WADE, BADGE # 396, of the Tacoma Police Department in their individual capacities
Respondents.

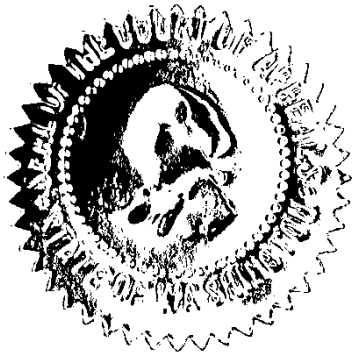
No. 27935-5-II

MANDATE

Pierce County Cause No.
00-2-11443-1

The State of Washington to: The Superior Court of the State of Washington in and for Pierce County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on December 20, 2002 became the decision terminating review of this court of the above entitled case on January 22, 2003. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Tacoma, this 19th day of March, 2003.

Clerk of the Court of Appeals,
State of Washington, Div. II

West Group
Timothy L. Healy
Bertha Baranko Fitzer
Ronald La Mar Williams

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

LOUIS D. SEAMAN and SOCORRO RIZALINA SEAMAN, husband and wife, and the marital community composed thereof, Appellants, v. DEPUTIES TODD KARR, BADGE # 98, TIM KOBEL, BADGE # 92, T. BERGER, BADGE # 104, D. SMITH, BADGE # 372, and J. MCCARTHY, of the Pierce County Sheriff's Department and/or Lakewood Police Department in their individual capacities; and OFFICERS REOPELLE, BADGE # 472, TSCHEUCHNER, T. WHITE, BADGE # 407, G. T. ROBERTS, VANZUYT, BADGE # 393, A. CALITIS, BADGE # 018, S. KELSTRUP, BADGE # 459, D. WALKINSHAW, BADGE # 496, R. TENNYSON, BADGE # 434, B. HAYES, BADGE # 438, J. NASWORTHY, BADGE # 488, and E. D. WADE, BADGE # 396, of the Tacoma Police Department in their individual capacities, Respondents.	No. 27935-5-II PUBLISHED OPINION

HUNT, C.J. -- Louis D. and Socorro R. Seaman appeal the summary judgment dismissal of their civil rights action against the Pierce County Sheriff's Department, the Lakewood Sheriff's Department, the Tacoma Police Department, and various individual law enforcement officers (Defendants). The Seamans argue that the trial court erred in granting summary judgment to the Defendants on grounds of qualified immunity. The Seamans contend that there

is sufficient evidence for a fact-finder to conclude that the officers (1) unreasonably detained the Seamans, (2) used excessive force, and (3) intentionally inflicted emotional distress.

We agree in part and reverse the summary judgment dismissal of the Seamans' emotional distress and unlawful detention claims, except as to defendants Jack Nasworthy and Jane McCarthy, whose dismissal from the action we affirm. We also affirm the trial court's summary judgment dismissal of the Seamans' remaining claims, including excessive force.

FACTS[1]

On April 25, 1999, the Seamans moved into their new residence at 3511 South Orchard, apartment C-7, in Tacoma. Several days later, they placed their name on the mailbox in the entry way. Documentation of the Seamans' tenancy was complete in April 1999, and it was common knowledge to the apartment management and tenants that the Seamans occupied apartment C-7.

Mr. and Mrs. Seaman were 67 and 37 years of age, respectively, and Caucasian and Filipino, respectively. They were not connected to a shooting in Lakewood a few weeks later.

I. THE PREVIOUS SHOOTING

On May 13, 1999, two men were shot at the 5400 block of Boston Avenue South West in Lakewood. One victim, Albert Turner,[2] died at the scene; the other, Dante Antwan Minor, refused to cooperate with detectives. The shooter escaped in a blue van and left it in a parking

[1] For purposes of reviewing summary judgment, we take the Seamans' supported allegations of fact as true. *See Kalina v. Fletcher*, 522 U.S. 118, 118 S. Ct. 502, 505, 139 L. Ed. 2d 471 (1997); *Gomez v. Toledo*, 446 U.S. 635, 637 n.3, 100 S. Ct. 1920, 64 L. Ed. 2d 572 (1980).

[2] Albert Turner was Randolph Johnson's cousin. On April 19, 1999, Johnson shot Robert Rodriguez. Rodriguez had threatened revenge on Johnson's family, which led to the shooting of Turner.

lot at 3511 South Orchard, the Seamans' apartment complex. The murder weapon, a 9 mm pistol, was not found.

The following day, Pierce County Sheriff's detectives took Juan Rodriguez-Maldonado, the driver of the getaway van, and Hugo Perez-Ortiz, the shooter, into custody. Rodriguez-Maldonado described several people who had been in the van at the time of the shooting, identifying one as Hector Mateo. Subsequent investigation revealed several known drug dealers of Puerto Rican descent linked to Rodriguez-Maldonado, Perez Ortiz, and the previous shooting of Perez-Ortiz's cousin.

Detectives found the abandoned blue van. It was registered to Mateo, who listed his address as 3511 South Orchard, apartment C-7. The Pierce County Sheriff's Department believed that Mateo and the murder weapon were at this apartment

II. Search Warrant

On May 18, the Pierce County Sheriff's Department obtained a search warrant for 3511 South Orchard, apartment C-7, and an arrest warrant for Mateo. Believing that the apartment managers had tipped off other residents about previous police investigations, the Sheriff's Department did not contact the management office to check the names of the apartment's current occupants. Thus, they did not know that Mateo had moved out or that the Seamans now resided in apartment C-7.

The Sheriff's Department determined that execution of this search warrant was high risk because of the two previous shootings and the drug and gang related violence in which the suspects were involved. Consequently, the Sheriff's Department requested and received assistance from the Tacoma Police Department Special Weapons and Tactic (SWAT) team.

A. PRELIMINARY SWAT TEAM BRIEFING

At an 8:00 A.M., May 20, briefing, the SWAT team reviewed with the Pierce County Sheriff's Department an Operation Order for executing the high-risk search warrant. The Operation Order named Robert Rodriguez as the primary homicide suspect, described him as a twenty-year-old Hispanic male, 150 pounds, and included his picture. The Operation Order also named Marcos L. Serrano as a suspect, describing him as a "DARK[-]SKINNED PUERTO RICAN OR BLACK MALE." Clerk's Papers (CP) at 157. The Operation Order cautioned:

> THE PERSON(S) INVOLVED [IN THE SHOOTING] ARE KNOWN TO BE VERY VIOLENT, ARMED WITH HANDGUNS. THEY HAVE BEEN INVOLVED IN NUMEROUS HOMICIDES, SHOOTINGS, AND DURING PREVIOUS ARREST SITUATIONS HAVE BEEN ARMED. THEY ARE ALSO REPORTED TO BE IN POSSESSION OF BALLISTIC VESTS. . . . DURING [SERVICE OF ANOTHER WARRANT] IN LAKEWOOD, [SOME OF THESE SAME] SUSPECTS INTENTIONALLY SET THE APARTMENT ON FIRE TO DESTROY PERISHABLE EVIDENCE. THE SUSPECTS VIOLENTLY RESISTED ARREST WHILE THE APARTMENT WAS ON FIRE, OTHERS BAILED OUT A BACK WINDOW TO TRY TO ESCAPE. . . . THE SUSPECTS AT THIS LOCATION ARE BELIEVED TO BE ORGANIZED CRIMINALS, DEALING IN NARCOTICS. IT IS UNCERTAIN HOW MANY OR WHO WILL BE PRESENT. *SOME OF THE SUSPECTS ARE CUBAN (BLACK) MALES, OTHERS ARE PUERTO RICAN OR MEXICAN MALES. AGES RANGE FROM 20'S TO 40'S.*

CP at 157 (emphasis added).

The Operation Order further stated that (1) no children, elderly persons, or dogs were believed to be at the location, and (2) the apartment management office was to be contacted and advised of the situation during and after service of the search warrant.

B. EXECUTION OF SEARCH WARRANT

About 9:30 A.M., several SWAT officers approached the Seamans' residence; they wore dark uniforms, helmets, and stockings covering their faces, and carried machine guns. They

moved past the mailbox, which displayed the Seamans' name, to apartment C-7. To maintain the element of surprise, the SWAT team knocked and announced at the rear sliding glass door.

1. Entry of Apartment

Seeing no movement inside, the SWAT team forcibly opened the apartment door and released a "distraction device." The distraction device exploded loudly; it shattered the sliding glass door, blowing glass into the living room; it dispersed smoke everywhere and ignited the carpet. When they entered the apartment, instead of finding the individuals described in the Operation Orders, the SWAT team found a terrified elderly white male, a middle-aged Filipino female, and two large dogs. Nonetheless, the SWAT team proceeded as planned.

Mr. and Mrs. Seaman, dressed casually, were preparing breakfast. Suddenly, unknown invaders in black "ninja suits," with masks over their faces, rushed in from several different directions, carrying machine guns and yelling, "[H]ut, hut, hut. . . ." CP at 124. Fearing for their lives, Mr. Seaman froze and Mrs. Seaman ran to the master bathroom, slammed the door shut, turned off the light, and hid in a corner behind the door, crying and shaking. They had no idea that the armed men were the police.

The Defendants pointed machine guns at Mr. Seaman's face as they advanced toward him yelling, "[H]ut, hut, hut. . . ." CP at 125. Mr. Seaman neither resisted nor provoked them. Several Defendants hit Mr. Seaman's back, threw him face-down to the floor, and landed on top of him, causing him breathing difficulty. As several Defendants aimed loaded machine guns at Mr. Seaman, one Defendant told him that if he moved, he would be shot. The Defendants then forced Mr. Seaman's arms behind his back, twisting his left wrist and handcuffing him so tightly that his wrists hurt, he began to cry, and he begged Defendants not to hurt him.

Still in hiding, Mrs. Seaman heard her husband's cries and believed they were being robbed. When she opened the bathroom door, the Defendants pointed machine guns in her face and yelled, "[G]et out." She complied. Without provocation, one Defendant threw her face-first down on the bed. They forced her arms behind her back, handcuffed her wrists so tightly that they hurt, pulled her off the bed, and ordered her to the hallway, still pointing loaded machine guns at her. She was crying and thought she was going to die.

Then, Mrs. Seaman read "Police" on one Defendant's back and asked, "[Y]ou guys are the police?" When she asked why they had broken into their residence, Defendants replied that they would tell her in a minute. CP at 133.

The Tacoma Police SWAT team left approximately 20 minutes after entering the apartment, shortly after Pierce County Detectives arrived to continue the investigation.

2. Mistaken Identity of Occupants

Mrs. Seaman told the Defendants that (1) they must have made a mistake because the Seamans had done nothing wrong, and (2) they had the wrong people. Defendants asked Mrs. Seaman her name, her husband's name, and how long they had resided in the apartment. She told the Defendants their names and that they had just moved in the previous month.

Around 9:40 A.M., ten minutes after the SWAT team had entered the Seamans' residence, the apartment complex maintenance supervisor, Mark Meuschke, asked one of the Defendants outside what was going on. The officer stated they were looking for a murder suspect. Meuschke informed him that (1) they had made a mistake because it was not Mr. or Mrs. Seaman; (2) Defendants must be in the wrong apartment; (3) Mr. Seaman is an elderly gentleman; and (4) the Seamans had just moved into apartment C-7 three to four weeks earlier.

The officer told Meuschke to let them do their job and walked back inside the Seamans' apartment.

Mrs. Seaman asked Defendants to help her husband up from the floor, where he lay on his side, crying. She told Defendants that her husband had a heart condition and other medical problems. One Defendant pulled Mr. Seaman up hard off the ground by his handcuffed wrists, causing him to scream in pain.

Mr. Seaman then learned that Defendants were the police. As his wife had done, he, too, told them that they had made a mistake and that they must be in the wrong apartment. Defendants did not answer. They moved Mr. Seaman, who was still in handcuffs, crying and shaking uncontrollably, to a chair.

Mrs. Seaman told Defendants to check their identification. Defendants then identified the occupants as Mr. and Mrs. Seaman. Mrs. Seaman also told Defendants that they had their name on the apartment mailbox.

At approximately 10:10 A.M., one of the Defendants went to ask the apartment manager who had lived in apartment C-7 before the Seamans. The apartment manager gave the Defendant the name of the prior tenant, who had lived there for two years.

Pierce County Detective Todd Karr, the officer in charge of the investigation, determined that the Seamans had not been involved in the shooting incident. Nonetheless, the investigation continued and the Seamans remained in handcuffs for the next two and a half hours.

Defendants asked the Seamans whether they knew anyone, or their whereabouts, from a list of several Hispanic names. Mr. Seaman responded that their names were Mr. and Mrs. Seaman and that he knew none of the people on the officers' list. Again, the Seamans explained

that they had just moved into the apartment and that the Defendants must be in the wrong apartment. Again, they asked Defendants to check with the apartment manager and other tenants, to check the name on the mailbox, and to check their identification.

The Defendants ignored the Seamans' assertions that they had made a mistake. Instead, Defendants (1) accused the Seamans of being involved with the murder; (2) told them that they would not be released because they were murder suspects; (3) said they knew the Seamans had the information they wanted; and (4) told the Seamans that they were going to jail on murder charges unless they cooperated.

Mr. Seaman told Defendants repeatedly that they had made a mistake and that he did not know the people they were looking for. He asked Defendants to remove or to loosen the handcuffs, to let them go, to stop going through their residence and personal effects, and to summon medical attention because his leg, shoulder, knees, and wrists hurt. The parties dispute whether the City offered medical aid.[3]

Defendants then asked if there were any firearms in the residence. Mr. Seaman stated they had a handgun for home protection and told them where it was. Defendants retrieved the handgun and discovered that it had not been fired.

Several other tenants and apartment employees saw the Seamans through the window. Mrs. Seaman was still in handcuffs and crying. Maintenance worker Kenneth Gordon saw some Defendants leave the Seamans' residence at approximately 10:30 A.M. At approximately 11:00 A.M., Gordon informed a female Defendant that they had made a mistake, that the Seamans had

[3] Defendants assert that they offered the Seamans medical attention, but the Seamans had refused. The Seamans assert that Mr. Seaman asked for medical attention and Defendants denied his request.

just moved into their residence thirty days ago, and that they were a nice elderly couple. The Defendant responded that it would be looked into. According to Gordon, another hour passed before Defendants finally left the Seamans' residence sometime around noon.

At approximately noon, Defendants told the Seamans that there had been a "mistake," and Detective Tim Kobel removed the handcuffs.[4] The Seamans again asked Defendants to leave their residence. But Defendants refused, said they were not finished, continued searching the residence, rummaged through the Seamans' personal effects, and, despite Mr. Seaman's telling them he had a key, broke into a storage locker.

Defendants photographed Mr. Seaman's injuries and the damage to the apartment. Defendants explained to the Seamans and the apartment manager how to seek reimbursement for the damage. Defendants asked the manager to help clean up the apartment.

Around 12:30 P.M., Defendants left the Seamans' residence. The Seamans were shaken and in shock. Mrs. Seaman was having difficulty speaking and appeared nervous; her wrists were red and exhibited cuff marks. Mr. Seaman was limping; his leg and right wrist were swollen, and his left knee was sprained and abraded.

III. SUMMARY JUDGMENT

The Seamans sued the Pierce County Sheriff's Department, the Lakewood Sheriff's Department, the Tacoma Police Department, and various individual officers, including Jack Nasworthy and Jane McCarthy, for violation of 42 U.S.C. § 1983 (unreasonable detention and

[4] It is disputed how long the Seamans were in handcuffs. The Seamans state that it was two hours. Defendants claim that it was less than 40 minutes. The apartment manager stated that Defendants left the Seamans' apartment at 12:30 P.M. The apartment maintenance worker stated that he informed the City at 11:00 A.M. that the City had made a mistake, and that Defendants left the apartment at 12:00 P.M.

excessive force in violation of the Fourth Amendment)[5] and intentional infliction of emotional distress when they mistakenly executed a search warrant at their residence.

Defendants moved for summary judgment, arguing that (1) they had not violated the Seamans' Fourth Amendment rights because they had executed the search with a facially valid warrant; (2) the Seamans' detention was not prolonged or unreasonable and the force was not excessive; (3) they were entitled to qualified immunity; and (4) their acts were not outrageous and did not constitute intentional or reckless infliction of emotional distress. Defendants also moved to dismiss the claims against those officers who had not been present inside the Seamans' apartment during execution of the warrant, namely McCarthy, Nasworthy, Ron Tennyson, and Edward Wade. The Seamans did not object to dismissing Officers Tennyson and Wade.

The trial court granted Defendants' motion for summary judgment and dismissed all the Seamans' claims. The Seamans appeal.

ANALYSIS

I. STANDARD OF REVIEW

In reviewing a grant of summary judgment, we engage in the same inquiry as the trial court. *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 48, 914 P.2d 728 (1996). Summary judgment is appropriate "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 a judgment as a matter of law." CR 56(c).

The party seeking summary judgment bears "the initial burden of showing the absence of an issue of material fact." *Green v. A.P.C.*, 136 Wn.2d 87, 100, 960 P.2d 912 (1998). Once that

[5] *Liston v. County of Riverside*, 120 F.3d 965, 977, 979 (9th Cir. 1997).

burden has been met, the "adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in [CR 56], must set forth specific facts showing that there is a genuine issue for trial." CR 56(e).

Claims of qualified immunity under state law are subject to the summary judgment standard, which requires that all facts and inferences be construed most favorably to the nonmoving party. CR 56. *Bremerton Pub. Safety Ass'n v. City of Bremerton*, 104 Wn. App. 226, 230, 15 P.3d 688 (2001). Thus, in reviewing Defendants' claims of qualified immunity, we assume that all facts alleged in the Seamans' complaint are true. *See Kalina v. Fletcher*, 522 U.S. 118, 118 S. Ct. 502, 505, 139 L. Ed. 2d 471 (1997); *Gomez v. Toledo*, 446 U.S. 635, 637 n.3, 100 S. Ct. 1920, 64 L. Ed. 2d 572 (1980).

We examine this case to determine whether there are material issues of fact that require a trial and whether reasonable minds could reach only one conclusion from all the evidence. *See Our Lady of Lourdes Hosp. v. Franklin County*, 120 Wn.2d 439, 452, 842 P.2d 956 (1993).

II. Dismissal of Officers McCarthy and Nasworthy

The Seamans do not contest the trial court's dismissal of Officers McCarthy and Nasworthy, whom they concede were not inside the Seamans' residence. Therefore, we affirm the trial court's grant of summary judgment dismissal of this action against Officers McCarthy and Nasworthy.

III. Qualified Immunity

As confirmed by their counsel during oral argument, the Seamans do not claim (1) that Defendants used excessive force in entering their home under authority of the search warrant, or (2) that Defendants' initial detention of the Seamans was unreasonable upon entering to execute

the warrant. Rather, they contend that their continued detention became unreasonable *later*, after Defendants had reason to believe that they had made a mistake and that they were detaining the wrong people.

Determining whether Defendants are entitled to qualified immunity involves a three-step inquiry: (1) What specific right did Defendants allegedly violate? (2) Was that right "so 'clearly established' as to alert a reasonable officer to its constitutional parameters?" (3) If so, would a reasonable officer have believed that his conduct was lawful? *DeBoer v. Pennington*, 206 F.3d 857, 864 (9th Cir. 2000).

A. UNREASONABLE DETENTION

1. Specific Right Violated

"[T]he right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established." *Wilson v. Layne*, 526 U.S. 603, 615, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999). "In identifying the contours of the right we must strike a balance 'between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties." *Deboer*, 206 F.3d at 864 (quoting *Davis v. Scherer*, 468 U.S. 183, 195, 104 S. Ct. 3012, 82 L. Ed. 2d 139 (1984)). The plaintiff's allegations are crucial to "identify[ing] the contours of the right allegedly violated." *Deboer*, 206 F.3d at 864.

Here, the specific right that Defendants allegedly violated derives from the Fourth Amendment's prohibition of unreasonable police detentions of home occupants during execution of a search warrant. *See Michigan v. Summers*, 452 U.S. 692, 705, 101 S. Ct. 2587, 69 L. Ed. 2d 340 (1981).

2. Clearly Established Law

To determine whether a federal right is clearly established, we look first to United States Supreme Court precedent and then to decisions of the controlling Circuit Court of Appeals. *See Denius v. Dunlap*, 209 F.3d 944, 950 (7th Cir. 2000). For qualified immunity purposes, "clearly established" means:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Wilson, 526 U.S. at 614-15 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)).

The Supreme Court has held: "[A] warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." *Summers*, 452 U.S. at 705 (footnotes omitted.)[6] Here, the Seamans were handcuffed during a substantial portion of their two-hour detention on the premises being searched. This police action implicated a clearly established Fourth Amendment right.

3. Objective Reasonableness of Defendants' Conduct

The Fourth Amendment proscribes "unreasonable" searches and seizures. The Supreme Court has reasoned that generally, the minor intrusiveness of detaining a resident in his or her home during execution of a warrant is outweighed by law enforcement interests in (1) preventing

[6] *See also Heitschmidt v. City of Houston*, 161 F.3d 834 (5th Cir. 1998) (detention unreasonable where resident of house that was not part of illegal activity was held in handcuffs for four hours during a search of house with valid warrant).

flight if incriminating evidence is found; (2) minimizing the risk of harm to the officers and occupants during the search; and (3) conducting an orderly search with the resident's help in unlocking doors and containers. *Summers*, 452 U.S. at 701-03. But "[a] detention conducted in connection with a search may be unreasonable if it is unnecessarily . . . prolonged, or if it involves an undue invasion of privacy." *Franklin v. Foxworth*, 31 F.3d 873, 876 (9th Cir. 1994) (emphasis added).

The reasonableness of a search or a seizure depends not only on when it is made, but also on how it is carried out. "[E]ven when supported by probable cause, a search or seizure may be invalid if carried out in an unreasonable fashion." *Franklin*, 31 F.3d at 875. "Whether an otherwise valid search or seizure was carried out in an unreasonable manner is determined under an objective test, on the basis of the facts and circumstances confronting the officers." *Franklin*, 31 F.3d at 875.

Here, the Seamans have established a prima facie case that Defendants detained them far longer than necessary to determine whether they had any knowledge or connection with the shooting. Defendants kept the Seamans handcuffed long after they had reason to believe that the Seamans were not connected to the people they were seeking. The Seamans agree that Defendants acted reasonably in briefly detaining them during the initial phase of the search warrant execution. They argue, however, that their detention became unreasonable after (1) Defendants observed that the Seamans did not at all match the description of the people believed to have been involved in the shooting; (2) the Seamans and other apartment complex personnel told Defendants that they had the wrong people; and (3) Defendants themselves acknowledged that there had been a mistake.

"Qualified immunity may shield officials who conduct an unreasonable . . . seizure which violates an individual's rights if a reasonable person in the position of the official could have believed that his conduct was lawful." *Deboer*, 206 F.3d at 866-67. But here, there is a question of material fact concerning the reasonableness of Defendants' detention of the Seamans and whether a reasonable officer could have believed that his conduct was lawful. *See Deboer*, 206 F.3d at 864. Accordingly, Defendants were not entitled to qualified immunity as a matter of law under these facts, and the trial court erred in dismissing the Seamans' claim of unlawful detention on summary judgment.

B. EXCESSIVE FORCE

The Seamans also allege a cause of action under 42 U.S.C. § 1983, claiming that Defendants used excessive force in handcuffing and pointing machine guns at them. Defendants counter that their actions were normal procedure.

The Supreme Court has held that claims of excessive force in the course of making an arrest are properly analyzed under the Fourth Amendment's "objective reasonableness" standard. *Graham v. Connor*, 490 U.S. 386, 388, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). The same standard applies when analyzing claims of excessive force in executing a search warrant. The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, not 20/20 hindsight. It is a standard of the moment as police officers are often forced to make split-second judgments in tense, uncertain, and rapidly evolving circumstances. *See Graham*, 490 U.S. at 397; *Palmer v. Sanderson*, 9 F.3d 1433, 1436 (9th Cir. 1993). "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's

chambers, violates the Fourth Amendment." *Graham*, 490 U.S. at 396 (*quoting Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)).

In *Graham*, the Supreme Court listed facts and circumstances that a court should consider when applying the "test of reasonableness": (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight. *Graham*, 490 U.S. at 396.

Here, as the Seamans concede, Defendants were initially entitled to use force to detain them, including handcuffs, in light of the murder they were investigating and the risk to officer safety that Defendants expected to encounter from the persons they sought in the residence. Thus, notwithstanding the Seamans' discomfort, Defendants' initial use of force was "objectively reasonable" as a matter of law.[7] *See Sintra Inc. v. City of Seattle*, 119 Wn.2d 1, 26, 829 P.2d 765 (1992) ("objective reasonableness" is test for qualified immunity for public employees).

Accordingly, we agree with the trial court that Defendants are entitled to qualified immunity and dismissal of the excessive use of force claim. *See Siegert v. Gilley*, 500 U.S. 226, 232, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991).

C. EMOTIONAL DISTRESS

To state a claim for the tort of outrage or intentional infliction of emotional distress, a plaintiff 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." *Birklid v.*

Boeing Co., 127 Wn.2d 853, 867, 904 P.2d 278 (1995) (quoting *Dicomes v. State*, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989) (quoting *Rice v. Janovich*, 109 Wn.2d 48, 61, 742 P.2d 1230 (1987)).

> 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 (quoting *Dicomes*, 113 Wn.2d at 630) (quoting *Grimsby v. Samson*, 85 Wn.2d 52, 59, 530 P.2d 291 (1975)).

Whether conduct is sufficiently outrageous is ordinarily a question for the jury. Initially, however, it is the trial court's responsibility to determine if reasonable minds could differ about whether the conduct was so extreme as to result in liability. *Dicomes*, 113 Wn.2d at 630; *Jackson v. Peoples Fed. Credit Union*, 25 Wn. App. 81, 84, 604 P.2d 1025 (1979) (trial court must make an initial determination as to whether the conduct may reasonably be regarded as extreme and outrageous, thus warranting a factual determination by the jury).

In determining whether a case should go to a jury, a trial court considers: (a) the position the defendants occupied; (b) whether the plaintiff was peculiarly susceptible to emotional distress, and if the defendants knew this fact; (c) whether the defendants' conduct may have been privileged under the circumstances; (d) whether the degree of emotional distress the defendants caused was severe as opposed to merely annoying, inconvenient, or embarrassing to a degree normally occurring in a confrontation between these parties; and (e) whether the defendants were aware that there was a high probability that their conduct would cause severe emotional distress,

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[7] As we have explained in the previous section, it was the *length* of the detention and discomfort from the length of time the Seamans remained handcuffed that remain actionable.

and they consciously disregarded it. *Phillips v. Hardwick*, 29 Wn. App. 382, 388, 628 P.2d 506 (1981) (paraphrasing *Jackson*, 25 Wn. App. at 86-87).

In reviewing the summary judgment dismissal of their emotional distress claims, we take the facts in the light most favorable to the Seamans. *Bremerton Pub. Safety Ass'n*, 104 Wn. App. at 230. Accepting the Seamans' factual allegations as true and drawing all reasonable inferences from them in their favor, we conclude that (1) there are material issues of fact that require a trial, (2) reasonable minds could differ as to whether the Defendants' conduct was "*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.

Defendants were lawfully engaged in the investigation of a serious crime. They had a warrant. The residents of apartment C-7 were suspects. Although the Seamans do not challenge Defendants' entry and initial use of force to contain them, they have proffered sufficient facts to convince a trier of fact that thereafter, (1) Defendants' conduct extremely distressed them; (2) Defendants were aware or should have been aware that the Seamans were particularly susceptible to emotional distress; and/or (3) Defendants consciously disregarded an obvious, high probability that their conduct would cause the Seamans to suffer severe emotional distress.

Elderly Mr. Seamans was quaking, crying, and begging Defendants not to hurt them. Mrs. Seamans repeatedly tried to explain to Defendants about his medical condition and asked for help, which the Seamans claim Defendants rebuffed. The Seamans allege that Defendants used especially rough force, beyond the simple act of handcuffing them -- yanking them by the cuffs up and down, throwing them down on the floor or bed, leaving the tight and painful cuffs

on for long periods of time to the point that they caused bruises, and ignoring the Seamans' repeated pleas to check with the apartment manager about their identity because Defendants clearly had the wrong people. And even after there was substantial doubt that the Seamans were the people Defendants were seeking, Defendants nevertheless (1) accused the Seamans of being involved with the murder; (2) told them that they would not be released because they were murder suspects; (3) said they knew the Seamans had the information they wanted; (4) told the Seamans that they were going to jail on murder charges unless they cooperated; and (5) continued rummaging through the Seamans' personal effects, leaving the apartment in shambles.

The Seamans have produced sufficient evidence such that a trier of fact could find Defendants' conduct exceeded "*all possible bounds of decency,*" measured against an objective standard of reasonableness. *Dicomes*, 113 Wn.2d at 630. Therefore, we reverse the trial court's summary judgment dismissal of the Seamans' emotional distress claims.

We affirm the summary judgment dismissal of all claims against defendants McCarthy and Nasworthy. With respect to the remaining Defendants, we reverse and remand for trial on the unlawful detention and intentional infliction of emotional distress claims, and we affirm summary judgment dismissal of the other claims, including excessive force.

Hunt, C.J.

We concur:

Seinfeld, J.

Bridgewater, J.

APPENDIX 5

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KATHLEEN MANCINI, a single woman, Appellant, v. CITY OF TACOMA, a municipal, entity and political subdivision of the State of Washington; TACOMA POLICE DEPARTMENT; and RON RAMSDELL, individually and in his official capacity as chief of Tacoma Police, Respondents.	DIVISION ONE No. 71044-3-I UNPUBLISHED OPINION FILED: June 8, 2015

DWYER, J. —

Courts, not the Legislature, legislated the public duty doctrine.

Justice Tom Chambers[1]

During his tenure on our state's highest court, Justice Chambers devoted significant attention to the public duty doctrine. On more than one occasion, he wrote separately, urging that the doctrine be either disavowed or applied in a

[1] Babcock v. Mason County Fire Dist. No. 6, 144 Wn.2d 774, 796, 30 P.3d 1261 (2001) (Chambers, J., concurring).

manner faithful to its origin. For a time, his view did not prevail. However, in 2012, he authored yet another separate opinion that, despite its modest identification as a concurrence, was signed by a majority of the members of our Supreme Court and, resultantly, controls the decisions made by members of our state's judiciary. See Munich v. Skagit Emergency Commc'n Ctr., 175 Wn.2d 871, 288 P.3d 328 (2012) (Chambers, J., concurring).

Justice Chambers' opinion in Munich is instructive in resolving this appeal, given that the plaintiff-appellant, Kathleen Mancini, seeks to hold the City of Tacoma liable for the allegedly tortious actions of its police officers who, in the course of investigating a drug trafficking suspect, mistakenly raided Mancini's apartment. Mancini appeals from the trial court's grant of summary judgment in favor of the City. She contends that the public duty doctrine was not a proper basis for dismissal of her negligence claim; that her intentional tort claims were improperly dismissed; and that the trial court erred in excluding testimony to be given by her treating healthcare providers. Although the trial court was right to dismiss Mancini's claims of defamation and outrage, it erred in dismissing her negligence claim, as well as the remainder of her intentional tort claims. It also erred in excluding the testimony of her treating healthcare providers as a discovery sanction. Therefore, whereas we affirm the dismissal of Mancini's claims of defamation and outrage, we reverse the trial court's grant of summary judgment on the remainder of her claims, reverse the trial court's order excluding the testimony of Mancini's treating healthcare providers, and remand for further proceedings.

I

On January 5, 2011, at approximately 9:30 a.m., Mancini was roused from her sleep when the door to her Federal Way apartment was blown off its hinges with a battering ram. Mancini, who was 63 years old at the time, worked as a nurse at Group Health Hospital. She worked the graveyard shift and had been asleep in her bed after finishing her shift the previous night. Wearing only a nightgown, she emerged from her bedroom to find numerous Tacoma City Police officers dressed in SWAT[2] gear in her hallway with their weapons drawn. The officers shouted "Get down! Get down!" and pushed Mancini, who stands approximately five feet tall, face down onto the floor. They then placed her in handcuffs with her hands behind her back and forcibly led her to the entrance of her apartment.

Although the officers "immediately observed that the inside of the apartment was not as the confidential and reliable informant had described," they still searched Mancini's apartment while she stood outside in handcuffs, wearing only a nightgown, for approximately 30 minutes. They removed clothing from hangers in a closet; they moved a bed in her guestroom; they disturbed a number of religious icons belonging to her deceased mother, which were on a bedside table; they rifled through kitchen cabinets; and they searched her fireplace. While her apartment was being searched, officers who remained with Mancini repeatedly shoved a picture of a man in her face, shouting, "Where is he? Where is he?" Mancini did not recognize the man in the picture.

[2] SWAT is an acronym for special weapons and tactics.

Eventually, the officers led Mancini up two flights of stairs to the parking lot of her building. There, they pointed to a Black Dodge Charger and asked, "Is that your car?" Mancini informed the officers that the row of parking where the Charger sat belonged to the building adjacent to hers. She lives in a complex with four separate buildings; she resides in Building B. She told the officers that the owner of the Charger likely lived in Building A.

At that point, the officers took Mancini back to the "breezeway" outside of her front door. Several officers again entered her apartment. Eventually, they emerged and she was released. Officer Kenneth Smith, the officer in charge of the raid, explained that they were seeking a man named "Matt" who was wanted in connection with drugs.

One month before the events detailed above, Smith had received a tip from a confidential informant (CI) that drugs were being sold out of an apartment in which a man named Matt Logstrom resided. Logstrom lived in the same apartment complex as Mancini. Several days before the raid on Mancini's apartment, the CI reported to Smith that she had been in Logstrom's apartment on December 31, 2010, and had seen a sufficient quantity of drugs to indicate that Logstrom was selling drugs. In response to the CI's report, the officers drove the CI by the apartment complex at which Mancini and Logstrom both resided. The CI pointed to Mancini's unit and identified it as the location where she had seen the drugs. Smith then sought and obtained a warrant to search the unit in which Mancini resided. Smith subsequently admitted that, although he usually would have placed a suspected drug dealer's apartment under

surveillance and performed a "controlled buy"[3] prior to seeking a search warrant, he did not employ those procedures in this instance.

After the officer released Mancini, they went to Building A and knocked on the door of the unit that corresponded to the location of Mancini's unit in Building B.[4] Logstrom answered the door and, when the officers asked him to step outside, he complied. At that point, Smith returned to Tacoma and obtained a search warrant for Logstrom's apartment. While waiting for Smith to return, Logstrom was permitted to sit on his living room couch and was not placed in physical restraints. When Smith returned with the warrant, officers searched Logstrom's apartment.

Following this incident, Mancini visited her primary care physician at Group Health Cooperative. Her physician recommended that she seek treatment in the form of massage therapy for a bilateral injury to her shoulder. She was treated 10 times by a massage therapist. She also saw a counselor to assist her in dealing with symptoms of posttraumatic stress disorder (PTSD), which included "[f]ear of noises, fear of men in black, fear of being alone, fear of—I can't even tell you," as well as crying every morning. However, her insurance plan covered only three therapy visits and, when she had exhausted her coverage, she did not seek further treatment for PTSD.

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[3] Dr. Norm Stamper, a former Chief of the Seattle Police Department, provided a declaration in this case on behalf of Mancini. Therein, he explained that a controlled buy occurs when a CI is provided with marked money, equipped with a wire for audio recording, and sent into a residence to purchase drugs. Once the CI leaves the residence, he or she immediately meets with officers, provides them with the purchased drugs, and explains to them the events that occurred.

[4] Mancini's address was 28652 16th Ave. S. #B1. Logstrom's address was 28617 16th Ave. S. #A1.

On May 18, 2012, Mancini filed a complaint in King County Superior Court. Named as defendants were the City of Tacoma, the Tacoma Police Department, and the chief of the Tacoma Police Department (collectively, the City). Mancini pleaded the following "causes of action": negligence, breach of duty to train and supervise, assault and battery, violation of Washington Constitution article I, section 1,[5] section 3,[6] and section 7,[7] violation of RCW 49.60.030,[8] false imprisonment, defamation, false light, invasion of privacy, and outrage. She sought damages for financial loss, pain and suffering, disability, loss of enjoyment of life, embarrassment, anguish, emotional distress, and PTSD.

The City moved for partial judgment on the pleadings pursuant to CR 12(c). The trial court granted this motion as to Mancini's claims of negligent training and supervision, and as to her constitutional claims, but denied the motion insofar as it sought dismissal of Mancini's claim of discrimination brought pursuant to RCW 49.60.030.

Subsequently, while the parties were engaged in discovery, the City requested a full disclosure of all expert opinions to be offered by Mancini at trial, including expert opinions from treating healthcare providers. In response, Mancini identified three healthcare providers who "have knowledge concerning

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[5] This section provides, "All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights." WASH. CONST. art. I, § 1.

[6] This section provides, "No person shall be deprived of life, liberty, or property, without due process of law." WASH. CONST. art. I, § 3.

[7] This section provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." WASH. CONST. art. I, § 7.

[8] Otherwise known as the Washington Law Against Discrimination.

[her] injuries, the cause of injuries, the circumstances surrounding the injuries, and the treatment thereof." She did not disclose any details regarding their specific opinions or the bases for their opinions. Unsatisfied with Mancini's disclosure, the City moved to preclude her from offering any medical expert testimony at trial, including expert opinions from treating healthcare providers or, alternatively, moved to compel complete disclosure of all expert opinions to be offered by Mancini at trial, including any expert opinions to be offered by her treating healthcare providers.

On June 20, 2013, the trial court ordered Mancini "to provide a complete disclosure of all experts opinions . . . to be offered at trial," "including treating healthcare providers who will be offering opinion evidence at trial," as well as "any expert opinions to be offered by plaintiff's treating healthcare providers, within 15 days of entry of the Court's order to compel." The trial court also ordered Mancini's treating healthcare providers to produce to the Tacoma City Attorney's Office complete and unredacted copies of Mancini's medical records covering the period between January 1, 2011 and June 20, 2013.

Subsequently, Mancini filed a "supplemental disclosure of expert witnesses." Therein, she included a brief account of the anticipated testimony from her treating healthcare providers. Mancini also moved for reconsideration "regarding plaintiff's responsibility to collect medical records on behalf of the defendants." This motion was denied.

Thereafter, the City again moved to exclude all expert opinion testimony from Mancini's treating healthcare providers. Mancini opposed the City's motion,

asserting that the testimony of her treating healthcare providers did not constitute expert testimony because her treating healthcare providers had not been retained in anticipation of litigation. Mancini argued, "The rule that the defense urges this court to adopt is that every single medical provider is an expert witness . . . . This is the federal rule not the state rule."

On August 2, 2013, the trial court entered an order in which it addressed the City's motion. The trial court's order is recreated, in pertinent part, below.

> 1. That this Court entered an order compelling [Mancini] to disclose any expert opinions to be offered by her treating healthcare providers at trial, and the bases for such opinions, by July 5, 2013; (& denied Reconsideration)
> 2. That [Mancini's] supplemental disclosure, produced in response to the Court's order to compel, does not contain the expert opinions to be offered at trial by her treating healthcare providers, and the bases for such opinions;
> 3. That [Mancini] has failed to comply with this Court's order compelling disclosure of these expert opinions; (or there are none)
> 4. That [Mancini's] failure to comply was willful; (if [Mancini] intends to offer such opinions)
> 5. That [Mancini's] failure to fully disclose the expert opinions to be offered by her treating healthcare providers and the bases for such opinions has substantially prejudiced the [City] in this case; and
> 6. That the Court has considered sanctions less severe than exclusion and has concluded that a lesser sanction would not suffice under the circumstances of this case. Now therefore, it is
> ORDERED, ADJUDGED AND DECREED that [the City's] Motion to Exclude Expert Testimony from [Mancini's] Treating Healthcare Providers is GRANTED; it is further
> ORDERED, ADJUDGED AND DECREED that [Mancini] is precluded from offering any expert testimony from her healthcare providers in this matter.

The trial court explained that its order would be in effect subject to the following caveat: "These Findings & Orders will be in effect only to the extent

Plaintiff does not comply with the Order of June 20, 2013 but now by August 16, 2013. (Due to the Motion for Reconsideration & the Court's extended vacation)."

On August 22, the City moved for summary judgment on all of Mancini's remaining claims.

In opposing the City's summary judgment motion, Mancini submitted a sworn declaration from Stamper, in which Stamper found fault with the conduct of the officers involved in the raid of Mancini's apartment. Stamper stated, "I can unequivocally and emphatically state that hitting the wrong door should never happen" and "is the result of poor supervision, improper training and a lack of due diligence in ascertaining the correct residence." "The actions of the officers involved in the Mancini raid," he continued, "demonstrate a failure to apply basic police standards for service of high risk warrants." One of these standards is "never to trust a confidential informant," which "is exactly what the Tacoma Police involved in the Mancini raid did. They relied exclusively on a confidential informant who herself has been involved in the drug trade." According to Stamper, "appropriate procedure in serving a high risk warrant involving drugs dictates that officers perform a 'controlled buy' prior to any raid." He noted that the Tacoma Police had had ample time to do this.

"Another failure of appropriate policies and procedures," according to Stamper, "is that the Tacoma Police failed to conduct any surveillance on the Mancini apartment prior to the raid." "Typically," he noted, "when someone is dealing drugs out of their residence, drug traffic can be observed as customers come and go to purchase the controlled substance being sold."

Stamper also stated that, in his opinion, the "officers were inside the residence longer than they have acknowledged." "Based upon Ms. Mancini's account, (and their own conflicting reports) the Tacoma police officers on the premises conducted much more than a single sweep of the premises." He also found it "highly unusual . . . that no verified time [for each essential step in the raid] is contained in the incident report other than the time this operation began," such that it "raises doubts about the validity of the officers' accounts."

Stamper concluded, "Because the Tacoma Police officers involved in this raid hit the wrong door, the search warrant obtained by Officer Smith was inappropriately obtained." He also noted that forcible entries of the type that occurred in Mancini's apartment are dangerous to both officers and residents, particularly with the adoption of "increasingly militaristic approaches to law enforcement since the advent of the war on drugs and the events of 9/11." As an observer of dozens of forcible entries, Stamper reported that "forcible entry terrifies and traumatizes residents, whether or not they are the correct target of the raid." He stated that Mancini's "report of trauma certainly fits with the profile of people I have personally observed and spoken with who have experienced forcible raids."

On September 20, 2013, a hearing on the City's summary judgment motion was held. Six days later, the trial court granted summary judgment in favor of the City and dismissed all of Mancini's remaining claims.

Mancini appeals.[9]

II

Mancini contends that the trial court improperly granted summary judgment in favor of the City. As a result, she asserts, her claims of negligence, battery, assault, false imprisonment, defamation, invasion of privacy, and outrage were erroneously dismissed. Although the trial court was right to dismiss Mancini's claims of defamation and outrage, it erred in dismissing the remainder of her aforementioned claims. Of particular note was the dismissal of her negligence claim, which, as we explain herein, is not barred by the public duty doctrine.

"We review a summary judgment order de novo." Lokan & Assocs., Inc. v. Am. Beef Processing, LLC, 177 Wn. App. 490, 495, 311 P.3d 1285 (2013).

[9] Mancini does not, in her notice of appeal, designate for appellate review the trial court's order granting partial judgment on the pleadings. Consequently, we do not consider her claims of negligent training and supervision, due process violations, and use of excessive force, which were dismissed as a result of the trial court's order granting partial judgment on the pleadings. See RAP 5.3(a) (a notice of appeal must "designate the decision or part of decision which the party wants reviewed"); Right-Price Recreation, LLC v. Connells Prairie Cmty. Council, 146 Wn.2d 370, 378, 46 P.3d 789 (2002).

Mancini did, in her notice of appeal, designate for appellate review the trial court's order granting summary judgment. Furthermore, in her merits briefing, she assigned error to the CR 56(c) dismissal of her claims of negligence, false imprisonment, invasion of privacy, and outrage. She also provided reasoned argument with citation to relevant authority to support her contention that these claims were improperly dismissed. Accordingly, we consider the propriety of summary adjudication as to each of these claims.

While Mancini did not, in her merits briefing, assign error to the dismissal of her claims of assault, battery, and defamation, she provided reasoned argument with citation to relevant authority to support her contention that these claims were improperly dismissed. The City responded to these arguments. Therefore, notwithstanding Mancini's failure to comply with RAP 10.3(a)(3), we exercise our discretion to consider the propriety of summary adjudication as to each of these claims. Viereck v. Fibreboard Corp., 81 Wn. App. 579, 582-83, 915 P.2d 581 (1996).

Mancini also did not, in her merits briefing, assign error to the dismissal of her claims of false light and violation of RCW 49.60.030. Moreover, she did not provide reasoned argument supported with citation to relevant authority regarding these claims. Therefore, we do not consider the propriety of summary adjudication as to either claim.

"When reviewing an order granting summary judgment, we engage in the same inquiry as the trial court, viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party." Brown v. Brown, 157 Wn. App. 803, 812, 239 P.3d 602 (2010). "The motion should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Mayer v. City of Seattle, 102 Wn. App. 66, 75, 10 P.3d 408 (2000). "'A material fact is one upon which the outcome of the litigation depends in whole or in part.'" Brown, 157 Wn. App. at 812 (quoting Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990)).

A

We first consider whether the public duty doctrine immunizes the City from being held liable for the alleged negligence of its officers. In doing so, we examine at some length Justice Chambers' concurring opinion in Munich. Nominally, his opinion was a concurrence. However, it was signed by a majority of the members of our state's highest court. Accordingly, it controls our decision in this matter.

In Munich, Justice Chambers observed that the public duty doctrine was a source of "great confusion."

> We (and I include myself) have not been careful in what we have said in past cases. This has given rise to deeply held and greatly divergent views on the doctrine. Some think the public duty doctrine is a tort of its own imposing a duty on any government that gives assurances to someone. Some view it as providing some sort of broad limit on all governmental duties so that governments are never liable unless one of the four exceptions to the public duty

> applies, thus largely eliminating duties based on the foreseeability of avoidable harm to a victim.

Munich, 175 Wn.2d at 886 (Chambers, J., concurring).

Justice Chambers set out to dispel this confusion.[10] He began by taking note of the legislature's repeal, in 1961, of State sovereign immunity.

> Amended only once . . . , the repeal of state immunity presently

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[10] This was not the first time Justice Chambers had written separately to address the subject of the public duty doctrine. See Cummins v. Lewis County, 156 Wn.2d 844, 133 P.3d 458 (2006) (Chambers, J., concurring); Babcock, 144 Wn.2d at 795-802 (Chambers, J., concurring). However, prior to Munich, Justice Chambers advocated that the public duty doctrine be either disavowed or limited to its original function.

> However imperfect our system of justice may be, there are certain goals of perfection for which we must strive. Equal justice for all is one of those elusive but desirable goals. We know that all people are not necessarily created equal; some are rich and some are poor, and some are given greater opportunities to develop their natural gifts and talents. The institution of our courts must be the great leveler—where justice is blind and a pauper and a king are judged by the same standard. In our courts of law every party must be treated equally. It is therefore contrary to the general principles of law that one party be granted a special set of rules not afforded to others. The public duty doctrine is one of those special privileges afforded some parties, which is antithetical to the foundations of our law.

Babcock, 144 Wn.2d at 795 (Chambers, J., concurring).

> I would, without reversing any of our prior decisions, simply decide this and all future government liability cases based upon traditional tort law analysis. Traditional tort liability analysis focuses on policy, foreseeability of injury, and proximate cause. The advantages of this approach are several. Traditionally tort duty analysis focuses consideration on the policy of whether the government should owe a duty in a given situation. When a government entity performs a function that is not paralleled in the private sector, such as the issuance of permits and inspection of construction, this Court should analyze the policy concerns unique to those public functions. Traditional tort duty analysis focuses on the class of persons intended to be protected as opposed to the relationship between the plaintiff and government entity. Traditional tort analysis applies the same standard of care to all parties, does not perpetuate the state's immunity, does not conflict with the legislative statutes abrogating governmental immunity and furthers our goal of providing equal justice to all parties.

Babcock, 144 Wn.2d at 800 (Chambers, J., concurring) (footnote omitted).

> The modern public duty doctrine ignores Washington's legislative waiver of sovereign immunity by creating a backdoor version of government immunity unintended by the legislature. It directs this court's attention away from its proper considerations of policy, foreseeability, and proximate cause in favor of a mechanical test that will inevitably lead us to absurd results. The public duty doctrine undercuts legislative intent, is harmful, and should either be abandoned or restored to its original limited function.

Cummins, 156 Wn.2d at 861 (Chambers, J., concurring).

> reads as follows: "The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct *to the same extent* as if it were a private person or corporation."

Munich, 175 Wn.2d at 887 (Chambers, J., concurring) (emphasis added) (quoting RCW 4.92.090).[11]

While "[t]here was a time when the king could do no wrong and the sovereign was immune from suit," the doctrine of sovereign immunity "became increasingly unpopular among" members of the judiciary, the legislature, and the academy, many of whom believed that "government should be more accountable for its conduct." Munich, 175 Wn.2d at 887 (Chambers, J., concurring). In repealing sovereign immunity, the legislature determined that the ideal increase in government accountability meant that governments should be held liable for their tortious conduct "'to the same extent'" as private persons or corporations. Munich, 175 Wn.2d at 886 (Chambers, J., concurring) (quoting RCW 4.92.090).

Commencing his analysis with the repeal of sovereign immunity was not merely a show of decorum: Justice Chambers meant to demonstrate that, although the public duty doctrine was created by the judiciary in response to the repeal of immunity, it was not (and could not have been) a judicial retrenchment of the legislature's decision to democratize tort liability. To the contrary, the public duty doctrine was created "to ensure that governments are not," as a consequence of immunity being withdrawn, "saddled with *greater liability* than private actors as they conduct the people's business." Munich, 175 Wn.2d at

[11] Justice Chambers also noted the express legislative repeal, in 1967, of immunity for local governments. Munich, 175 Wn.2d at 887 (Chambers, J., concurring).

886 (Chambers, J., concurring) (emphasis added). This was a very real concern, given that "statutes and ordinances imposed duties on governments not imposed upon private persons or corporations." Munich, 175 Wn.2d at 887 (Chambers, J., concurring). On account of this concern, "when a duty was imposed or mandated upon a government entity by statute or ordinance," the court found the public duty doctrine to be a useful tool in determining whether the legislature intended the mandated duty to be "owed to the public in general or to a particular class of individuals." Munich, 175 Wn.2d at 887-88 (Chambers, J., concurring). If application of the public duty doctrine revealed that a mandated duty was owed the public in general, then a breach of that duty would not give rise to liability in tort—a principle that prompted the proverb, "'a duty to all is a duty to no one.'" Munich, 175 Wn.2d at 889-90 (Chambers, J., concurring) (internal quotation marks omitted) (quoting Meaney v. Dodd, 111 Wn.2d 174, 759 P.2d 455 (1988)); cf. Babcock v. Mason County Fire Dist. No. 6, 144 Wn.2d 774, 796, 30 P.3d 1261 (2001) (Chambers, J., concurring) ("Initially the public duty doctrine was simply another way of saying the state did not have a duty to everyone.").

Justice Chambers took pains, however, to explain that in the absence of a *mandated* duty, the public duty doctrine would be of no use in determining the scope of government liability. This was so because, if no duty has been mandated, it is axiomatic that the scope of government liability is, as a result of the repeal of sovereign immunity, coterminous with that of private persons or corporations. See Munich, 175 Wn.2d at 888 (Chambers, J., concurring) ("Because the legislature had declared that governments were to be liable for

their tortious conduct just like private persons or corporations, the public duty doctrine was not applied to duties that governments had in common with private persons."). The public duty doctrine—a judicially-created tool for ascertaining legislative intent—is unable to limit "the government's *common law duties* to only those with whom the government has a special relationship, while extending the liability of private individuals to all those foreseeably harmed by a breach of the same common law duties." Munich, 175 Wn.2d at 892 (Chambers, J., concurring) (emphasis added). Indeed, if the public duty doctrine were, in fact, applied in such fashion, it would "violate the clear declaration of the legislature that governments are to be liable 'to the same extent' as private persons or corporations." Munich, 175 Wn.2d at 892 (Chambers, J., concurring) (quoting RCW 4.92.090; RCW 4.96.010(1)).

As Justice Chambers summarized the Supreme Court's precedents:

> Although we could have been clearer in our analyses, the only governmental duties we have limited by application of the public duty doctrine are duties imposed by a statute, ordinance, or regulation. This court has never held that a government did not have a common law duty solely because of the public duty doctrine.

Munich, 175 Wn.2d at 886-87 (Chambers, J., concurring) (footnote omitted).

Mancini's claim herein is much unlike the claims to which the public duty doctrine has been applied. At common law, a private party had no duty to go to the rescue of another private party. Similarly, "[a]t common law, the police did not have a duty to respond to citizen calls." Cummins v. Lewis County, 156 Wn.2d 844, 870, 133 P.3d 458 (2006) (Chambers, J., concurring). Thus, disputes involving the public duty doctrine have frequently arisen in lawsuits

stemming from calls to 911 seeking rescue or assistance. See, e.g., Munich, 175 Wn.2d 871; Harvey v. Snohomish County, 157 Wn.2d 33, 134 P.3d 216 (2006); Cummins, 156 Wn.2d 844; Bratton v. Welp, 145 Wn.2d 572, 39 P.3d 959 (2002); Beal v. City of Seattle, 134 Wn.2d 769, 954 P.2d 237 (1998); Chambers-Castanes v. King County, 100 Wn.2d 275, 669 P.2d 451 (1983). Mancini brings no such lawsuit. Nor does she claim that the City had a duty to ferret out Logstrom's criminal behavior, that it failed to do so, and that she was injured as a result. Cf. Aba Sheikh v. Choe, 156 Wn.2d 441, 128 P.3d 574 (2006); Bailey v. Town of Forks, 108 Wn.2d 262, 737 P.2d 1257, 753 P.2d 523 (1987).

Instead, Mancini's claim is a straightforward one, grounded in the common law. She claims that she had a common law right in the sanctity of her home and that the City's agents had a duty not to engage in a nonconsensual invasion of her dwelling. This duty, the duty to refrain from invading a private individual's home, whether intentionally (a trespass) or negligently (resulting from the absence of due care) is one of common law origin and applies to all. Her neighbors could not invade her home. The same is true of the City's agents.

In our view, a simple analogy can be drawn. For instance, a private individual driving a car, upon approaching a stop sign, has a duty to slow down and avoid crashing into a vehicle stopped at the stop sign. This duty also applies to a police officer driving a patrol car. And, contrary to the City's position in this litigation, the existence of the duty to stop—and an actionable breach thereof should the officer's vehicle collide with the other vehicle—does not depend on whether the officer's inattention resulted from the officer's munching on a

sandwich (a purely private act) or punching data into the patrol car's computer (a governmental act). In either instance, the officer (and his employer) would be liable in tort to the same extent as would be a private actor. The public duty doctrine would not bar a claim by the driver or owner of the favored vehicle.

Munich compels this analysis. Indeed, from this recent pronouncement of a majority of our Supreme Court, several points are made clear. First, the public duty doctrine is not a grant of immunity or a version of an immunity analysis. Second, the public duty doctrine has never been applied by the Supreme Court to bar a claim alleging the breach of a common law duty by a governmental actor. Third, the public duty doctrine only applies to tort claims premised upon a violation of a statute, ordinance, or regulation when the duty imposed by the statute, ordinance, or regulation was owed to the public in general, as opposed to the claimant in particular. Fourth, if a private person would be liable in tort to the particular claimant, so too would be a governmental actor.

Mancini alleges the breach of a common law duty, applicable to private actors and governmental actors alike. The duty was owed directly to her, as the occupant of the home. It was not a duty owed to society in general.

The public duty doctrine is not a judicially-created immunity. It does not bar a common law claim brought by the person to whom the breached duty was owed. The trial court erred in dismissing Mancini's negligence claim.[12]

[12] The City attempts to reformulate Mancini's claim as being one for the nonexistent cause of action of negligent investigation. Mancini is correct in rejecting this reformulation. Mancini does not allege that a negligent investigation led to her being wrongly considered a

B

Having addressed Mancini's negligence claim, we now consider the propriety of summary adjudication as to her intentional tort claims, which include assault and battery, false imprisonment, defamation, invasion of privacy, and outrage. We conclude that Mancini failed to establish a prima facie case of defamation and of outrage and, consequently, we affirm the dismissal of these two claims. However, the trial court erred in dismissing Mancini's claims of assault and battery, false imprisonment, and invasion of privacy; thus, we reverse the dismissal of these claims.

i

Mancini first contends that the trial court erred in dismissing her claims of assault and battery. She maintains that genuine issues of material fact exist regarding the reasonableness of the force that was used against her. We agree.

"A battery is '[a] harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff or a third person to suffer such a contact, or apprehension that such a contact is imminent.'" McKinney v. City of Tukwila, 103 Wn. App. 391, 408, 13 P.3d 631 (2000) (alteration in original) (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 9, at 39 (5th ed. 1984)). "An assault is any act of such a nature that causes apprehension of a battery." McKinney, 103 Wn. App. at 408.

While, in general, "a police officer making an arrest is justified in using

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suspect in a crime. Nor does she allege that a negligent investigation allowed the true criminal to cause her harm. The City's attempt to reformulate her claim is off the mark.

sufficient force to subdue a prisoner," an officer "becomes a tortfeasor and is liable as such *for assault and battery* if unnecessary violence or excessive force is used in accomplishing the arrest." Boyles v. City of Kennewick, 62 Wn. App. 174, 176, 813 P.2d 178 (1991). An early description of the standard for determining whether excessive force was used, which has since become known as the "test of reasonableness," has continued validity.

> In this state, where the common law rule prevails, a police officer is justified in making an arrest when he has reasonable ground to believe, and does believe, that a crime is being committed, and, having the right to make the arrest, he has the right to use that degree of force the circumstances of the case warrant; that is to say, if the crime is a misdemeanor, he may use the force the law permits in making arrests for misdemeanors; and if it be a felony, he may use the force the law permits in making arrests for felony. When, therefore, an officer is called upon to answer for a claimed unlawful arrest, or for excessive use of force in making a lawful arrest, he has the right to show the circumstances surrounding the transaction, and the impression these circumstances make on his mind, and to have the jury charged on his theory of the case; unless, of course, the circumstances were such that there could be no two opinions concerning it.

Coldeen v. Reid, 107 Wash. 508, 516, 182 P. 599 (1919).

A more recent articulation of the "test of reasonableness" instructs courts to consider the "(1) severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." Staats v. Brown, 139 Wn.2d 757, 774, 991 P.2d 615 (2000) (citing Graham v. Connor, 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)).

Viewed in the light most favorable to Mancini, the trial court record shows that Mancini was menaced with firearms, shouted at, pushed face down on the

floor, and placed in handcuffs, before being picked up off of the floor and forcibly led to the entrance of her apartment. Although Officer Smith immediately realized that Mancini's apartment did not match the description given by the CI, Mancini was kept in restraints for 30 minutes, during which time officers repeatedly shoved a picture of a man (who she did not recognize) in her face, shouting, "Where is he? Where is he?" Additionally, the officers led Mancini, who was still handcuffed, up two flights of stairs to the parking lot of her building before leading her back to her apartment and, eventually, removing the handcuffs. Mancini was, at the time, 63 years old, and stood approximately five feet tall. She did not, at any point, resist the use of force against her and she was responsive to all of the questions directed to her.

In view of these facts, we decline to hold, as a matter of law, that the force used against Mancini was reasonable. Taken in the light most favorable to Mancini, the evidence is sufficient to create a genuine issue of material fact on the question of whether the officers' use of force was reasonable under the circumstances. The answer to this question must come from a trier of fact. Accordingly, we reverse the dismissal of her claims of assault and battery.

ii

Mancini next contends that the trial court erred in dismissing her claim of false imprisonment. She argues that a reasonable trier of fact could conclude that she was confined beyond a reasonable period of time. We agree.

"The gist of an action for false arrest or false imprisonment is the unlawful violation of a person's right of personal liberty or the restraint of that person

without legal authority." Bender v. City of Seattle, 99 Wn.2d 582, 591, 664 P.2d 492 (1983). "[S]uch restraint or imprisonment may be accomplished by physical force alone, or by threat of force, or by conduct reasonably implying that force will be used." Kilcup v. McManus, 64 Wn.2d 771, 777, 394 P.2d 375 (1964). "[T]he plaintiff in a false imprisonment claim must show merely that the defendant intended to confine the plaintiff, not that the defendant intended to do so without legal authority." Stalter v. State, 113 Wn. App. 1, 15, 51 P.3d 837 (2002), rev'd in part on other grounds, 151 Wn.2d 148, 86 P.3d 1159 (2004).

"Although probable cause is generally a defense to false imprisonment, lawful arrest does not necessarily 'foreclose consideration of facts surrounding the subsequent imprisonment.'" Stalter, 113 Wn. App. at 15 (citation omitted) (quoting Kellogg v. State, 94 Wn.2d 851, 854, 621 P.2d 133 (1980); Tufte v. City of Tacoma, 71 Wn.2d 866, 870, 431 P.2d 183 (1967)). Thus, "a lawful imprisonment following proper arrest may under some circumstances become unlawful." Tufte, 71 Wn.2d at 870; see Stalter, 113 Wn. App. at 15 ("an initial justification for the detention does not necessarily shield the County from claims of false imprisonment based on the erosion of that justification over time").

Viewed in the light most favorable to Mancini, the evidence shows that, although Officer Smith immediately observed that the inside of the apartment was not as the CI had described, Mancini was nevertheless kept in confinement for approximately 30 minutes. It is true that the officers were in possession of a warrant to search the premises; however, that fact did not authorize the confinement of Mancini beyond a reasonable period of time. We hold that a jury

could, based on the evidence before the trial court on summary judgment, find that Mancini was kept in confinement beyond a reasonable period of time. Therefore, we reverse the dismissal of her false imprisonment claim and remand for trial.

iii

Mancini next contends that the trial court erred in dismissing her claim of defamation. She maintains that the act of parading her "into a parking lot in full view of a major thoroughfare and the adjoining apartment buildings and condominiums" while in handcuffs was defamatory. Reply Br. of Appellant at 17. Her contention is unavailing.

"When a defendant in a defamation action moves for summary judgment, the plaintiff has the burden of establishing a prima facie case on all four elements of defamation: falsity, an unprivileged communication, fault, and damages." LaMon v. Butler, 112 Wn.2d 193, 197, 770 P.2d 1027 (1989). "Once the plaintiff has established a prima facie case of defamation, the defendant can raise either an absolute or qualified privilege to defend against liability for defamatory statements." Momah v. Bharti, 144 Wn. App. 731, 741, 182 P.3d 455 (2008). "'An absolute privilege or immunity is said to absolve the defendant of all liability for defamatory statements. A qualified privilege, on the other hand, may be lost if it can be shown that the privilege has been abused.'" Momah, 144 Wn. App. at 741 (quoting Bender, 99 Wn.2d at 600). Our Supreme Court has previously ruled that "the release of information to the press and public by police officers" is subject to a "qualified privilege." Bender, 99 Wn.2d at 601.

In order to establish an abuse of a qualified privilege, there must be "proof of knowledge or reckless disregard as to the falsity of a statement"—in other words, "actual malice." Bender, 99 Wn.2d at 559, 601-02. Furthermore, "proof of an abuse of a qualified privilege must be established by clear and convincing evidence, not simply by a preponderance of the evidence." Bender, 99 Wn.2d at 601 (adopting rule from RESTATEMENT (SECOND) OF TORTS § 600, at 288 (1977)); accord Momah, 144 Wn. App. at 742 ("Actual malice must be shown by clear and convincing proof of knowledge or reckless disregard as to the falsity of a statement."). "Thus, the showing that a privilege applies raises both the standard of fault and burden of proof, even where the plaintiff is a private individual."[13] Momah, 144 Wn. App. at 742.

Mancini maintains that that the officers acted negligently. Negligence, however, is not the applicable standard of fault. Owing to the officers' qualified privilege, Mancini must show "actual malice" by clear and convincing evidence. Yet, she fails even to assert that she has satisfied this exacting burden of production, and our review of the trial court record reveals that she has not, in fact, met her burden.[14] Consequently, we hold that the trial court did not err in dismissing her defamation claim.

iv

Mancini next contends that the trial court erred in dismissing her claim of

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[13] "When the standard of fault is negligence, the applicable burden of proof is preponderance of the evidence." Momah, 144 Wn. App. at 741.

[14] We need not—and, therefore, do not—reach the issue of whether a publication occurred. See McKinney, 103 Wn. App. at 409-10 (concluding that the issue of publication need not be reached where the nonmovant failed to establish the element of fault).

invasion of privacy by intrusion on seclusion. We agree.

Our Supreme Court has made clear that "the common law right of privacy exists in this state and that individuals may bring a cause of action for invasion of that right." Reid v. Pierce County, 136 Wn.2d 195, 206, 961 P.2d 333 (1998). "A person may sue the government for common law privacy invasion if it intentionally intrudes upon his or her solitude, seclusion, or private affairs." Youker v. Douglas County, 178 Wn. App. 793, 797, 327 P.3d 1243, review denied, 180 Wn.2d 1011 (2014). But cf. Reid, 136 Wn.2d at 213-14 (refusing to create a constitutional cause of action for governmental privacy invasions).

The following elements must be proved by a preponderance of the evidence to establish a prima facie claim of invasion of privacy: (1) an intentional intrusion, physically or otherwise, upon the solitude or seclusion of plaintiff, or her private affairs; (2) a legitimate and reasonable expectation of privacy with respect to that matter or affair; (3) an intrusion that would be highly offensive to a reasonable person; and (4) damage proximately caused by the defendant's conduct. John Doe v. Gonzaga Univ., 143 Wn.2d 687, 705-06, 24 P.3d 390 (2001), rev'd on other grounds, 536 U.S. 273, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002). "'[T]he intruder must have acted deliberately to achieve the result, with the certain belief that the result would happen.'" Youker, 178 Wn. App. at 797 (alteration in original) (quoting Fisher v. Dep't of Health, 125 Wn. App. 869, 879, 106 P.3d 836 (2005)).

Upon entering Mancini's apartment, Officer Smith—the leader of the raid and the liaison between the CI and law enforcement—immediately recognized

that the apartment did not match the description given by the CI. While Smith claimed the officers only conducted a "brief protective sweep" of the apartment, Mancini alleged that her apartment was searched twice during the 30 minutes she spent in confinement. A reasonable trier of fact could conclude, based on this evidence, that the officers intentionally intruded upon Mancini's seclusion by searching her apartment several times, despite quickly realizing that they had entered the wrong apartment.

The City concedes that there was an intrusion into Mancini's private affairs. However, it argues that the search warrant "superseded [Mancini's] reasonable expectation of privacy" and, therefore, the entry "is not actionable as an invasion of privacy." Br. of Resp't at 26. The City does not cite any authority in support of this position.

We decline to rule that the existence of a warrant forecloses, as a matter of law, a claim of invasion of privacy. As previously explained, the existence of a search warrant does not foreclose, as a matter of law, a claim of false imprisonment. Rather, because probable cause to detain may be eroded over time, subsequent circumstances will, in some cases, necessitate consideration by the trier of fact. Probable cause to search, even when written on a warrant, is not written in stone. Of course, the existence of the warrant may prove difficult for Mancini to overcome insofar as her burden of *persuasion* is concerned. However, the warrant, in and of itself, does not prevent Mancini from presenting her case to a trier of fact. Because we conclude that a reasonable trier of fact could determine that the officers invaded Mancini's privacy, we reverse the

dismissal of this claim.

V

Mancini next contends that the trial court erred in dismissing her claim of outrage. We disagree.

"To establish a claim for the tort of outrage—also known as intentional infliction of emotional distress—the plaintiff must show that (1) he or she suffered severe emotional distress; (2) the emotional distress was inflicted intentionally or recklessly, but not negligently; (3) the conduct complained of was outrageous and extreme; and (4) he or she personally was the subject of the outrageous conduct." Grange Ins. Ass'n v. Roberts, 179 Wn. App. 739, 753-54, 320 P.3d 77 (2013) (footnote omitted), review denied, 180 Wn.2d 1026 (2014). "'[I]t is not enough that a defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by malice, or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort.'" Birklid v. Boeing Co., 127 Wn.2d 853, 868, 904 P.2d 278 (1995) (internal quotation marks omitted) (quoting Grimsby v. Samson, 85 Wn.2d 52, 59, 530 P.2d 291 (1975)). Instead, the conduct "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.'" Grange, 179 Wn. App. at 754 (internal quotation marks omitted) (quoting Reid, 136 Wn.2d at 202). "The question of whether certain conduct is sufficiently outrageous is ordinarily for the jury, but it is initially for the court to determine if reasonable minds could differ on

witness disclosure requirements. Furthermore, she asserts, the harsh sanction of excluding witness testimony was not adequately supported by the requisite findings set forth by our Supreme Court in Burnet v. Spokane Ambulance, 131 Wn.2d 484, 933 P.2d 1036 (1997).

While the record, as designated on appeal, does include an order entered on August 2, 2013, in which the trial court purported to be excluding witness testimony from Mancini's treating healthcare providers, the effect of the order was expressly conditioned on a subsequent failure by Mancini to comply with a prior order within a certain period of time following entry of the order.[15] It is not clear from the record whether this condition, in fact, occurred. Nonetheless, because we reverse in part and remand for further proceedings, we choose to address this issue as presented to us by Mancini, which is to say that we assume that the August 2 order became effective.

A

Washington appellate courts "review a trial court's sanctions for discovery violations for abuse of discretion." Blair v. TA-Seattle E. No. 176, 171 Wn.2d 342, 348, 254 P.3d 797 (2011). An abuse of discretion occurs when a decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006). A decision rests on untenable grounds or is based on untenable reasons if the trial court applies the wrong legal standard. Mayer, 156 Wn.2d at 684. Questions of

[15] As noted, the court stated, "These Findings & Orders will be in effect only to the extent Plaintiff does not comply with the order of June 20, 2013 but now by August 16, 2013. (Due to the Motion for Reconsideration & the Court's extended vacation)."

whether the conduct was sufficiently extreme to result in liability." Dicomes v. State, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989).

The evidence, when viewed in the light most favorable to Mancini, establishes that she was needlessly subjected to both mental and physical distress. Nevertheless, no reasonable trier of fact could find the officers' actions to "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.'" Grange, 179 Wn. App. at 754 (internal quotation marks omitted) (quoting Reid, 136 Wn.2d at 202). As this string of superlatives suggests, outrage is a tort reserved for the most egregious instances of wrongdoing. See, e.g., Kloepfel v. Bokor, 149 Wn.2d 192, 194-95, 66 P.3d 630 (2003) (elements of outrage met when defendant, who was under a no-contact order, threatened to kill his ex-girlfriend, threatened to kill her boyfriend, watched her home, called her home 640 times, called her work 100 times, and called the homes of her male friends numerous times). No reasonable trier of fact could find that the mistreatment suffered by Mancini meets the high standard detailed herein. Accordingly, we hold that the trial court did not err in dismissing Mancini's claim of outrage.

III

Maninci next contends that the trial court, in its August 2, 2013 order, erroneously excluded witness testimony to be given by her treating healthcare providers at trial. According to Mancini, the imposition of this discovery sanction was premised on a misapplication of the superior court civil rule governing

law are reviewed de novo. Mayer, 156 Wn.2d at 684.

As our Supreme Court has made clear: "[T]he law favors resolution of cases on their merits." Burnet, 131 Wn.2d at 498 (alteration in original) (quoting Lane v. Brown & Haley, 81 Wn. App. 102, 106, 912 P.2d 1040 (1996)). Because of this, the court has cabined a trial court's discretion to exclude witness testimony as a means of sanctioning discovery violations. Jones v. City of Seattle, 179 Wn.2d 322, 338, 314 P.3d 380 (2013); Mayer, 156 Wn.2d at 688; Burnet, 131 Wn.2d at 494. Consequently, prior to excluding witness testimony, "the trial court must explicitly consider whether a lesser sanction would probably suffice, whether the violation at issue was willful or deliberate, and whether the violation substantially prejudiced the opponent's ability to prepare for trial." Jones, 179 Wn.2d at 338 (citing Burnet, 131 Wn.2d at 494).

Discovery sanctions should be "proportional to the nature of the discovery violation and the surrounding circumstances" of the case. Rivers v. Wash. State Conf. of Mason Contractors, 145 Wn.2d 674, 695, 41 P.3d 1175 (2002). Generally, "the court may impose only the least severe sanction that will be adequate to serve its purpose in issuing a sanction." Teter v. Deck, 174 Wn.2d 207, 216, 274 P.3d 336 (2012). "We have also said that 'it is an abuse of discretion to exclude testimony as a sanction [for noncompliance with a discovery order] absent any showing of intentional nondisclosure, willful violation of a court order, *or other unconscionable conduct.*" Burnet, 131 Wn.2d at 494 (emphasis added) (alteration in original) (internal quotation marks omitted) (quoting Fred Hutchinson Cancer Research Ctr. v. Holman, 107 Wn.2d 693, 706, 732 P.2d 974

(1987)). As made clear, only "unconscionable conduct" can give rise to the exclusion of testimony as a discovery sanction.

Moreover, the trial court must make a proper record of its consideration. While the court may enter an order imposing a discovery sanction without oral argument or a colloquy on the record, the order (or a contemporaneous record) must contain findings on the Burnet factors of willfulness, prejudice, and consideration of a lesser sanction. Teter, 174 Wn.2d at 216-17. To allow for meaningful review, the findings themselves must explain the court's reasoning for reaching its conclusions. Burnet, 131 Wn.2d at 494. In addition, the order must "be supportable *at the time it was entered.*" Blair, 171 Wn.2d at 350.

As a result of Burnet—and subsequent Supreme Court authority further refining and applying that decision—there exists a presumption that witnesses will be allowed to testify and that they shall not be excluded in situations in which the applicable rule, or its application, is unclear. Such was the case herein.

B

Mancini asserts that she was required to disclose her treating healthcare providers as lay witnesses. Therefore, she argues, the trial court erred by ordering her to disclose to the City the expert witness testimony to be given by her treating healthcare providers at trial.

Both the King County Local Civil Rules and the Superior Court Civil Rules impose certain disclosure requirements with regard to both lay witness testimony and expert witness testimony.

The civil rules provide, in pertinent part, for the following:

> (5) *Trial Preparation: Experts.* Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subsection (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows: . . . .
>
> . . . .
>
> (7) *Discovery From Treating Health Care Providers.* The party seeking discovery from a treating health care provider shall pay a reasonable fee for the reasonable time spent in responding to the discovery.

CR 26(b).

The King County local rules provide, in pertinent part, for the following:

> **(k) *Disclosure of Primary Witnesses. Required Disclosures.***
>
> **(1) Disclosure of Primary Witnesses.** Each party shall, no later than the date for disclosure designated in the Case Schedule, disclose all persons with relevant factual or expert knowledge whom the party reserves the option to call as witnesses at trial.
>
> **(2) Disclosure of Additional Witnesses.** Each party shall, no later than the date for disclosure designated in the Case Schedule, disclose all persons whose knowledge did not appear relevant until the primary witnesses were disclosed and whom the party reserves the option to call as witnesses at trial.
>
> **(3) Scope of Disclosure.** Disclosure of witnesses under this rule shall include the following information:
>
> **(A) All Witnesses.** Name, address, and phone number.
>
> **(B) Lay Witnesses.** A brief description of the witness' relevant knowledge.
>
> **(C) Experts.** A summary of the expert's opinions and the basis therefore and a brief description of the expert's qualifications.
>
> **(4) Sanctions.** Failure to comply with this rule or the court's Order Setting Case Schedule may result in sanctions, including the exclusion of witnesses.

KCLR 26(k).

"[L]ocal rules may not be applied in a manner inconsistent with the civil rules." Jones, 179 Wn.2d at 344. Whereas the King County local rules address expert witness testimony, they do not specifically address treating healthcare

provider testimony. The civil rules, however, address expert witness testimony and treating healthcare provider testimony in separate subsections of Rule 26. This indicates that Rule 26 does not view the two to be coextensive. In other words, under the civil rules, not all prospective testimony of treating healthcare providers is to be considered prospective expert testimony.

Case law confirms this. Referring to former CR 26(b)(4), now enumerated as CR 26(b)(5), we previously announced that, "[u]nder CR 26(b)(4) the distinction between an expert who is testifying as a fact witness and an expert witness who is testifying as a CR 26(b)(4) expert is whether the facts or opinions possessed by the expert were obtained for the specific purpose of preparing for litigation." Peters v. Ballard, 58 Wn. App. 921, 927, 795 P.2d 1158 (1990). Thus, in that case, with respect to a witness, Dr. Kranz, who had provided healthcare to plaintiff Peters, we held that, "Dr. Kranz's knowledge and opinions were derived from his role as Peters' subsequent treating physician, not in anticipation of litigation or for trial. Accordingly, Dr. Kranz should be treated as any other witness." Peters, 58 Wn. App. at 930.

This distinction was again recognized in a later decision, in which the varied legal bases for the prohibition against ex parte contact with such witnesses was discussed. "Ex parte contact with an opposing party's expert medical witness is prohibited by court rule. Ex parte communication with a treating physician who testifies not as an expert but as a fact witness is prohibited as a matter of public policy." Rowe v. Vaagen Bros. Lumber, Inc., 100 Wn. App. 268, 278-79, 996 P.2d 1103 (2000) (citations omitted).

It was on this basis—the recognized distinction between expert witnesses and treating healthcare providers—that Mancini took the position that the local rules called for her to disclose her treating healthcare providers as lay witnesses, as opposed to expert witnesses.

The City disagreed and sought relief from the trial court. It countered that opinion testimony from health care providers constituted expert testimony. In support of its contention, the City cited ER 702, which provides, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

This rule, however, is a rule of evidentiary admissibility, not a rule regarding discovery. The applicable rules, CR 26(b) and KCLR 26(k) are not fully harmonious. If in conflict, the local rule must give way to the Supreme Court's rule. Jones, 179 Wn.2d at 344. This supports Mancini's position.

Having said all this, we readily acknowledge that, in any given case, the superior court has inherent authority to provide for and direct discovery. Mayer, 156 Wn.2d at 689; State v. Mecca Twin Theater & Film Exch., Inc., 82 Wn.2d 87, 90, 507 P.2d 1165 (1973). Accordingly, we do not base our decision on the superior court's incorrect resolution of the conflict between the state and local rules. The trial court had the authority to rule as it did based on its inherent authority, the wording of the various rules notwithstanding. Instead, we analyze whether the court, in its August 2 order excluding testimony from Mancini's

treating healthcare providers, correctly determined that the harsh sanction of witness exclusion was justified in this instance.

C

We conclude that the trial court erred in determining that the harsh sanction of witness exclusion was justified in this instance. Although the court, in its August 2 order, invoked the language of the requisite factors that comprise the Burnet inquiry, it failed to adequately explain the bases for its findings. In the absence of such an explanation, we are unable to conclude that the severity of the sanction imposed by the court was tailored to the nature of the prejudice suffered by the City as a consequence of Mancini's discovery violation.

A fundamental purpose of the discovery process is to prepare both parties for trial. When this purpose is intentionally frustrated by one party, such that another party is prejudiced in its ability to prepare for trial, there is an established preference in favor of curing the resultant prejudice, as opposed to compromising the claims or defenses of either party at trial. E.g., Burnet, 131 Wn.2d at 498. This preference helps to explain our Supreme Court's insistence that the severity of a discovery sanction imposed by a trial court must be tailored to the nature of the prejudice caused by the discovery violation being sanctioned. See Jones, 179 Wn.2d at 345 ("Burnet requires that a trial court consider lesser sanctions 'that could have advanced the purposes of discovery and yet compensated [the opposing party] for the effects of the . . . discovery failings.'" (alterations in original) (quoting Burnett, 131 Wn.2d at 497)); Teter, 174 Wn.2d at 216 ("the court may impose only the least severe sanction that will be adequate to serve its

purpose in issuing a sanction"); Rivers, 145 Wn.2d at 695 ("the sanction imposed should be proportional to the nature of the discovery violation and the surrounding circumstances").

In its August 2 order, the trial court found that Mancini had willfully violated a discovery order, that the City had been substantially prejudiced as a result, and that the court had considered but ultimately rejected lesser sanctions than witness exclusion. However, because the court did not provide an explanation of the nature of the prejudice to the City caused by the discovery violation, we are unable to determine that exclusion was the least severe sanction adequate to serve the court's purpose in sanctioning Mancini.[16]

Tellingly, the court's findings that lesser sanctions would not have sufficed was entered while discovery was still ongoing. Ordinarily, under such circumstances, any prejudice to a defendant's ability to prepare for trial could be cured by sanctions less severe than witness exclusion. Cf. Jones, 179 Wn.2d at 346 ("prejudice" finding satisfied Burnet requirements where trial court excluded testimony that had been offered for the first time only after trial had begun). For instance, if the trial court in this matter had found that the City was prejudiced in that it lacked sufficient information with which to examine Mancini's witnesses at trial, the court could have ordered the City to depose Mancini's witnesses, but at

[16] The trial court's findings are deficient in two important regards. First, the court did not set out in what way Mancini's discovery disclosures were insufficient. Specific findings on this question would inform any finding of prejudice. Second, the court did not set out the nature of the prejudice to the City. Specifically, it is not clear whether the trial court believed that the City's ability to adequately depose Mancini's witnesses was compromised or whether it believed that the City planned to try the case without ever deposing Mancini's witnesses, and that, accordingly, the deficient disclosures prejudiced the City's ability to deal (at trial) with the testimony of Mancini's witnesses.

Mancini's expense. See Mayer, 156 Wn.2d 677 (trial courts may impose monetary compensatory discovery sanctions without conducting a Burnet analysis). If the court had instead found that the City was prejudiced in that it did not have sufficient information with which to depose Mancini's witnesses, the court could have ordered the City to depose Mancini's witnesses twice: the first at Mancini's expense (and limited to discovering those facts that the court found were missing from Mancini's disclosures), the second at the City's expense. In either scenario, any prejudice to the City would have been cured without compromising Mancini's presentation of her claims at trial.

In view of the foregoing, we conclude that the sanction imposed by the trial court in its August 2 order was too severe. Not only did the court fail to explain the nature of the prejudice to the City, it failed to explain why, under such circumstances, lesser sanctions—such as those detailed herein—would have been insufficient to cure the prejudice to the City.[17] Because the trial court's order did not evidence that the severity of the sanction imposed was tailored to the nature of the prejudice suffered, the usual presumption that witnesses will be allowed to testify was not overcome. As such, the order must be vacated.[18]

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[17] Supreme Court precedent makes clear that under Burnet and its progeny, the party wronged by the discovery violation is not entitled to the sanction it prefers. It is only entitled to the least sanction available to remedy the prejudice identified.

[18] Mancini contends that the trial court abused its discretion when it ordered her to obtain her records from Group Health and provide them to the City. However, the trial court's unambiguous order directed Mancini's "treating healthcare providers, Elizabeth Daniels, MA, and Group Health, are hereby ordered to produce to the Tacoma City Attorney's Office complete and unredacted copies of [Mancini's] medical records for the period of January 1, 2001 to the present." It is apparent, therefore, that Mancini's contention is based on a misreading of the trial court's order. No appellate relief is warranted as Mancini was not directed to do anything. We

IV

Mancini requests an award of attorney fees and costs on appeal. She does so in a single sentence: "Appellants' counsel requests attorneys fees and costs pursuant to RAP 18.1." Br. of Appellant at 48.

Attorney fees and costs will be awarded on appeal if (1) applicable law grants a party the right to recover reasonable attorney fees on review and (2) the party devotes a section of its opening brief to the request for fees. RAP 18.1. However, we will deny a request for attorney fees and costs where the requesting party devotes to the issue only one sentence in its brief's concluding paragraph. See, e.g., Wilson Court Ltd. P'ship v. Tony Maroni's, Inc., 134 Wn.2d 692, 710-11 n.4, 952 P.2d 590 (1998). "Argument and citation to authority are required" to advise us of the appropriate ground for an award of fees and costs; the parties must make "more than a bald request for attorney fees." Wilson Court, 134 Wn.2d at 710-11 n.4.

Mancini devotes only one sentence in her opening brief's concluding paragraph to her request for fees and costs and fails to cite to any authority in support of the request. Accordingly, we deny her request.[19]

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will not speculate as to the trial court's options should either Daniels or Group Health (who are not parties to this action) refuse to comply.

[19] Mancini's request that we remand this matter to a different trial judge is also denied.

Affirmed in part, reversed in part and remanded.

We concur:

APPENDIX 6

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ESTATE OF STEPHEN CUNNINGHAM, PHIL CUNNINGHAM,

Plaintiffs,

v.

CITY OF TACOMA, JIMMY WELSH, PATRICK PATTERSON, OFFICERS JOHN OR JANE DOE 1-5,

Defendants.

CASE NO. 3:16-CV-05835-DWC

ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73, and Local Rule MJR 13, the parties have consented to have this matter heard by the undersigned Magistrate Judge. Dkt. 9. Currently before the Court is Defendants City of Tacoma, Jimmy Welsh, and Patrick Patterson's Motion for Summary Judgment ("Motion"). Dkt. 18.

The Court concludes Plaintiffs, the Estate of Stephen Cunningham and Phil Cunningham, have failed to rebut Defendants' summary judgment showing. Accordingly, the Court grants the

Motion. Additionally, the Court dismisses the Doe defendants due to Plaintiffs' failure to prosecute. Accordingly, this case is closed.

I. BACKGROUND

Plaintiffs bring this civil action under 42 U.S.C. § 1983 challenging the actions of Defendants City of Tacoma, Welsh, and Patterson during a police-involved shooting. *See* Dkt. 1-1. Plaintiffs allege Defendants City of Tacoma and Welsh, a police officer with the Tacoma Police Department, violated Stephen Cunningham's ("Stephen") constitutional rights when Defendant Welsh shot and killed Stephen. *Id*. Plaintiffs also contend Defendants City of Tacoma and Patterson violated Phil Cunningham's ("Phil") constitutional rights when Defendant Patterson searched Phil's home without a warrant. *Id*.

Defendants filed the Motion with supporting evidence on January 1, 2018. Dkt. 18-23. Plaintiffs filed a Response with supporting evidence on February 5, 2018. Dkt. 27-35. Defendants filed a Reply and two additional affidavits on February 9, 2018. Dkt. 36-38. The parties did not request oral argument. *See* Dkt. 18, 27. Regardless, the Court has reviewed the record and independently determined oral argument is not necessary in this case.

II. STANDARD OF REVIEW

Summary judgment is proper only if the pleadings, discovery, and disclosure materials on file, and any affidavits, show that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for

the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt"); *see also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

III. EVIDENCE

The relevant evidence shows Defendant Welsh, a police officer with the Tacoma Police Department, was on patrol on the evening of May 10, 2015. *See* Dkt. 20, Welsh Dec., ¶¶ 2-3. Defendant Welsh was a "single officer," meaning he was the only officer in his patrol car. *See* Dkt. 20, p. 13. At approximately 10:00 p.m., Defendant Welsh and non-party Officer Angela Hayes, a police officer with the Tacoma Police Department who was driving a separate patrol car, were dispatched to investigate a noise complaint in the area of 3424 South Proctor Street, Tacoma, Washington. *Id.*; Dkt. 20, Welsh Dec., ¶ 4. The officers responded to the complainant's location and spoke with Angela Sprinkle, the complainant. Dkt. 20, Welsh Dec., ¶ 5; Dkt. 31, Sprinkle Dec., ¶¶ 2-5; Dkt. 20, p. 13. Defendant Welsh stated he could hear the music from inside Ms. Sprinkle's home and the officers advised Ms. Sprinkle that they would make contact with the neighbor and ask the neighbor to turn the music down. Dkt. 20, Welsh Dec., ¶ 5; Dkt. 20, p. 13.

Defendant Welsh and Officer Hayes "walked to the house that was playing music." Dkt. 20, Welsh Dec., ¶ 6. At the time Defendant Welsh initially made contact at the residence, it was a very simple call to request the music be turned down. Dkt. 20, p. 15; Dkt. 23, pp. 19-20. "The

house was a duplex and the music was coming from the unit at the back of the house [, (Unit B)].” *Id*. The officers “entered through a pedestrian gate and walked down a long walkway to reach the door of the unit playing music.” *Id*. There was a large picture window next to the front door of Unit B. *Id*. at ¶ 7; Dkt. 21, Hayes Dec., ¶ 8. The officers could see the lights were on in the home and on the back patio of the home. Dkt. 20, Welsh Dec., ¶ 7. The entire inside of the house was visible; Office Welsh could see the living room, a hallway going back to what appeared to be the bedrooms, the kitchen, and part of the back patio. Dkt. 20, p. 14; *see also* Dkt. 21, Hayes Dec., ¶¶ 8-9.

At this point in the evening, the evidence is in dispute regarding the events which transpired prior to Defendant Welsh shooting Plaintiff.

A. Defendants’ Evidence

Defendants’ evidence shows Defendant Welsh and Officer Hayes, who were both in police uniform, stood in front of the large window next to the front door so the occupants could see they were police officers and not be startled. Dkt. 20, Welsh Dec., ¶ 8; Dkt. 20, p. 13; Dkt. 21, p. 10. Defendant Welsh testified he knocked on the metal storm door frame and said “Tacoma Police.” Dkt. 20, Welsh Dec., ¶ 8. Defendant Welsh did not hear anything immediately after he knocked and announced the officers’ presence. *Id*. However, a few seconds later, Stephen came into the living room, looked towards the back patio, and then made brief eye contact with Defendant Welsh. *Id*. Defendant Welsh continued to knock on the door and, at one point, announced, “Tacoma Police. You just need to turn down your music.” Dkt. 20, Welsh Dec., ¶ 9. While Stephen appeared to react to the officers’ presence when he first entered the living room, Defendant Welsh did not feel threatened. Dkt. 20, p. 15.

Officer Hayes testified that Stephen looked at the officers and Defendant Welsh knocked and said "Tacoma Police" while Stephen was in the room. Dkt. 21, Hayes Dec., ¶ 9; Dkt. 20, p. 11. Stephen had a blank stare, or "thousand yard stare," and did not acknowledge the officers. Dkt. 21, Hayes Dec., ¶ 9. Officer Hayes stated that a "thousand yard stare" is usually associated with "PCP, hallucinogens," and, in her training, officers cannot negotiate with an individual exhibiting a "thousand yard stare." Dkt. 21, p. 15. Stephen then walked back towards the kitchen and the sliding door that provided access to the back patio. Dkt. 21, Hayes Dec., ¶ 9; Dkt. 20, Welsh Dec., ¶ 10; Dkt. 20, p. 15.

After Stephen walked away, both Defendant Welsh and Officer Hayes noticed "a firearm sitting on the coffee table, with two magazines right next to it." Dkt. 20, Welsh Dec., ¶ 10; Dkt. 21, Hayes Dec., ¶ 9. Defendant Welsh stated the gun appeared to be a Kimber 1911 with a dark metallic finish; it was in a small holster, like a pressure holster. Dkt. 20, p. 15. Defendant Welsh did not consider the mere presence of the firearm to be a threat. Dkt. 20, Welsh Dec., ¶ 10; Dkt. 20, p. 15.

Defendant Welsh knocked an additional time and Stephen turned back towards the living room. Dkt. 21, Hayes Dec., ¶ 10. Defendant Welsh, who was standing at least partially in front of the window, flashed his flashlight on himself briefly to show he was a police officer. Dkt. 20, Welsh Dec., ¶ 11. Stephen looked at the officers again; he now looked frantic, angry, intense, and crazed. *Id.*; Dkt. 20, p. 16. Stephen made a gesture and said something to the effect of "oh, okay" or "oh, no, your (sic) gonna get it." Dkt. 20, Welsh Dec., ¶ 11. Stephen picked up speed, moving towards the gun. Dkt. 21, p. 12. He fixated on the gun and grabbed for it. Dkt. 20, Welsh Dec., ¶ 11; Dkt. 21, Hayes Dec., ¶ 10. Defendant Welsh stated that he was "immensely fearful" Stephen would begin shooting the officers through the door of the house. Dkt. 20, p. 17.

The officers were in a terrible tactical position. Dkt. 20, Welsh Dec., ¶ 12. The coffee table, where the gun was located, was very close to the officers. *Id*. The officers could not retreat the way they had come because it was a long walkway with no cover and they would have their backs to Stephen. *Id*.; *see also* Dkt. 20, p. 16. Thus, when Stephen reached for the gun, both Defendant Welsh and Officer Hayes ran to the west side of the house and into the backyard. Dkt. 20, Welsh Dec., ¶ 11; Dkt. 21, Hayes Dec., ¶ 11. There was no doubt in Officer Hayes's mind that the officers were in danger when they ran around the northwest corner of the house into the backyard. Dkt. 28-2, p. 10 (Hayes Depo., p. 31).

Officer Hayes ran to take cover at the southwest corner of the house. Dkt. 28-2, p. 10 (Hayes Depo., p. 31). When Officer Hayes arrived at the southwest corner she engaged with a male wearing a white shirt. Dkt. 21, Hayes Dec., ¶ 12. She directed him to stay where he was and show her his hands. *Id*. Officer Hayes heard Stephen say, "I'm going to fucking kill you guys" and the male in the white shirt ran into the house through the back patio door. *Id*.

After Defendant Welsh ran around the northwest corner of the house, he began walking backwards towards the southwest corner of the house when he heard Stephen slam the front door open and heard Officer Hayes contact someone from her location near the southwest corner of the house. Dkt. 20, Welsh Dec., ¶ 13; Dkt. 20, p. 17. Defendant Welsh did not know if the individual Officer Hayes was engaged with was collaborating with Stephen or just someone in the backyard. Dkt. 20, p. 18. When Defendant Welsh reached the southwest corner of the house, he attempted to use as much of the corner of the house as he could to shield Officer Hayes from Stephen. Dkt. 20, p. 18. Defendant Welsh saw Stephen peer around the northwest corner of the house like he was looking for the officers with his gun out at "low ready." Dkt. 20, Welsh Dec., ¶ 13; Dkt. 20, p. 18. Defendant Welsh could see the gun in Stephen's right hand. Dkt. 20, p. 18.

Defendant Welsh was repeatedly screaming, "Tacoma Police! Drop your gun!" Dkt. 20, Welsh Dec., ¶ 13.

Defendant Welsh's head was sticking out from behind the southwest corner of the house and Stephen looked right at him. Dkt. 20, p. 18. Stephen disappeared around the northwest corner of the house and said something like "I'm going to get you!" or "I'm going to fucking kill you guys." Dkt. 20, Welsh Dec., ¶ 13; Dkt. 21, Hayes Dec., ¶ 12. Stephen then came directly around the northwest corner of the house with his gun raised and aimed at Defendant Welsh, who believed Stephen was coming to shoot the officers. Dkt. 20, Welsh Dec., ¶ 13; *see also* Dkt. 20, pp. 18-19. Officer Hayes heard Defendant Welsh say "Drop your weapon. Drop your weapon" and then heard Defendant Welsh fire his weapon several times. *Id*.

Defendant Welsh dropped his flashlight and fired four or five shots at Stephen. Dkt. 20, Welsh Dec., ¶ 13; Dkt. 20, p. 18. He stopped for a "split second," saw that Stephen was not incapacitated, still holding his gun in his left hand three quarters of the way up, and facing the officers. Dkt. 20, Welsh Dec., ¶ 13; Dkt. 20, pp. 18-19. Defendant Welsh fired a second volley of shots until Stephen fell to the ground. Dkt. 20, Welsh Dec., ¶ 13; Dkt. 20, pp. 18-19. Stephen's gun was "recovered with the safety off, in firing configuration with the hammer cocked and a round in the chamber," indicating Stephen was intent to fire the weapon. Dkt. 23, p. 26.

During the shooting, the officers were located near the southwest corner of the house and were standing close enough that the casings from Defendant Welsh's weapon hit Officer Hayes on the shoulder. Dkt. 20, Welsh Dec., ¶ 21; Dkt. 21, Hayes Dec., ¶ 12; Dkt. 28-2, p. 13 (Hayes Depo., p. 34); *see also* Dkt. 20, p. 17. Additionally, Defendants' evidence shows Defendant Welsh knocked and announced the officers probably four different times between the time the officers arrived at the home and when Stephen grabbed his gun. Dkt. 20, Welsh Dec., ¶ 9. There

is also evidence showing Andrew Blinn, one of Stephen's roommates who was present that evening, stated "he knew that Officer Hayes and Officer Welsh were police officers, and that he didn't know why [Stephen] didn't also know this." Dkt. 23, p. 24.

Defendants submitted an expert report stating that when Stephen armed "himself with a semi-automatic pistol" and moved "aggressively towards the officers," his actions constituted attempted assault in the first degree. Dkt. 23, p. 22. Additionally, Stephen's actions of moving toward the officers and raising the weapon met the elements of attempted assault in the first degree or attempted murder in the second degree. Dkt. 23, p. 24.

After the shooting occurred, Defendant Patterson, a police officer with the Tacoma Police Department, contacted the occupants in the other half of the duplex, Unit A. Dkt. 22, Patterson Dec., ¶¶ 2, 4. The occupants, Phil and Beverly Cunningham, are Stephen's parents. *See id*. at ¶ 5. Defendant Patterson initially asked the Cunninghams to move away from the wall shared with Unit B for their safety. *Id*. There was a concern there were individuals still inside Unit B who were not responding to the police. *Id*. at ¶ 4. Defendant Patterson was talking to the Cunninghams through the open front door when he was directed to obtain information from them about the occupants of Unit B. *Id*. at ¶ 6. Defendant Patterson does not recall if a sergeant or another officer asked him to obtain information from the Cunninghams. *Id*. While speaking through the open door, Mrs. Cunningham invited Defendant Patterson into the home. *Id*. at ¶ 7. Defendant Patterson does not recall if he asked if he could come in or if she "just invited" him inside; however, he does recall Mrs. Cunningham being concerned about leaving the door open due to the cool air outside. *Id*. Defendant Patterson entered the home and the door was closed behind him and remained closed while he was inside. *Id*.

The Cunninghams provided Defendant Patterson with information about the occupants of Unit B, including the fact that there were other weapons inside Unit B, which led Tacoma Police supervisors to direct SWAT to respond to the scene. *Id*. at ¶ 9; Dkt. 19, p. 75 (police had evidence that there were numerous weapons and possibly an individual who suffered from PTSD in the home). After Defendant Patterson learned that SWAT was being called, non-party Sergeant Verone instructed Defendant Patterson to ask the Cunninghams to leave Unit A for their safety. Dkt. 22, Patterson Dec., ¶ 10. Defendant Patterson instructed the Cunninghams to dress warmly and escorted them from the residence. *Id*. Defendant Patterson later learned the Cunninghams had cameras outside the residence and there was concern the feed could be seen inside Unit B, allowing the occupants to see the police. *Id*. at ¶ 13. The Cunninghams informed Defendant Patterson that the camera feed was only visible in Unit A. *Id*. The police did not re-enter Unit A to check the camera feed. *Id*. Defendant Patterson did not re-enter Unit A, did not search Unit A, and did not see the video feed or access the video cameras or equipment. *Id*. at ¶ 16.

B. Plaintiffs' Evidence

Plaintiffs' evidence shows that on the evening of May 10, 2015, Stephen and Mr. Blinn were sitting on the back patio of Unit B listening to music. *See* Dkt. 30, Blinn Dec., ¶¶ 2-3. They went into the home through the back door and saw multiple flashlights moving on the outside of the living room window. *Id*. at ¶¶ 8-9. Mr. Blinn saw at least two flashlights moving, but he could not see how many individuals were outside the home. *Id*. at ¶¶ 10-11. Mr. Blinn never heard anyone announce themselves. *Id*. at ¶ 12.[1] Stephen grabbed his pistol off the coffee table,

[1] The Court notes Mr. Blinn testified that neither he nor Stephen heard anyone announce themselves; however, Mr. Blinn provides no evidence explaining how he knew what Stephen did or did not hear. *See* Dkt. 30, Blinn Dec., ¶ 12. Therefore, the Court finds Mr. Blinn does not have knowledge of what Stephen heard.

opened the front door, and said, "Really? Who the fuck are you?" *Id*. at ¶¶ 13-14. "There was no response from the individuals outside." *Id*. at ¶ 14. Stephen then walked out the door and turned left; Mr. Blinn followed him out. *Id*. at ¶ 15. As Mr. Blinn took his first step outside the door, he heard approximately six gunshots and dove in the opposite direction. *Id*. at ¶ 16. Stephen was laying twenty feet away from Mr. Blinn. *Id*. at ¶17. Mr. Blinn heard Stephen struggling for breath, then silence, then more gunshots. *Id*. "After the last gunshot, [Mr. Blinn] heard police yelling. Up until that point[, Mr. Blinn] didn't know who was shooting at [himself and Stephen.]" *Id*. Mr. Blinn testified that he never heard an order to drop the gun from the police, who only identified themselves after they fired multiple shots at Stephen. *Id*. at ¶ 18.

After the shooting, Phil was standing at the door of his home and Defendant Patterson forced Phil back into his home. Dkt. 28-1, p. 6 (Phil Depo., pp. 50-52). Defendant Patterson then entered Phil's home without being invited and without a warrant. *Id*. at p. 7 (Phil Depo., p. 53). Defendant Patterson moved the Cunninghams to the back bedroom so they would be away from the windows in the living room because there might be gunshots. *Id*. at p. 9 (Phil Depo., p. 63). Defendant Patterson then told the Cunninghams they had to leave the home because it was going to be searched by the police. *Id*. at p. 8 (Phil Depo., p. 59). Phil saw flash bulbs going off in his bedroom at 3:30 a.m., so he knew the police were in his home taking pictures. *Id*. at p. 12 (Phil Depo., pp. 86-87). Around 6:00 a.m., Phil and his wife were allowed to return to the home to get medications. *Id*. at pp. 10-11 (Phil Depo., pp. 67, 73). No police were in the home at that time. *Id*. at pp. 10 (Phil Depo., p. 67). The Cunninghams were allowed back in their home around 12:20 p.m. on May 11, 2015. *See id*. at p. 11 (Phil Depo., p. 75).

Plaintiffs also submitted declarations from five neighbors who lived near the scene of the shooting. *See* Dkt. 29, Robinson Dec.; Dkt. 31, Sprinkle Dec.; Dkt. 32, Fivecodes Dec.; Dkt. 33,

Sears Dec.; Dkt. 34, Renich Dec.; Dkt. 35, Walter Dec. The neighbors all state that they heard the gunshots, but did not hear anyone identify themselves prior to the shooting. *See* Dkt. 29, Robinson Dec., ¶ 7; Dkt. 31, Sprinkle Dec., ¶ 7; Dkt. 32, Fivecodes Dec., ¶ 5; Dkt. 33, Sears Dec., ¶ 4; Dkt. 34, Renich Dec., ¶5; Dkt. 35, Walter Dec., ¶ 6.

IV. DISCUSSION

In the Motion, Defendants assert there is no genuine issue of material fact regarding: (1) Defendant City of Tacoma's liability; (2) punitive damages; (3) Defendant Welsh's use of deadly force; and (4) Defendant Patterson's entry into Phil's home. Dkt. 18.

A. Defendant City of Tacoma and Punitive Damages

Defendants assert Plaintiffs cannot establish excessive use of force or unlawful entry claims against Defendant City of Tacoma. *See* Dkt. 18, pp. 16-18, 23. Defendants also contend Plaintiffs have not established that there is a basis for punitive damages in this case. *Id*. at pp. 23-24. In their Response to the Motion, Plaintiffs state they dismiss any claim against Defendant City of Tacoma "based on its policy, custom, failure to train, or ratification." Dkt. 27, p. 19. Plaintiffs also concede there is no evidence showing punitive damages are appropriate in this case. *Id*. at p. 21. Based on Plaintiffs' Response, the Court dismisses Defendant City of Tacoma and any claim for punitive damages.

B. Use of Force

Defendants assert the excessive force claim alleged against Defendant Welsh must be dismissed because Defendant Welsh's use of deadly force was objectively reasonably. Dkt. 18. Further, even if Defendant Welsh's actions were not objectively reasonable, he is entitled to qualified immunity. *Id*. "[G]overnment officials performing discretionary functions [are entitled to] a qualified immunity, shielding them from civil damages liability as long as their actions

could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987) (citations omitted). "Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). "In determining whether an officer is entitled to qualified immunity, we consider (1) whether there has been a violation of a constitutional right; and (2) whether that right was clearly established at the time of the officer's alleged misconduct." *Lal v. California*, 746 F.3d 1112, 1116 (9th Cir. 2014) (citing *Pearson*, 555 U.S. at 232).

1. *Constitutional Violation*

First, the Court must determine whether a constitutional violation occurred. Here, Plaintiffs allege Defendant Welsh violated Stephen's Fourth Amendment rights when he failed to warn Stephen prior to using deadly force. Dkt. 1-1, 27.

In the Ninth Circuit, courts "analyze all claims of excessive force that arise during or before arrest under the Fourth Amendment's reasonableness standard[.]" *Coles v. Eagle*, 704 F.3d 624, 627 (9th Cir. 2012) (*citing Graham v. Connor*, 490 U.S. 386 (1989)). "[T]he 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham*, 490 U.S. at 397.

> Factors for evaluating reasonableness include, but are not limited to: (1) the severity of the crime at issue; (2) whether the suspect posed an immediate threat to the safety of the officers or others; and (3) whether the suspect actively resisted arrest or attempted to escape. Other relevant factors include the availability of less intrusive alternatives to the force employed, whether proper warnings were given and whether it should have been apparent to officers that the person they used

> force against was emotionally disturbed. Of all these factors, the most important one is whether the suspect posed an immediate threat to the safety of the officers or others.

S.B. v. City of San Diego, 864 F.3d 1010, 1013-14 (9th Cir. 2017) (internal citations and quotations omitted).

The Ninth Circuit has "determine[d] that [ ] warnings should be given, when feasible, if the use of force may result in serious injury, and that the giving of a warning or the failure to do so is a factor to be considered[.]" *Deorle v. Rutherford*, 272 F.3d 1272, 1284 (9th Cir. 2001). However, "where a suspect threatens an officer with a weapon such as a gun or a knife, the officer is justified in using deadly force." *Smith v. City of Hemet*, 394 F.3d 689, 704 (9th Cir. 2005). As the Ninth Circuit has summarized, "[l]aw enforcement officers may not shoot to kill unless, at a minimum, the suspect presents an immediate threat to the officer or others, or is fleeing and his escape will result in a serious threat of injury to persons." *Harris v. Roderick*, 126 F.3d 1189, 1201 (9th Cir. 1997).

"The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with 20/20 vision in hindsight." *Id*. at 396 (*citing Terry v. Ohio*, 392 U.S. 1, 20-22 (1968)). "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." *Graham*, 490 U.S. at 396-97.

In determining whether summary judgment is appropriate, the Court must consider all facts in dispute in the light most favorable to Plaintiffs, the nonmoving party. *See Glenn v. Washington County*, 673 F.3d 864, 870 (9th Cir. 2011). Here, the evidence viewed in the light most favorable to Plaintiffs shows Stephen was sitting on the back patio of his home with Mr.

Blinn. They walked into the house through the sliding glass door and saw flashlights shining through the front window of the home, indicating there were people outside the front door. Stephen grabbed his gun, opened the front door, and said, "Really, who the fuck are you?" While Defendant Welsh said he was repeatedly saying, "Tacoma Police. Drop your gun," Mr. Blinn testified he did not hear a response. Stephen walked outside the door and was shot within a few seconds.

In the few moments between when Stephen walked outside the front door of his home and when he was shot by Defendant Welsh, the undisputed evidence shows Stephen peered behind the northwest corner of his home with his gun at "low ready." He went back behind the northwest corner of the house and within a few seconds stepped out completely from behind the house and started toward Defendant Welsh with his gun raised and pointed at Defendant Welsh. During this time, Officer Hayes heard Stephen say, "I'm going to fucking kill you guys" and both Defendant Welsh and Officer Hayes state Defendant Welsh yelled "Drop your weapon."

In assessing the *Graham* balancing test, the Court finds that, first, the crime occurring during the shooting was severe. At the time Defendant Welsh initially made contact at Unit B, Defendant Welsh stated it was a very simple call to request the music be turned down. Dkt. 20, p. 15; Dkt. 23, pp. 19-20. However, once Stephen grabbed his weapon, pursued the officers, and said, "I'm going to fucking kill you guys" or "I'm going to get you," the severity of the crime escalated. When Stephen armed "himself with a semi-automatic pistol" and moved "aggressively towards the officers," his actions constituted attempted assault in the first degree. Dkt. 23, p. 22. Additionally, Stephen's actions of moving toward the officers and raising and pointing the gun at Defendant Welsh met the elements of attempted assault in the first degree or attempted murder in the second degree. *See* Dkt. 23, p. 24. The Court finds the undisputed evidence shows that, at the

time of the shooting, the crime at issue was severe. Thus, the first factor weighs in favor of finding Defendant Welsh's actions were objectively reasonable.

Second, there is evidence showing Stephen presented an immediate threat to Defendant Welsh and Officer Hayes. The Court notes that whether Stephen posed an "immediate threat to the safety of the officers or others" is "the most important single element of the three specified factors" of the *Graham* test. *Chew v. Gates,* 27 F.3d 1432, 1441 (9th Cir. 1994). Here, the evidence viewed in the light most favorable to Plaintiffs shows Stephen saw people outside his living room by the front door. Stephen, looking frantic, angry, intense, and crazed, quickly grabbed the gun off the coffee table near the front door. Defendant Welsh and Officer Hayes ran from the front door of Unit B when they saw Stephen grab the gun because they feared they were in immediate danger of being shot. The officers could not tactically retreat the way they had come because it was a long walkway with no cover and they would have their backs to Stephen, an armed individual. Thus, when Stephen reached for the gun, both Defendant Welsh and Officer Hayes ran to the west side of the house and into the backyard. Defendant Welsh was immensely fearful that Stephen would shoot the officers through the front door. Further, there was no doubt in Officer Hayes's mind that the officers were in danger when they ran into the backyard.

Stephen walked out the front door, which is where the officers were located, and said, "Really, who the fuck are you?" Defendant Welsh and Officer Hayes took cover near the southwest corner of the house. Stephen peered around the northwest corner of the house towards the officers with his gun at "low ready." Defendant Welsh was, at least, partially visible to Stephen. Stephen stepped back behind the northwest corner of the house, out of Defendant Welsh's view. He then completely stepped out from behind the northwest corner of the house and started toward Defendant Welsh with his gun raised and pointed at Defendant Welsh. During

this time, Officer Hayes heard Stephen say, "I'm going to fucking kill you guys" and Defendant Welsh heard Stephen say "I'm going to get you." Evidence also shows Stephen's gun was "recovered with the safety off, in firing configuration with the hammer cocked and a round in the chamber," indicating Stephen was intent to fire the weapon. Thus, the evidence, viewed in the light most favorable to Plaintiffs, shows Stephen posed an immediate threat to Defendant Welsh and Officer Hayes. This factor, the most important factor, weighs in favor of finding Defendant Welsh's actions were objectively reasonably.

Third, the evidence shows Defendant Welsh did not warn Stephen prior to using deadly force. Plaintiff asserts that this case hinges on evidence showing Defendant Welsh failed to identify himself or warn Stephen before he used deadly force. *See* Dkt. 27. Officers are only required to give a warning "where feasible." *Tennessee v. Garner*, 471 U.S. 1, 12 (1985). "Verbal warnings are not feasible when lives are in immediate danger and every second matters." *Estate of Martinez v. City of Federal Way*, 105 F. App'x 897, 899 (9th Cir. 2004). However, when a suspect does not pose an immediate threat to the lives of officers or others, a warning is feasible. *See Deorle*, 272 F.3d at 1284.

In this case, viewing the evidence in the light most favorable to Plaintiffs, Defendant Welsh and Officer Hayes testified that Defendant Welsh identified himself as a police officer and directed Stephen to drop his weapon.[2] Importantly, there is no evidence showing Defendant Welsh provided any warning that he was going to use deadly force. However, it is undisputed that the events unfolded very quickly from the moment Stephen grabbed the gun until Defendant Welsh fired his weapon. Mr. Blinn testified it happened in a matter of seconds. At the time of the

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[2] The Court does note the record contains conflicting information regarding whether Mr. Blinn was aware Defendant Welsh and Officer Hayes were police officers. *See See* Dkt. 23, p. 24; Dkt. 30, Blinn Dec. However, the Court will view Mr. Blinn's testimony in the light most favorable to Plaintiffs, which shows Mr. Blinn was not aware Defendant Welsh and Officer Hayes were police officers until after the shooting.

shooting, Stephen had his gun raised, was moving towards the officers, and had stated he was going to kill them or "get" them. The officers were trapped in the fenced-in backyard. Both officers believed they were in imminent danger. Officer Welsh heard Officer Hayes engaged with another individual in the backyard. The individual did not follow Officer Hayes commands, and it was unclear to Defendant Welsh if this individual was collaborating with Stephen. The undisputed evidence shows the situation escalated quickly, and Stephen's actions, including verbally threatening to kill the officers and walking towards the officers with his gun pointed at them, created a situation that put the officers' lives in immediate danger where every second mattered.

The Court notes there is evidence showing Mr. Blinn and neighbors did not hear Defendant Welsh identify himself as a police officer. Mr. Blinn's testimony, viewed in the light most favorable to Plaintiffs, shows that he did not hear the police identify themselves until after the gunfire stopped. Furthermore, there is testimony from several neighbors stating they did not hear anyone identify themselves prior to hearing gunshots. Significantly, there is no evidence showing the neighbors were close enough to hear Defendant Welsh identify himself or were listening for people to identify themselves until after they heard gunshots. Regardless, this evidence is not dispositive of the issue of whether Defendant Welsh provided a warning prior to using deadly force. As the undisputed evidence shows, Defendant Welsh could not have feasibly provided a warning prior to using deadly force.

Plaintiffs argue that because Defendant Welsh testified he was able to repeatedly state, "Drop your weapon," it was feasible for him to warn Plaintiff that he would be using deadly force. Dkt. 27, pp. 15-19. However, as stated above, the Ninth Circuit has held "[v]erbal warnings are not feasible when lives are in immediate danger and every second matters." *Estate*

of Martinez, 105 F. App'x at 899. Here, the undisputed evidence shows Stephen was armed, verbally threatened to kill the officers, and was moving towards the officers with a gun pointed at Defendant Welsh, who was visible to Stephen. Regardless of whether there was literally enough time for Defendant Welsh to warn Stephen that he would be using deadly force, the evidence shows that it was not feasible, under the law, for Defendant Welsh to provide a verbal warning prior to using deadly force in this case. Therefore, Plaintiffs' argument that Defendant Welsh may have had enough time in terms of literal seconds to issue a verbal warning does not overcome Defendants' summary judgment showing. Accordingly, the third factor weighs in favor of finding Defendant Welsh's actions were objectively reasonable.

For the above stated reasons, and consistent with the *Graham* factors, the Court finds the evidence, viewed in the light most favorable to Plaintiffs, shows Defendant Welsh's conduct was objectively reasonable.

As the Court finds Defendant Welsh did not violate Stephen's Fourth Amendment rights, Defendant Welsh is entitled to qualified immunity. *See Corrales v. Impastato*, 650 F. App'x 540 (9th Cir. 2016) (finding the officer, who did not issue a warning, did not violate the plaintiff's Fourth Amendment rights when the evidence showed the plaintiff rushed toward the officer with his hand positioned in a way that made the officer believe the plaintiff had a gun); *Penley v. Eslinger*, 605 F.3d 843, 854 n. 6 (11th Cir. 2010) (holding that when an officer ordered an armed man to "put down the gun," he did not issue a "warning" under *Garner*, but he was justified in firing because "such a warning might easily have cost the officer his life").

2. *Clearly Established Law*

The Court has determined the undisputed evidence shows Defendant Welsh's actions did not result in a violation of Stephen's Fourth Amendment rights. Therefore, there is no genuine

issue of fact regarding the first prong of qualified immunity. As such, the Court need not determine if the second prong of qualified immunity has been met. However, the Court also finds there was no clearly established law at the time of the shooting that put Defendant Welsh on notice that his actions violated Stephen's rights.

Under the second prong of qualified immunity, the Court must determine "whether the right at issue was clearly established such that a reasonable officer would have understood his actions were unlawful." *Hughes v. Kisela*, 841 F.3d 1081, 1088 (9th Cir. 2016). While the Supreme Court's case law "does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate." *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (internal citations omitted). "Clearly established law" should not be defined at a high level of generality; it must be "particularized" to the facts of the case. *See id.*; *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011); *Anderson*, 483 U.S. at 640. To determine "clearly established law," the Court should first look to binding precedent. *Chappell v. Mandeville*, 706 F.3d 1052, 1056 (9th Cir. 2013). "Absent binding precedent, [the Court] look[s] to all available decisional law, including the law of other circuits and district courts, to determine whether the right was clearly established." *Osolinski v. Kane*, 92 F.3d 934, 936 (9th Cir. 1996); *see Elder v. Holloway*, 510 U.S. 510, 516 (1994) (the Court should consider all relevant precedents); *Dunn v. Castro*, 621 F.3d 1196, 1203 (9th Cir. 2010) ("In determining whether a right is clearly established, we may also look to precedent from other circuits.").

At the time of the shooting, on May 10, 2015, it was clearly established that "[l]aw enforcement officers may not shoot to kill unless, at a minimum, the suspect presents an immediate threat to the officer or others, or is fleeing and his escape will result in a serious threat

of injury to persons." *Harris*, 126 F.3d at 1201. Additionally, it was clearly established that officers are only required to give a warning "where feasible." *Garner*, 471 U.S. at 12.

Here, the situation resulting in Defendant Welsh's use of force escalated quickly. At the time of the shooting, Stephen verbally threatened to kill Defendant Welsh and Officer Hayes and was walking toward the officers with his gun pointed at Defendant Welsh. Defendant Welsh and Officer Hayes were trapped in a small fenced-in backyard without means to escape. The parties do not cite to, nor does the Court find, any precedent establishing that Defendant Welsh's conduct under these circumstances was unreasonable "beyond debate." *See City & County of San Francisco v. Sheehan*, 135 S.Ct. 1765, 1774 (2015). Therefore, Defendant Welsh is also entitled to qualified immunity under the "clearly established" prong. *See Flores-Haro v. Slade*, 686 F. App'x 454, 456 (9th Cir. 2017) (finding officers were entitled to qualified immunity under the second prong where officers shot the plaintiff multiple times after the plaintiff confronted the shadowy figures he saw circling his home. The plaintiff was armed when he was shot, but viewing the evidence in the light most favorable to him, he never pointed his gun at the officers or fired it and the officers never issued a warning).[3]

3. *Conclusion*

Viewing the evidence in the light most favorable to Plaintiff, the undersigned finds there are no genuine issues of material fact regarding whether Defendant Welsh's use of deadly force was excessive in violation of the Fourth Amendment. Further, even if Defendant Welsh's conduct was objectively unreasonable, there was no clearly established law at the time of shooting that would have put Defendant Welsh on notice that his conduct violated Stephen's

[3] Factual findings regarding the lack of warning are detailed in the district court's decision. *See Flores-Haro v. Slade*, 160 F. Supp. 3d 1231, 1233 (D. Or. 2016) ("Plaintiffs contend the shooting was without warning, and the officers never identified themselves.").

right to be free from excessive force. Accordingly, the Court finds Plaintiffs have not overcome Defendants' summary judgment showing as to the excessive force claim alleged against Defendant Welsh.

C. Warrantless Entry

Next, Plaintiffs allege Defendant Patterson unlawfully entered Phil's home immediately after the shooting. Dkt. 1-1. "It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable." *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006) (internal quotations omitted, citations omitted). The warrant requirement is, however, subject to exceptions. *Id*.; *see Flippo v. West Virginia*, 528 U.S. 11, 13 (1999); *Katz v. United States*, 389 U.S. 347, 357 (1967). "[W]arrants are generally required to search a person's home or his person unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Mincey v. Arizona*, 437 U.S. 385, 393-394 (1978).

"[L]aw enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." *Stuart*, 547 U.S. at 403; *Mincey*, 437 U.S. at 392; *Georgia v. Randolph*, 547 U.S. 103, 117 (2006). "Because of law enforcement officers' role as community caretakers, '[t]he emergency doctrine allows [them] to enter and secure premises without a warrant when they are responding to a perceived emergency.'" *United States v. McKee*, 157 F. Supp. 3d 879, 895 (D. Nev. 2016) (quoting *United States v. Stafford*, 416 F.3d 1068, 1073 (9th Cir. 2005)). For a warrantless search under the emergency doctrine to be justified, the following factors must be met: "(1) The police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property;" and (2) "There must be some reasonable basis,

approximating probable cause, to associate the emergency with the area or place to be searched." *Stafford*, 416 F.3d at 1073-74.[4]

First, the evidence viewed in the light most favorable to Plaintiffs shows Defendant Patterson entered Phil's home because Defendant Patterson believed there was an immediate need to assist the Cunninghams for the protection of their life. Defendant Patterson entered Phil's home immediately after the shooting. The police were still attempting to secure residents inside Unit B who were not complying with police commands. Defendant Patterson moved the Cunninghams to the bedroom of their home because he was concerned there may be additional gunshots, which could enter their living room. After the Cunninghams were in the bedroom with Defendant Patterson, Defendant Patterson learned that SWAT was responding to the scene and instructed the Cunninghams to leave Unit A because it needed to be searched. After Defendant Patterson escorted the Cunninghams from Unit A, he did not re-enter the unit. The evidence, viewed in the light most favorable to Plaintiffs, shows Defendant Patterson entered Phil's home in order to protect Phil from the immediate threat of additional gunshots while the police attempted to secure the scene.

Second, there was a reasonable basis to associate the emergency with Phil's home. The evidence shows the shooting occurred outside Unit B and Unit B is attached to Phil's home (Unit A). Officers were attempting to secure a shooting scene. There were occupants in the Unit B who were not responding to police commands and there was evidence of additional weapons in Unit B. It was possible for bullets to travel through the living room window or wall of Phil's home. Therefore, there was a reasonable basis to associate the emergency with Phil's home.

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[4] In *Stafford*, the Ninth Circuit also required inquiry into the motivation of the officer. *See id*. at 1073. However, in *Brigham City*, the Supreme Court held the officer's subjective motivation is irrelevant. 547 U.S. at 404.

Plaintiffs agree Defendant Patterson was "certainly within his Constitutional right to clear" the Cunninghams from their home to protect them from the emergency. Dkt. 27, p. 20. However, Plaintiffs assert Defendant Patterson had no reason to enter Phil's home because the emergency was not in their home; it was next door, in Unit B. *Id*. at pp. 20-21. Plaintiffs, however, cite to no evidence to support this argument.

As previously discussed, the undisputed evidence shows, at the time Defendant Patterson entered Phil's home, there was an ongoing situation wherein, following a shooting, the occupants of Unit B (the apartment attached to Phil's home) were not complying with police commands. There is no evidence showing it was unreasonable for Defendant Patterson to attempt to keep Phil safe in his home before escorting him away from an active shooting situation. Therefore, Plaintiffs have failed to overcome Defendants' showing that an emergency situation created an exception to the Fourth Amendment warrant requirements allowing Defendant Patterson to lawfully enter Phil's home.

The Court also notes Phil testified that he saw flashbulbs in his home around 3:30 a.m. However, Phil did not testify that he saw Defendant Patterson in his home and there is no evidence showing Defendant Patterson re-entered Phil's home after he escorted the Cunninghams from their home. Thus, the fact that Phil saw flashbulbs in his home around 3:30 a.m. does not create a genuine issue of material fact regarding whether Defendant Patterson violated Phil's Fourth Amendment rights.

In summation, considering the factors, the evidence viewed in the light most favorable to Plaintiffs shows Defendant Patterson entered Phil's home without a warrant under the emergency exception doctrine. Therefore, there is no genuine issue of material fact regarding whether Defendant Patterson violated Phil's constitutional rights when he entered Phil's home without a

warrant. *See United States v. Escalante*, 17 F. App'x 635, 636 (9th Cir. 2001) (finding the emergency exception applied when gun shots had been reported by a neighbor outside of the searched home). Accordingly, Plaintiffs have failed to overcome Defendants' summary judgment showing regarding the claim alleged against Defendant Patterson.

D. Unserved Defendants

Plaintiffs bring claims against Officers John and Jane Doe 1-5. *See* Dkt. 1-1. The time for serving the summonses and Complaint expired on December 29, 2016, 90 days after the Complaint was filed in this Court, and no proof of service has been filed regarding the Doe defendants. *See* Dkt. 1; Fed. R. Civ. P. 4(l), 4(m). Further, the Doe defendants have not been identified and no attorney has entered an appearance on their behalf. Unless a plaintiff can show good cause for his failure to serve, the court shall dismiss the action without prejudice as to that defendant or shall extend the time for service. Fed. R. Civ. P. 4(m). Plaintiffs have not showed good cause for the failure to serve or requested an extension of time to serve the Doe defendants. Accordingly, the Doe defendants are dismissed from this case without prejudice.

V. CONCLUSION

The Court concludes the evidence, viewed in the light most favorable to Plaintiffs, shows no genuine issues of material fact exist in this case. Therefore, Plaintiffs have not overcome Defendants' summary judgment showing. Accordingly, Defendants' Motion for Summary Judgment is granted, the Doe defendants are dismissed, and this case is closed.

Dated this 7th day of March, 2018.

David W. Christel
United States Magistrate Judge

APPENDIX

Q. And then when he is done with the log, does he decide who gets it?
A. No. It goes to -- usually the lieutenants get a copy of it or cc'd and then it goes into Cop Web under command post logs.
Q. Okay.
So in this case, you assume that it went to Lieutenants Travis and Lane, right?
A. I would assume they got copies of it, yes.
Q. And that it also went into Cop Web, right?
A. Yes.
Q. And then do Travis and Lane have -- from time to time decide who else to send it to?
A. They could -- they could. They could forward it to somebody. If somebody in higher authority said, Hey, I want to look at this command post log, a captain or assistant chief, they could send it wherever.
Q. Before preparing for this deposition and looking at Exhibit 1, had you ever seen that command post log before?
A. I am -- I probably had back at a day or so afterwards.
Q. And you say that because you believe that someone sent it to you?
A. I am sure Jack would have sent it to me, yes.

Q. And then do you have discretion to decide to send it on to yet more people?
A. I could send it to whoever I wanted to on the team or whoever would ask.
Q. Do you remember whether you sent it to anybody else?
A. No.
Q. Okay.
Do you know where the command post log is stored?
A. It is stored in Cop Web under the SWAT section.
Q. And it is stored only -- does that mean it is stored only electronically or is there a hard copy stored somewhere?
A. Just electronically as far as I know.
Q. Do you remember whether you made any use of this command post log when you got it, within a day or so of the event?
A. I would have gotten it in an email format and I would have looked at it and then just deleted it, assuming that Jack sent it forward and the Lieutenant Travis would have -- we would have had final approval before it was put into Cop Web.
Q. One of those lieutenants would have had final approval, Travis or Lane?

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Q. So if it is being done electronically, are you saying there is no actual hard copy of it in the special teams area?

A. I don't believe so. I can't be absolutely sure of that. I know that over the years things, you know, they have gotten rid of stuff because we are talking 25, 30 years of probation reports for folks coming through and they had left the team -- onces they're off probation and they have completed it successfully, there wouldn't really be a reason to retain it.

Q. Okay.

And so if it is done electronically, it gets put into some kind of database, does that sound kind of -- what does it get put into electronically? If you were asking me what I do with a legal brief that I write, I do it electronically and I could tell you I put it into something called Pro Law, which is just a software program maintained by my firm.

Do you know where these things go now in these evaluation reports?

A. I am assuming they go to Cop Web if they're retaining them that way.

Q. That was Cop Web?

A. Yes.

Q. C-O-P, W-E-B?

A. Yes.
Q. And that's some kind of electronic filing system kept by the Tacoma Police Department?
A. Yes. It's for all different units that use it. Policies and procedures are on there. That's where you go to look all that stuff up.
Q. Okay.
Would Swat Team policies and procedures be in this Cop Web?
A. There may be a copy of them in there. That would be -- department policies for sure there would be a copy of it, and electronically the policy manual for the department, procedure manual for the department, it would have section for SWAT.
Q. Okay.
Are there records created, say, complaints made about actions taken by the Swat Team or individual members of the Swat Team?
A. The Swat Team wouldn't handle that. Internal Affairs would.
Q. So all those complaints would be in the records of Internal Affairs?
A. Correct.
Q. So go back to January of 2016, if I were walking into this special teams area building toward the end of

January of 2016 and I went to the part of the building which was the Swat Team office, and I was looking for every Swat Team record that was there, would there be filing cabinets?

A. There would be file cabinets in the office, yes.

Q. Okay.

And in 2016 there would also -- am I right, there would also be some kind of computer terminal with a keyboard where you could input stuff electronically?

A. Yes. Well, your laptop.

Q. Your laptop.

A. Yes.

Q. Okay.

And if I understood this right, as far as the evaluations of probationary people were concerned, once they were done with their 12 months of probation, you believe their evaluations were destroyed?

MS. ELOFSON: Object to form.

Q. Was that a yes?

A. I didn't hear. I am assuming they were.

Q. Why do you assume that?

A. If they hadn't passed probation and their evaluations weren't such that they passed it, if they did pass it, and there weren't any issues, there would be no reason to keep them. It's more of a training

APPENDIX 9

somewhere in the last month or two?
A. Yeah.
Q. Okay.
On this particular night, January of 28, 29, 2016, when you got the callout, when you got the callout for SWAT to turn out for duty, in general what information were you told about this callout?
A. I probably did the callouts.
Q. I see.
A. I was probably notified I am on the callout board in the operations center of the station, so I would be the point of contact. The duty lieutenant would call after talking to one of our lieutenants and say, initiate a SWAT callout, we have -- this happened and Kenneth Wright is supposed to be in the area.
Q. Can I stop you there for a second. And you said this happened. So, in general, what was your understanding of what had happened?
A. There had been an officer-involved shooting and Kenneth Wright was in the vehicle and they needed the SWAT Team to come out and search the neighborhood because he fled on foot. So we were looking for Kenneth Wright, who was armed, out on foot.
Q. Did you know the name of the officer who had done the shooting?

shot and hit some unnamed person, is that what the term "officer-involved shooting" meant to you or not?

A. All I knew was there was an officer-involved shooting, which means some officer discharged their firearm. Somebody was shot, killed, injured and that Kenneth Wright was out on foot.

And according to the information that the desk gave me, he had a rifle of some sort and was out on foot in the neighborhood and they wanted the SWAT Team out there to search for him.

Q. So you didn't know that the person shot -- you didn't know if it was man or a woman, right?

A. No.

Q. And you certainly didn't know the name of the person shot, right?

A. No, not that I recall.

Q. Did you know that some person got shot and died?

A. I wouldn't have known that until I got out there. And I am not sure that I would have even known that. I was -- I am assuming they were transported to the hospital and they wouldn't have died at the scene. They would have been at the hospital being treated.

Q. Okay.

Well, I don't know, the end of this log is -- this command post ends around 4:30 in the morning. So

APPENDIX 10

COMMAND POST LOG

CASE # - 1602801965
DATE – 1/29/2016
LOCATION – 3300 Sawyer/3326 Sawyer susp address
SUBJECT – Kenneth Wright
SITUATION – Officer Involved Shooting

0110hrs – SWAT Team showing up. SWAT 1 on scene
0114hrs - Guardian 1 departed. Radio from LERN to PC11. WSP has containment on I-5
0119hrs – Containment map below:

0123hrs – Bearcat-Habib, May, Wolfe, Kelley, Graham, Ovens. Bear-Tiffany, Koskovich, Shafner, Roberts, Verkoelen, Storwick
0124hrs – Bear and Bearcat moving to 3326 Sawyer
0131hrs – Media Staging at 38th and M. CP moving to 37 and M Street. Dispatch notified
0139hrs – Tiffany to Habib-Subjects moving inside house we are at
0141hrs – Two females in bedroom by door, possibly moving towards door
0143hrs – May-woman, baby, and young male inside 3326 Sawyer
0146hrs – Habib-no indications in yard
0147hrs – May-K9 track not working
0147hrs – Habib copy. Hold for now
0148hrs – Habib-no indications around the house, on the fence or alley

COMMAND POST LOG

CASE # - 1602801965
DATE – 1/29/2016
LOCATION – 3300 Sawyer/3326 Sawyer susp address
SUBJECT – Kenneth Wright
SITUATION – Officer Involved Shooting

0148hrs – Habib to Tiffany-they are coming around to your side of house. Tiffany-I might need another body
0148hrs – Hoschouer on scene
0151hrs – Shafner-turn off headlights in Bearcat
0152hrs – Graham to Habib-K9 wants to check house next door
0152hrs – Habib talking to witness. Suspect last seen in yard and dropped a personal item then fled. Have K9 try from here
0200hrs – K9 having no indication
0204hrs – May to Tiffany-move your crew back to Bearcat. Move Bearcat back to original scene
0204hrs – Team moving back to original locaiton to clear house to house
0205hrs – Quilio on scene
0208hrs – Habib-make announcements
0208hrs – May-3314 is a known house suspect is staying in
0210hrs – Habib-when you are ready make announcements
0210hrs – May to Habib-we need to push some people to alley to cover
0212hrs – Habib-what address is involved?
0213hrs – May to Bear-move vehicle broadside. Set up containment on front and back to cover all sides-Koskovich copy
0214hrs – Habib-Bearcat moving in alley
0215hrs – Tiffany-one looking out 1-1-1 window
0216hrs – Habib to Quilio-come east down alley
0217hrs – May to Habib-start making announcements yet? Habib-not yet need to shore up containment and clear some cars
0220hrs – Habib to Quilio-move forward. Moving
0224hrs – Habib to May-vehicles cleared moving back to alley
0225hrs – May-ready for announcement at 3314? Habib yes. Tiffany be ready with receiving team
0226hrs – Quilio-announcements loud and clear in alley
0227hrs – May- Five adults exiting 3314
0230hrs – Subjects from house cooperatie. Standing by for patrol to assist
0233hrs – Tiffany-five detained. 3 females and 2 males
0239hrs – May to Habib-debrief done. All subjects claim Wright has not been here at 3314 today.
0245hrs – May-prepare to contact 3318

COMMAND POST LOG

0246hrs – May moving in to clear 3318

CASE # - 1602801965
DATE – 1/29/2016
LOCATION – 3300 Sawyer/3326 Sawyer susp address
SUBJECT – Kenneth Wright
SITUATION – Officer Involved Shooting

0247hrs – May-opening exterior door
0249hrs – Patrol taking subjects from SWAT
0250hrs – 3318 is clear-May
0250hrs – Habib-will check 4017 Cushman on call of hearing noises
0251hrs – May, Wolfe and K9 moving up to check 3314 perimeter
0256hrs – Bearcat is on scene 4017 Cushman
0259hrs – K9 located crawl space. Clear
0300hrs – 4017 Cushman is clear
0304hrs – May to Tiffany-K9 didn't indicate anywhere around house at 3314. Security cameras observed. Perimiter of 3314 is secure.
0306hrs – May-K9 can clear
0306hrs – Tiffany-County K9 is clear
0308hrs – May-3318 is all clear. 3314 exterior and crawl space is clear. Need to clear inside
0310hrs – May-clear the house? Habib yes
0312hrs – May-will prep ThrowBot and prepare to breach and hold at back door.
0319hrs – Tiffany-ThrowBot is down. May-standby
0319hrs – May is in back with Wolfe, Tiffany is in front. Habib copy
0321hrs – Habib to May you can move
0321hrs – May to Tiffany- we will breach and delay. Then you can move and breach
0321hrs – Tiffany-moving
0322hrs – Tiffany-we are at front door. May-copy. We will breach back door. Back door breached
0323hrs – Tiffany-entry made into living room
0323hrs – May-removing security camera from exterior
0324hrs – Clearing
0330hrs – Moving upstairs
0332hrs – May-House is clear
0345hrs – Habib-Me, May, Tiffany, Hoschouer, Ovens, Wolfe will stay behind for security The rest of the team is securing. House ready to turn over to CID
0400hrs – Most of tactical back at CP
0436hrs – CID arriving

October 06, 2022 - 11:08 AM

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