Supreme Court No.: 98831-5
COA No.: 79394-2

King County Superior Court No.: 17-2-15771-6SEA

IN THE SUPREME COURT
FOR THE STATE OF WASHINGTON

KERRY ZIEGER
Petitioner

v.

CITY OF SEATTLE
Respondent

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

Respondent City of Seattle (the "City") asks this Court to deny Kerry Zieger's petition for review of the Court of Appeals decision, *Zieger v. City of Seattle*, No. 79394-2-I, 2020 WL 3498497 (Wash. Ct. App. June 29, 2020).

II. INTRODUCTION

Rule of Appellate Procedure 13.4(b) provides an exacting standard for Supreme Court review that the Petitioner has not met here. This is a negligence case and Petitioner, Seattle police officer Kerry Zieger, has the burden of proof. Zieger was injured on May Day 2016 while working with the Seattle Police Department's (SPD) bike squad, when a protester threw a rock that struck Zieger's forehead. He sued the City of Seattle, his employer, on multiple grounds. This appeal addresses his allegation that the City was negligent because it failed to outfit him with a Bell Super 2R, a bicycle helmet which provides broader facial coverage than the one he was wearing.

Applying well-settled precedent, the Superior Court dismissed Zieger's case on summary judgment and the Court of Appeals, Division I, affirmed in an unpublished opinion, *Zieger v. City of Seattle*, No. 79394-2-I, 2020 WL 3498497 (Wash. Ct. App. June 29, 2020). The Court of Appeals affirmed dismissal on two independent grounds: (1) without an expert establishing standard of care, or other admissible evidence establishing that

reasonable prudence required the City to provide the superior helmet, Petitioner failed to present a dispute of material fact demonstrating the City of Seattle breached its duty; and (2) Petitioner could not establish that the alleged breach proximately caused his injury with speculative evidence.

Petitioner now seeks additional appellate review. He does not claim a conflict with a decision of this Court or another Court of Appeals decision, nor that the matter raises a significant constitutional question. *See* RAP 13.4(b)(1), (2) and (3). He argues for this Court's review only under subsection (4), that the case "involves an issue of substantial public interest that should be determined by the Supreme Court." While police operations are often a matter of general public interest, Petitioner's lawsuit involves an allegation of ordinary negligence for which he failed to present evidence sufficient to survive summary judgment. Further, an unpublished opinion, the Court of Appeals decision has no precedential value and is not binding on any court. *See* GR 14.1. The issues and matter presented do not support further review and the petition should be denied.

III. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court correctly ruled, and the Court of Appeals correctly affirmed on *de novo* review, that the standard of care applicable to the alleged breach involving a municipal police department's provision of specialized bicycle protective gear during

a civic demonstration was not within the ordinary knowledge and experience of laypersons and therefore that specialized or expert evidence establishing the standard of care is required.

2. Whether summary judgment dismissal was proper, *i.e.*, the trial court correctly ruled and the Court of Appeals correctly affirmed on *de novo* review, that there was no genuine issue of material fact as to whether the City breached a duty of care by failing to provide Petitioner with the Bell Super 2R on May Day 2016 where Petitioner failed to present evidence, by custom, trade, past practice, nor by specialized or expert knowledge, that ordinary care required the City to provide that helmet?

3. Whether the trial court correctly ruled, and the Court of Appeals correctly affirmed on *de novo* review, that there was no genuine issue of fact on causation where Petitioner did not adduce evidence on which a jury could find without speculation that an alternate helmet would have prevented the injury?

IV. COUNTERSTATMENT OF THE CASE

A. Officer Zieger's Injury

On May 1, 2016, Kerry Zieger, an officer in the Seattle Police Department, was assigned to work a bicycle patrol at the annual "anti-capitalist" May Day protest in downtown Seattle. CP 2; 52-53. Because he

was not working as a full-time bike officer, he was provided with a bike and helmet that day, and already had eye protection. CP 54-56. He was also outfitted with hardened, protective body gear. CP 57.

Not all officers received the same helmet on May 1, 2016. Some used the standard Zen or Hex model, and some were issued a special, newer helmet, a Bell Super 2R, which included a chin protector and the potential for integrated goggles. CP 57-58. Officer Zieger testified that he had never personally seen or held one of these helmets before, CP 58, and had not used one during any prior May Day protest. CP 59. About half of the officers in his bike squad had this newer style of helmet. CP 60.

Officer Zieger patrolled as the protesters moved around downtown streets. CP 63-65. Officer Zieger recalled seeing a road flare thrown past him which drew his attention, and after he turned back a rock thrown by one of the protesters hit him in the head and injured him. CP 69. Officer Zieger deployed his pepper spray to protect himself and fellow officers and another officer escorted him to a transport van for medical treatment. CP 121.

B. Seattle Police Department's Helmet Use and Acquisition

All bike officers working on May 1, 2016 were issued essential safety equipment including a bike helmet. CP 38-39. As of May 1, 2016, SPD had started transitioning to a newer style of bike helmet, the Bell Super 2R, which provided greater facial protection, including an optional

chin-guard attachment and an integrated goggle option. CP 38; 150-151; 153-154; 155-156. SPD began purchasing the Bell Super 2R helmets at the end of 2014, with the first acquisitions occurring in 2015. CP 157-158. However, SPD was still in the process of phasing in the newer helmets; so, as Officer Zieger described from his own squad, two styles of helmet were in use. CP 38. While bike helmets generally were considered essential equipment for bike officers, there was no rule, custom, policy or practice in place at the City mandating the newer variety of helmet at that time. CP 38-39.

Sergeant James Dyment served as a supervisor on the City's bicycle squad since 2012 and played a role in the bicycle helmet selection process. CP 145-146. In approximately 2013, a bicycle officer suffered a *knee* injury, which motivated him and others at that time to proactively seek out more protective equipment for bicycle officers—helmets were only one aspect of the overall gear upgrade. CP 385. Dyment was unaware of any bicycle officer suffering a head injury as a result of a thrown projectile at a protest prior to Zieger's injury. CP 385.

SPD routinely searches for, and incrementally acquires, new safety equipment on an ongoing basis – a process that was still underway with respect to these helmets in May of 2016. CP 39. According to Deputy Chief of the Seattle Police Department Marc Garth Green:

> …it has been my experience throughout my years in command rank (lieutenant or above) that SPD searches for, and acquires, new and upgraded safety equipment for officers in a variety of roles nearly every year. The newer helmets in use as of May 1, 2016 represented an effort by SPD to incrementally and proactively improve its protective equipment, but at that time SPD had not transitioned toward using them exclusively. The older styles of bike helmet … had been successfully in use by SPD for years prior to May 1, 2016, and continued to be in use as of that date.

CP 39 (Dec. Garth Green, ¶ 10).

Sgt. James Dyment was assigned as a supervisor in the bicycle unit since approximately 2012. He testified that the Bell Super 2R (or a later version now in use, the 3R) is still not an official industry or department standard. CP 164 ("You mean who made an actual standard of that – I don't think that's officially been done yet"); *see also id*. (referencing the ANSI (Snell) requirement through the International Police Mountain Biking Association.) According to Dyment, the Bell Super 2R was first approved for purchase in 2015, "collectively" by chain of command and fiscal department but not deemed a department standard at that time. CP 164 ("I don't think we have a specific one [standard] written down. It's not in policy and procedure."). At the time of Zieger's appeal, the City then purchased the Bell Super 3R and both the 2R and 3R were in use. CP 163.[1]

[1] Petitioner mischaracterizes Sgt. Dyment's testimony regarding "standards" when stating, "Dyment testified that in 2015, the Department decided "collectively" that the more-protective Bell Super 2R helmet would be the standard bicycle helmet." See Petitioner Br., p. 7. In context, it is clear that

In the wake of Zieger's injury, the City ordered 30 more helmets. CP 170. In order to help the department evaluate whether to make the purchase, chain of command sought Sgt. Dyment's opinion regarding whether the Bell Super 2R might have prevented Zieger's injury. CP 172-173. Sgt. Dyment did not undertake a detailed analysis of Zieger's incident. Rather, Sgt. Dyment's testimony makes clear that, in assisting his chain of command with the decision to go forward with this subsequent remedial measure, Sgt. Dyment did not know exactly what helmet Zieger was wearing and did not have specific knowledge of Zieger's injury. Instead, it was merely his *untested* belief that the Bell Super 2R *potentially* would have *mitigated the threat* of injury:

> I believe that it was requested of me to evaluate what my thoughts – hey, does this helmet protect officers better and so would it have stopped this injury or what have you, was my discussion with them and, you know, **I can't guarantee that it would stop that**. There's no way to say, "Hey, if you got a rock thrown at your head and you're wearing that helmet it's not going to hurt you." I can't give that guarantee. **I believe it would have mitigated that injury and potentially stopped that injury just based on the integration of the google and the helmet itself** . . . based on where his injury had occurred, and I think that that helmet/goggle integration is much better than the one on the Zen or Hex, and I hadn't seen – **he either had a Zen or Hex, I believe**. Just from looking at – over on the video from my recollection **it might have been a slightly different helmet**, but that style of helmet, that integration. . . . I think – and the

Dyment testified that the department "collectively" approved the Bell Super 2R for purchase in 2015 but did not make it an official department standard. CP 164-166.

> **fit system on that helmet [Bell Super 2R] potentially could have provided better protection** for him, right? So **I can't say, hey, for sure** [] he would not have gotten hurt if he was wearing that helmet, right? But I think it would have – I believe it probably would have worked, right? I mean, **we didn't test it,** but the fact that it's designed and you have that lip and level . . . It would have mitigated that threat, I guess you should say, right? . . . **I couldn't give anybody 100 percent, but that's why we bought that helmet**.

CP 172-173 (emphasis added).

Petitioner offered no expert testimony; no written internal policy; and no policy, rule, custom, or practice from another jurisdiction demonstrating that another police agency on May Day, 2016 would have equipped all bike officers with this superior helmet, or that providing the helmet used by Zieger fell below the standard of care for a municipal police department at the time.

The City also refers this Court to the accurate statement of the case delineated by the Court of Appeals in its unpublished opinion. *See* Slip Op. at pp. 1-5 (Section I).

A. Procedural History

Zieger sued the City claiming that the SPD was negligent in failing to prevent, or protect him from, a criminal assault by a protestor. More specifically, he claimed SPD should have: 1) prevented the assault by issuing a general dispersal order to the protesters before it occurred, 2) provided him with less-lethal weapons known as "blast balls," so that he could have used these to disperse

protesters before he was struck, and 3) provided him with the best available style of bicycle helmet to maximize his protection from projectiles. CP 4. At the close of discovery, the City moved for summary judgment on grounds that Zieger lacked sufficient evidence to establish negligence and proximate cause for any of his claims. CP 8-34. In a written opinion, the superior court granted summary judgment on all three claims. CP 395-405. Zieger appealed only the Superior Court's ruling on his claim that the City was negligent by not providing him with a Bell Super 2R helmet.

The Court of Appeals articulated the duty owed to Zieger as one arising out of the employer-employee relationship. *See* Slip Op. at p. 7 (City owed a duty to Zieger under RCW 41.26.281 to "provide equipment that does not fall below the standard of care for police department employers.").

The Court of Appeals affirmed the Superior Court's grant of summary judgment on both breach and proximate cause, agreeing on all three bases argued by the City for dismissal:

(1) That the alleged breach, which required the fact finder to understand the standard of care for a reasonable police department outfitting its bike officers for riot conditions, was not within the ordinary knowledge and experience of laypersons, and therefore needed expert testimony. *See* Slip Op. at pp. 6-8.

(2) Examining the record as a whole, including facts presented that SPD began purchasing the Bell 2R prior to May Day 2016 and acknowledged that it provided greater face protection, Zieger failed to present evidence from which a reasonable juror could conclude that the standard helmet fell below the standard of care. *See* Slip Op. at pp. 9-10.

(3) Speculative testimony that the superior helmet "might" have mitigated the injury offered by a Seattle police officer who did not examine the incident in any detail did not satisfy Zieger's burden to establish a genuine dispute of fact on "but for" causation.

Petitioner now seeks review by this Court under RAP 13.4(b).

V. THIS COURT SHOULD DENY REVIEW

Petitioner's challenge to the Court of Appeals' decision is nothing more than a reiteration of his arguments rejected below by the Superior Court and the Court of Appeals. Because he fails to satisfy the requisite standard for review under RAP 13.4(b), this Court should deny review.

A. Petitioner's "adequate protective equipment" argument does not raise an issue of "substantial public interest" warranting review.

Petitioner here invokes RAP 13.4(b)(4), which allows for review of cases "involve[ing] an issue of substantial public interest that should be determined by the Supreme Court," as his only basis for seeking Supreme

Court review. The standard is met, he argues, because the case "involves the City's responsibility to provide adequate protective equipment to its bicycle squad officers working large scale violent protests." *See* Pet. at 7.

Petitioner's uncontroversial assertion that police protective gear is important is insufficient to merit this Court's review under RAP 13.4(b)(4). While it goes without saying that a police department's operations and officer safety are matters of substantial importance and general public interest, nothing about this case implicates broad public policy concerns. Rather, this appeal involves the routine application of well-settled summary judgment principles to a particular factual record. Applying those principles, the Court of Appeals ruled that Petitioner did not meet his burden to establish a genuine question for trial on breach and proximate cause. *See* CR 56.

Petitioner sets forth no argument that distinguishes his case from any other negligence case where a plaintiff fails to establish duty, breach, causation and damage. Stated another way, without arguing that the Court of Appeals decision conflicts with a decision of this Court, or any other appellate decision, Zieger asks this Court to reverse and remand this case for trial, asking a jury to determine genuine fact questions regarding breach and proximate cause where both the trial court and Court of Appeals ruled that none existed—that the evidence submitted, if even admissible, would

require the jury to impermissibly speculate about breach and proximate cause. The public has no interest in reversing this matter for trial.

Underscoring this point, and ostensibly for this very reason, the Court of Appeals elected not to publish its decision. As such, the decision has no precedential value and is not binding on any court, *see* GR 14.1. Petitioner has not cited a single case that supports review under these circumstances.

B. The Court of Appeals properly affirmed summary judgment dismissal under this Court's precedent.

The routine application of precedent to a specific set of facts does not warrant review under RAP 13.4(b). Here, the Court of Appeals followed well-settled precedent relating to summary judgment procedure and elements-of-proof of negligence when it affirmed summary judgment dismissal. *See* Slip Op. at pp. 5-6 (citing to CR 56(c); *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989) (moving party can show the absence of issues of material fact by pointing out the lack of evidence supporting an essential element of the non-moving party's case, after which, the burden shifts to the plaintiff to set forth affirmative evidence; the nonmoving party may not rely on allegations, speculation, or argumentative assertions that unresolved factual issues remain); *Donatelli v. D.R. Strong Consulting Eng'g., Inc.*, 179 Wn.2d 84,

89, 312 P.3d 620 (2013); *Hoffstatter v. City of Seattle*, 105 Wn. App. 596, 599, 20 P.3d 1003 (2001) (plaintiff claiming negligence must prove elements of duty, breach, causation and damage); *Bodin v. City of Stanwood*, 130 Wn.2d 726, 741, 927 P.2d 240 (1996) (quoting *Young v. Caravan Corp.*, 99 Wn.2d 655, 661, 663 P.2d 834 (1983)).

1. The Court of Appeals Properly Held That Reasonable Prudence Here Was Not Within a Layperson's Knowledge.

To establish breach of the standard of care, it was incumbent on Petitioner to adduce evidence establishing the applicable standard—in other words, the yardstick against which the City's conduct would be measured. It is not enough for Zieger to report his dissatisfaction with the City's helmet provision. He must place those acts into context for jurors: what would objective, reasonable prudence have looked like on May 1, 2016 with regard to helmet acquisition and how did the City fail to act reasonably? And, importantly, from what source is this measure of reasonable prudence derived?

While expert testimony is not a pre-requisite to all negligence actions, it may be required where the issue is not within the ordinary knowledge and experience of laypersons , *see AAS-DMP Mgmt., L.P. v. Acordia Northwest, Inc.*, 115 Wn. App. 833, 842, 63 P.3d 860 (2003), and is required in professional malpractice cases. *Peterson v. State*, 100 Wn.2d

421, 437 (1983). Here, the alleged breach—failure of a municipal police department to provide every bike officer with the superior helmet on the market as of May Day, 2016—is not within the ordinary knowledge or experience of laypersons. Rather, such a determination calls for knowledge or experience relating to the municipal police department employer-employee relationship; suitability, availability and efficacy of this specialized piece of police equipment; and the appropriate acquisition and deployment of that equipment at a particular moment in time.

This oversight and outfitting of specialty police forces is simply not within layperson's understanding and the Court of Appeals properly recognized this: "a reasonable police department outfitting its bike officers for riot conditions . . . is not something commonly understood by a lay person." Slip. Op. at p. 7 (citing ER 702; 5B KARL B. TEGLAND, WASH. PRAC.: EVID. § 702.16 (6th ed.); *Pagnotta v. Beall Trailers of Oregon, Inc.*, 99 Wn. App. 28, 36, 991 P.2d 728 (2000). In so doing the Court of Appeals noted that neither the standard helmet nor the Bell Super 2R were designed for police use and no official industry standard governed these helmets.

The Court of Appeals also aptly observed that deployment of bike officers in a riot situation necessarily involves tactical decisions that are not within the ordinary knowledge of lay persons. *See* Slip Op. at p. 8 ("It could well be that deploying fewer officers – only those with the Bell Super 2R

helmet – would have put those officers at greater risk of harm," and Petitioner's counsel conceded such at oral argument.). In a similar vein, Petitioner cites to "current debates" as to "how the Department should be generally equipping its officers in protest situations" in support of his argument for review under RAP 13.4(b)(4). *See* Pet. at p. 7. While he does not elaborate on this point, the fact that a debate may exist at all underscores the complexity of this issue and thus further supports the conclusion that an expert or other specialized evidence is necessary for a jury to understand the standard of care and reasonable prudence in a police department's equipping and deployment of its bicycle squad for riot encounters.

Having no expert, the Court of Appeals also correctly held that Petitioner could not meet his burden with SPD Sgt. James Dyment's testimony. Slip Op. at p. 8. Even if he were qualified to opine on standard of care, as the Court of Appeals noted, nowhere does Dyment testify that reasonable prudence called for the Super Bell 2R for all officers as of May Day, 2016. On the contrary, Dyment testified that the Super Bell 2R was *not standard*; that the Department saw potential benefits, but that both helmets were considered acceptable. While undisputed that the Super Bell 2R provided greater facial protection and Sgt. Dyment believed it to be a superior helmet, none of his testimony, nor any evidence for that matter, establishes that yardstick suggested by Petitioner—that reasonable

prudence required the Super Bell 2R for all officers as of May 1, 2016.

2. Lacking Evidence to Establish that a Reasonably Prudent Police Department Would Have Furnished All Bike Officers with Bell Super 2R as of May 1, 2016, Zieger Failed to Raise A Genuine Issue of Material Fact on Breach of Duty.

Examining the record as a whole, the Court of Appeals properly concluded that Petitioner could not meet his burden on breach.

Contrary to Petitioner's arguments, the evidence did not support that SPD "rejected" the standard helmet and no reasonable juror could conclude that it did. The Court of Appeals observed:

> Zieger has not pointed to any custom or practice in other police departments demonstrating a rejection of the standard helmet or that other departments have rejected phased acquisition of new equipment. . . . Zieger mischaracterizes the evidence of SPD's proactive activities to find more protective equipment as evidence that the standard of care changed.

Slip Op. at p. 9-10.

Without ruling on the City's hearsay challenge to former Chief of Police Kathleen O'Toole's email where she indicated that the Bell Super 2R protected an officer from injury on May Day the previous year, the Court of Appeals also noted that, regardless of Chief O'Toole's statement, Sgt. Dyment, who was in charge of searching for protective equipment, had no knowledge of any 2015 May Day head injury that had been prevented by the helmet. *See* Slip Op. at p. 10 n.4.

In short, while it was undisputed that as of May 1, 2016, SPD had purchased some Bell Super 2R helmets but not enough for all bicycle officers, that both the newer and standard helmet were in use on May Day 2016 ,.and that the Bell Super 2R afforded superior facial coverage, no evidence established that the standard helmet had been rejected during this transition. As the Court of Appeals observed: "While it is undisputed that the Bell Super 2R provides more protection for its wearer, Zieger has failed to present evidence, from which a reasonable juror could conclude that the standard helmet fell below the standard of care." Slip Op. at p. 10.

3. Speculation and Conjecture Cannot Create a Genuine Issue On Proximate Cause.

Finally, the Court of Appeals properly applied well-settled law that "evidence establishing proximate cause must rise above speculation, conjecture, or mere possibility." Slip Op. at pp. 11-12 (citing *Attwood v. Albertson's Food Ctrs., Inc.*, 92 Wn. App. 326, 331, 966 P.2d 351 (1998); Petitioner's reliance on the helmet design alone to prove causation necessarily required the jury to speculate that the injury would have been prevented or lessened, but by an unknown quality, had Zieger been wearing the Bell Super 2R at the time the protestor threw the rock. His argument relied on Sgt. Dyment's testimony regarding his opinion about whether the Bell Super 2R would have helped Zieger. This testimony is inadmissible to

the extent it describes the City's subsequent remedial measures (ER 407). In any event, Sgt. Dyment's testimony is itself speculative, conclusory and lacking in foundation (ER 602).

In its ruling, the Court of Appeals noted the absence of any evidence showing "the location of Zieger's injury or how the two helmets fit on Zieger's head," and observed that, even with the Bell Super 2R, there remained "a gap between the rim of the helmet and the goggles where skin remains exposed." Slip Op. at p. 12.

Sgt. Dyment did not perform any detailed analysis of the incident, but rather, offered his opinion after the fact, "based on his concerns he expressed to SPD following Zieger's injury." Slip Op. at p. 14. Without foundation, he could not say, more-probably-than-not, that use of the Bell Super 2R would have prevented the injury. His opinion is speculative at best, as revealed by his own equivocal word choice. He testified that while he "believes it would have mitigated the injury and potentially stopped that injury," CP 171-72, he concedes that SPD "didn't test it." CP 171-172. Rather, his "belief" is based on his understanding of the helmet design and not based on any study of the dynamics of the projectile or mechanics of the injury. CP 171-72. Thus, according to Dyment, Zieger may [?] have been injured even with the Bell Super 2R helmet and he cannot say what the difference in injury would have been.

The Court of Appeals properly concluded that Dyment's testimony was speculation, insufficient to create a dispute of material fact on "but for" causation. *See* Slip Op. at p. 14.

VI. CONCLUSION

Petitioner fails to satisfy the grounds for review by this Court under RAP 13.4(b). The Court of Appeals correctly analyzed the issues raised in affirming summary judgment dismissal. This Court should deny the petition.

Respectfully submitted this 28th day of August, 2020.

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DATED this 28th day of August, 2020.

s/ Autumn Derrow
Autumn Derrow, Legal Assistant

SEATTLE CITY ATTORNEY'S OFFICE

August 28, 2020 - 7:53 AM

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